UNC SCHOOL OF GOVERNMENT

2015 New Misdemeanor Defender Training

September 15 – 18, 2015 / Chapel Hill, NC

ELECTRONIC MATERIALS*

*This PDF file contains "bookmarks," which serve as a clickable table of contents that allows you to easily skip around and locate documents within the larger file. A bookmark panel should automatically appear on the left-hand side of this screen. If it does not, click the icon—located on the left-hand side of the open PDF document—that looks like a dog-eared page with a ribbon hanging from the top.

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

Tuesday, September 15

12:15-1:00	Check-in
1:00-1:30	Introduction Alyson Grine, Defender Educator UNC School of Government, Chapel Hill, NC
1:30-2:45	**Basics of Driving While Impaired:** **Elements, Sentencing, and Motions Practice** (75 min.) Shea Denning, Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
2:45-3:00	Break *(light snack provided)*
3:00-3:45	**Basics of Driving While Impaired**, cont'd**.** (45 min.) Shea Denning
3:45-4:30	**Demonstration of Motions Practice in Impaired Driving Charges** (45 min.) Todd Roper, Attorney Moody, Williams, Roper and Lee, LLP, Siler City, NC
4:30-5:30	**Reading Driving Records and Getting Your Client Back on the Road** (60 min.) Michael Paduchowski, Attorney Law Office of Matthew Charles Suczynski, Chapel Hill, NC
5:30	Adjourn

*IDS employees may not claim reimbursement for lunch

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Wednesday, September 16

9:00-9:45	**Problems with Pleadings** (45 min.) John Rubin, Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
9:45-10:30	**Client Interviewing** (45 min.) Toussaint Romain, Assistant Public Defender Office of the Public Defender, Charlotte, NC
10:30-10:45	Break
10:45-12:30	**Interviewing Workshops** (105 min.) Rooms: 2500 Hall
12:30-1:30	Lunch *(provided in building)**
1:30-3:00	**Introduction to Structured Sentencing** (90 min.) Jamie Markham, Associate Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
3:00-3:15	Break *(light snack provided)*
3:15-4:15	**Probation Violations** (60 min.) Jamie Markham
4:15-5:15	**Introducing Evidence** (60 min.) John Donovan, Attorney Charns & Donovan, Durham, NC
5:15	Adjourn

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Thursday, September 17

9:00-9:30	**Negotiating Effectively** (30 min.) Fran Castillo, Assistant Capital Defender Office of the Capital Defender, Durham, NC
9:30-11:00	**Negotiating Workshops** (90 min.) Rooms: 2500 Hall
11:00-11:15	Break
11:15-12:15	***Crawford* and the Confrontation Clause** (60 min.) Jessica Smith, Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
12:15-1:15	Lunch *(provided in building)**
1:15-2:15	**Suppressing Evidence in District Court** (60 min.) John Rubin
2:15-3:15	**Ethical Issues in District Court** (ETHICS) (60 min.) Thomas Maher, Executive Director Office of Indigent Defense Services, Durham, NC
3:15-3:30	Break *(light snack provided)*
3:30-4:15	**IDS' Resources and Policies** (45 min.) Danielle Carman, Assistant Director Office of Indigent Defense Services, Durham, NC
4:15-4:30	**Introduction to the Office of Language Access Services** (15 min.) Brooke Bogue Crozier, Manager, Office of Language Access Services Administrative Office of the Courts, Raleigh, NC
4:30	Depart for Durham
5:00-6:30	Tour of TROSA (Triangle Residential Option for Substance Abuse) and Discussion with Residents Alyson Grine (facilitator)

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Friday, September 18 (Mini Bench Trial School Using Hypotheticals)

9:00-10:00	**Theory of Defense/Emotional Themes** (60 min.) Alyson Grine
10:00-10:30	**Cross Examination** (30 min.) Tonza Ruffin Buffaloe, Attorney, Ruffin Law Firm Windsor, NC
10:30-10:45	Break
10:45-12:15	**Cross Examination Workshops** (90 min.) Rooms: 2500 Hall
12:15-1:15	Lunch *(provided in building)**
1:15-1:45	**Direct Examination** (30 min.) Susan Brooks, Public Defender Administrator Office of Indigent Defense Services, Durham, NC
1:45-3:15	**Direct Examination Workshops** (90 min.) Rooms: 2500 Hall
3:15-3:30	Break *(light snack provided)*
3:30-4:15	**Objections and Motions Practice in Non-DWI Bench Trials** (45 min.) Alyson Grine
4:15-4:30	Wrap-up
4:30	Adjourn

CLE HOURS: 22.25*
*Includes 1 hour of ethics/professional responsibility

*IDS employees may not claim reimbursement for lunch

UNC SCHOOL OF GOVERNMENT

ONLINE RESOURCES FOR INDIGENT DEFENDERS

ORGANIZATIONS

NC Office of Indigent Defense Services
http://www.ncids.org/

UNC School of Government
http://www.sog.unc.edu/

Indigent Defense Education at the UNC School of Government
http://www.sog.unc.edu/node/117

TRAINING

Calendar of Live Training Events (including biannual criminal law webinars providing case and legislative updates; next webinar December 6, 2013)
http://www.sog.unc.edu/node/643

Online Training (6 hours of CLE credit available per year for watching archived sessions)
http://www.sog.unc.edu/node/644

MANUALS

Orientation Manual for Assistant Public Defenders
http://www.sog.unc.edu/node/1002

Reference Manuals (including Defender Manual, Volumes 1 and 2; Juvenile Defender Manual; Civil Commitment Manual; Guardianship Manual; Immigration Consequences Manual; Child Support Enforcement; Abuse, Neglect, Dependency, and Termination of Parental Rights)
http://www.sog.unc.edu/node/654

UPDATES

NC Criminal Law Blog
www.sog.unc.edu/node/487

Criminal Law in North Carolina Listserv (to receive summaries of new criminal appellate cases and new criminal legislation)
http://www.sog.unc.edu/crimlawlistserv

TOOLS and RESOURCES

Collateral Consequences Assessment Tool (centralizes collateral consequences imposed under NC law and helps defenders advise clients about the impact of a criminal conviction)
www.sog.unc.edu/node/490

Index of School of Government Criminal Law Materials (includes Criminal Case Compendium, Legislative Summaries, Justice Reinvestment Resource Page, and faculty papers)
http://www.sog.unc.edu/node/1500

Motions, Forms, and Briefs Bank
http://www.sog.unc.edu/node/657

Training and Reference Materials Index (includes manuscripts and materials from past trainings co-sponsored by IDS and SOG)
http://www.ncids.org/Defender%20Training/Training%20Index.htm

IMPAIRED DRIVING

Excerpt from chapter 2 of *The Law of Impaired Driving and Related Implied Consent Offenses in NC*, 2014, by Shea Riggsbee Denning, published by the School of Government.

Chapter 2

Implied Consent Offenses

This chapter sets forth the elements of and the punishment and license revocation for each of the twelve implied consent offenses identified in chapter 1.

I. Driving While Impaired

A. Elements

Driving while impaired under G.S. 20-138.1 is the most commonly charged implied consent offense.[1] A person commits this offense if he or she

(1) drives
(2) a vehicle
(3) while impaired
(4) on a street, highway, or public vehicular area.

Each of these elements is discussed in further detail below.

1. Drive

The term "driver" is defined in G.S. 20-4.01(7) as being synonymous with the term "operator," defined in G.S. 20.4.01(25). Cognates of both words (such as drive, driving, operate, operating) also share the same meaning. An operator is "[a] person in actual physical control of a vehicle which is in motion or which has the engine running."[2]

A defendant's purpose for taking actual physical control of a car is not relevant to consideration of whether he or she was driving.[3] Thus, in the criminal prosecution of defendants for offenses of which driving is an element, there is no requirement that the State establish that the vehicle was in motion with the defendant behind the wheel or that the defendant started the car for purposes of driving it.[4] In *State v. Fields*,[5] for example, a law enforcement officer came upon a vehicle sitting in the right

1. There were 51,131 charges for this misdemeanor offense in 2013 (statistics from N.C. Administrative Office of the Courts, on file with author).
2. G.S. 20-4.01(25).
3. State v. Fields, 77 N.C. App. 404 (1985).
4. *Id.*
5. *Id.*

hand lane of the road. The vehicle was motionless and the defendant was seated behind the wheel. The vehicle's owner was seated on the passenger side. Both the defendant and the passenger testified at trial that the passenger had been driving and stopped the vehicle on the street so that they could use the bathroom. The defendant got back into the driver's seat of the car and started it because he was cold. The court found that this constituted sufficient evidence of driving in the prosecution of defendant for the offense of driving while impaired.

Driving can be established by circumstantial as well as direct evidence. In *State v. Dula*,[6] the court found sufficient evidence to justify the inference that the defendant was driving where the driver of another car saw black tire marks on the highway, dust in the air, and a car, with its headlights on, lying on its top in a field near the highway. The driver of the other car stopped at the scene and found the defendant in the overturned car, the doors of which were closed and the windows rolled up. He did not see anyone else in the area. The investigating officer saw tire marks leading from the black marks on the highway across the highway shoulder and into the field where the overturned car was located. The officer could not open the car doors. Testimony from a witness for the defendant that the witness was driving the car and fled the scene did not render the State's evidence insufficient.

Likewise, in *State v. Riddle*,[7] the court found circumstantial evidence of driving sufficient to warrant submission of the case to the jury where the defendant was seen getting out of the car immediately after the collision and no one else was seen in or near the car. The defendant said that his friend had been driving and left the scene of the accident, running through the woods. A witness and law enforcement officers checked the woods and discovered no evidence to support the defendant's claim. The defendant in *Riddle* claimed that the driver of the car left through the driver's side door, but an investigating law enforcement officer was unable to open the door because of the damage it sustained during the collision. When the wrecker driver arrived, the defendant pulled the keys to the car out of his pocket and handed them to the wrecker driver.[8]

The court reached a different conclusion in *State v. Ray*,[9] finding insufficient evidence to support the impaired driving charge where the only evidence that the defendant was driving was that he was sitting "halfway [in] the front seat."[10] In *Ray*, an officer responded to an accident call and saw the defendant seated in a car that had hit two parked cars. There was no evidence that the car had been operated recently or that the motor was running.

2. Vehicle

The term "vehicle" is defined in G.S. 20-4.01(49) as "[e]very device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon fixed rails or tracks." There are several exceptions to this general definition. First, despite the exclusion from the definition for devices moved by human power, bicycles are

6. 77 N.C. App. 473 (1985).

7. 56 N.C. App. 701 (1982).

8. *See also* State v. Mack, 81 N.C. App. 578, 579, 583 (1986) (defendant's admission that he fell asleep driving and "ran over there to the fence," combined with officer's observation of the defendant's car sitting on top of a chain link fence approximately forty-five feet from the road with the headlights on, the "key in the ignition, the warm hood, the defendant asleep in the driver's seat, and the near-empty bottle of Canadian Mist on the floorboard" were "sufficient to allow a reasonable jury to infer that defendant drove the vehicle on a public street").

9. 54 N.C. App. 473 (1981).

10. *Id.* at 475.

deemed vehicles for purposes of G.S. Chapter 20.[11] Second, several other devices that would satisfy the general definition are excepted, and thus are not vehicles for purposes of Chapter 20, including G.S. 20-138.1. The term "vehicle" does not include certain devices used as a means of transportation by a person with a mobility impairment. To qualify for the exception, the device must be "designed for and intended to be used as a means of transportation for a person with a mobility impairment, or who uses the device for mobility enhancement, [be] suitable for use both inside and outside a building, including on sidewalks, and [be] limited by design to 15 miles per hour when the device is being operated by a person with a mobility impairment, or who uses the device for mobility enhancement."[12] The court of appeals in *State v. Crow*[13] rejected an argument by the defendant, a healthy 25-year-old man who had no mobility impairment, that the motorized scooter he was driving was not a "vehicle" in that it was a device used for mobility enhancement. The scooter the defendant was driving "was powered by an electric motor and was likened at trial to a skateboard with handlebars on the front."[14] It had two wheels, six to eight inches in diameter, that were arranged in tandem. The court held that the device did not qualify for the mobility impairment exception, explaining that the legislature's addition in 2001 of the term "mobility enhancement" to the sentence concerning "mobility impairment" "was a technical change that did not substantively expand the existing mobility impairment exception to the term 'vehicle.' "[15] Thus, the court concluded that the defendant's use of the scooter solely for "recreational purposes," did not except the device from the definition of vehicle.[16]

Electric personal assistive mobility devices also are excluded from the definition of vehicle.[17] These are self-balancing, non-tandem, two-wheeled devices that are designed to transport one person and have a propulsion system that limits their maximum speed to 15 miles per hour or less.[18] The "Segway Human Transporter"[19] is an example of such a device. The court in *Crow* concluded that the defendant's scooter did not qualify for this exception, as it was not self-balancing and its wheels were arranged in tandem.[20]

Horses are not vehicles for purposes of the impaired driving statute, G.S. 20-138.1,[21] though they apparently may be considered vehicles for other Chapter 20 offenses.[22]

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11. G.S. 20-4.01(49) further provides that "every rider of a bicycle upon a highway shall be subject to the provisions of this Chapter applicable to the driver of a vehicle except those which by their nature can have no application."

12. *Id*. § 20-4.01(49).

13. 175 N.C. App. 119 (2009).

14. *Id.* at 121.

15. *Id.* at 124.

16. *Id.*

17. G.S. 4.01(49).

18. *Id.* § 20-4.01(7a).

19. *Crow*, 175 N.C. App. at 124.

20. *Id.* The court also rejected the defendant's argument that electric scooters should be excepted from the definition of "vehicle" since "in light of the express exception for bicycles and electric personal assistive mobility devices, an average person might infer that small, lightweight, low-speed devices such as scooters would also fall outside the reach of the statute." *Id.* at 126. The court explained that while it was "wary of requiring the legislature to be overly specific in drafting exceptions to the statute," the General Assembly had deliberately defined "a small number of very specific exceptions," to G.S. 20-138.1. *Id.* The court concluded that "the absence of a motorized scooter from the list of exceptions is indicative of the General Assembly's intent to include such devices in the statutory definition of vehicle." *Id.* at 126 (citations omitted).

21. G.S. 20-138.1(e).

22. In *State v. Dellinger*, 73 N.C. App. 685 (1985), the court upheld the defendant's conviction for impaired driving based upon his riding of a horse on a street with an alcohol concentration of 0.18. The court reasoned that G.S. 20-171 renders traffic laws applicable to persons riding an animal or driving an animal pulling a

3. Street, Highway, or Public Vehicular Area

The third element of driving while impaired is that a person must drive on a street, highway, or public vehicular area.

a. Street, Highway

G.S. 20-4.01(13) defines the term "highway" as "[t]he entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter or right for the purposes of vehicular traffic." The provision further specifies that "[t]he terms 'highway' and 'street' and their cognates are synonymous."[23] There is no requirement that the street be part of the state highway system.[24]

b. Public Vehicular Area

"Public vehicular areas" (or PVAs) are defined to include four broad types of areas: (1) areas "used by the public for vehicular traffic at any time," (2) beach areas used by the public for vehicular traffic, (3) roads used by vehicular traffic within or leading to a gated or non-gated subdivision or community, whether or not the subdivision or community roads have been offered for dedication to the public, and (4) portions of private property used by vehicular traffic and designated by the private property owner as a public vehicular area in accordance with G.S. 20-219.4.[25] G.S. 20-4.01(32)a. sets forth several illustrative examples of areas satisfying the first type. Thus, public vehicular areas include drives, driveways, roads, roadways, streets, alleys, or parking lots upon the grounds or premises of any of the following:

1. Any public or private hospital, college, university, school, orphanage, church, or any of the institutions, parks or other facilities maintained and supported by the State of North Carolina or any of its subdivisions.
2. Any service station, drive-in theater, supermarket, store, restaurant, or office building, or any other business, residential, or municipal establishment providing parking space whether the business establishment is open or closed.
3. Any property owned by the United States and subject to the jurisdiction of the State of North Carolina.

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vehicle on a highway. The legislature defined the term "vehicle" in broad terms in G.S. 20-4.01(49). This broad definition reflects the legislature's intent that horses are vehicles within the meaning of G.S. 20-138.1, the statute prohibiting impaired driving. Whatever the view of the legislature pre-*Dellinger*, that body acted a few years later to express its then-current determination that a person *should not* be convicted of impaired driving for riding a horse (or a bicycle or lawnmower) while impaired. 1989 N.C. Sess. Laws, ch. 711 enacted G.S. 20-138.1(e) excepting the aforementioned conveyances from the definition of "vehicle" as that term is used in the DWI statute. In 2006, the legislature removed the bicycle and lawnmower exceptions. S.L. 2006-253.

23. G.S. 20-4.01(13); *see also id.* § 20-4.01(46) (providing that the "terms 'highway' and 'street' and their cognates are synonymous").

24. *Cf.* State v. Hopper, 205 N.C. App. 175 (2010) (rejecting defendant's argument that the provisions of G.S. 20-129 requiring lighted headlamps and rear lamps during certain conditions did not apply because the street on which he was driving was not part of the state highway system; concluding that officer's testimony that the street on which the defendant drove was within an apartment complex owned by the City of Winston-Salem that the officer was assigned to patrol and that there were parking spots on the street with cars parked in them at the time of the stop was sufficient to support the trial court's finding that the defendant was traveling on a street "open to the use of the public as a matter of right for the purposes of vehicular traffic" per G.S. 20-4.01(13)).

25. G.S. 20-4.01(32).

North Carolina's appellate courts have adopted a broad view of the term "public vehicular area," noting on several occasions that their interpretation accords with the legislature's desire to protect people in parking lots from the dangers posed by those who drive while impaired.[26] The court of appeals has deemed the following locations to be public vehicular areas:

- the parking lot of a car wash, notwithstanding a town ordinance prohibiting parking on the premises unless the facilities were being used[27]
- a privately maintained paved road in a privately owned mobile home park[28]
- a wheelchair ramp in the parking lot of a hotel[29]
- an area of a public park occasionally used for public parking[30]
- the parking lot of a private nightclub[31]

4. While Impaired

The offense of impaired driving under G.S. 20-138.1 is a single offense that may be proven in one of three ways:[32] (1) by showing that the defendant was under the influence of an impairing substance; (2) by showing the presence of an alcohol concentration of 0.08 or more; or (3) by showing the presence of a Schedule I controlled substance. In many cases, more than one theory of impairment may be proven. The State is not required to elect a single theory, nor must it specify its theory in the charging instrument. All impairment theories for which sufficient evidence exists may be presented to the fact finder. If the case is being heard by a jury, the judge is not required to instruct the jury to indicate which theory or theories it relied upon,[33] and the fact that jurors may have relied upon different theories of impairment in finding a defendant guilty does not render the verdict nonunanimous.[34]

a. Under the Influence of an Impairing Substance

A person is "under the influence of an impairing substance" when his or her physical or mental faculties are appreciably impaired by an impairing substance.[35] This theory of impairment frequently is referred to as "appreciable impairment." An impairing substance is (1) alcohol, (2) a controlled

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26. *See* State v. Robinette, 124 N.C. App. 212 (1996); State v. Turner, 117 N.C. App. 457 (1994); State v. Mabe, 85 N.C. App. 500 (1987); State v. Carawan, 80 N.C. App. 151 (1986).

27. *Robinette*, 124 N.C. App. 212.

28. *Turner*, 117 N.C. App. 457.

29. *Mabe*, 85 N.C. App. 500.

30. *Carawan*, 80 N.C. App. 151.

31. State v. Snyder, 343 N.C. 61 (1996). The definition of a public vehicular area at the time of the offense in *Snyder* was significantly narrower than the current one and consisted of areas "generally open to and used by the public for vehicular traffic," including parking lots upon the grounds of a business establishment "providing parking space for customers, patrons, *or* the public." *Id.* at 67 (referencing former G.S. 20-4.01(32)). *Snyder* explained that "even if an establishment is cloaked in the robe of being a private club, it is still a 'business establishment providing parking space for its customers, patrons, *or* the public' and cannot escape liability simply because a membership fee is required." *Id.* at 69. *See also* Shea Denning, *Private Clubs and Public Vehicular Areas*, N.C. Crim. L., UNC Sch. of Gov't Blog (Dec. 11, 2012), http://nccriminallaw.sog.unc.edu/?p=4002 (explaining that in most circumstances the parking lots of private social clubs qualify as public vehicular areas).

32. *See* State v. Oliver, 343 N.C. 202 (1996) (describing impaired driving under former G.S. 20-138.1 as a single offense that may be proven in one of two ways).

33. *Oliver*, 343 N.C. at 215; State v. Garvick, 98 N.C. App. 556, 567 (1990).

34. *Oliver*, 343 N.C. at 215.

35. G.S. 20-4.01(48b).

substance under G.S. Chapter 90, (3) any drug or psychoactive substance capable of impairing a person's physical or mental faculties, or (4) any combination of these substances.[36]

(i) Alcohol

Alcohol is defined as any substance containing any form of alcohol, including ethanol, methanol, propanol, and isopropanol.[37]

(ii) Controlled Substance under G.S. Chapter 90

Article 5 of G.S. Chapter 90 categorizes numerous controlled substances into Schedules I through VI.[38]

(iii) Drug

The term "drug" is not defined in G.S. Chapter 20, but it is defined in G.S. Chapter 90 as follows:

> . . . a. substances recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; b. substances intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; c. substances (other than food) intended to affect the structure or any function of the body of man or other animals; and d. substances intended for use as a component of any article specified in a, b, or c of this subdivision; but [the term "drug"] does not include devices or their components, parts, or accessories.[39]

Thus, prescription as well as illicit drugs may qualify as impairing substances, as may over-the-counter medications and other psychoactive substances like inhalants, depending upon their potential effect on the body. The fact that a person is legally entitled to use a particular drug is not a defense to a charge of impaired driving,[40] though it may be a mitigating factor at sentencing.[41]

The model jury instructions direct the judge to determine whether a particular substance is an impairing substance and to so instruct the jury.[42] The state's appellate courts have not considered whether an instruction from a judge that a particular substance is an impairing substance is proper or whether it improperly permits the judge to resolve a material fact. In most circumstances, the instruction likely is proper. For example, a judge's instruction to the jury that "alcohol" or "a controlled substance under Chapter 90" is an impairing substance would not invade the province of the jury. That sort of instruction simply defines the term "impairing substance." Likewise, an instruction that "a drug or psychoactive substance capable of impairing a person's physical or mental faculties is an impairing substance" is not objectionable. Furthermore, there would appear to be no problem with a judge instructing the jury that any of the specific substances listed in Chapter 90 is an impairing substance. Thus, the judge could properly inform the jury that a substance such as cocaine, alprazolam (Xanax), or zolpidem (Ambien) is an impairing substance.[43] In some drugged driving cases,

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36. *Id.* § 20-4.01(14a).
37. *Id.* § 20-4.01(1a).
38. *See* G.S. 90-89 (Schedule I); 90-90 (Schedule II); 90-91 (Schedule III); 90-92 (Schedule IV); 90-93 (Schedule V); 90-94 (Schedule VI).
39. *Id*. § 90-87(12).
40. *Id.* § 20-138.1(b).
41. *Id.* § 20-179(e)(5).
42. N.C. Pattern Jury Instructions—Crim. 270.00 (Replacement June 2011) (suggesting that the judge instruct the jury in such cases that "((Name substance involved) is an impairing substance").
43. *See* G.S. 90-90(1)c.; 90-92(a)(1)a.; 90-92(a)(1).

however, the substance that a defendant is alleged to have consumed is *not* a controlled substance under Chapter 90. The State may contend, for example, that a defendant is impaired from inhalants or from prescription medication that is not a scheduled controlled substance. In this circumstance, it arguably is improper for the judge to instruct the jury that the specified drug (such as, for example, sertraline (Zoloft)) is a controlled substance.[44]

b. Proving Appreciable Impairment

Neither a chemical analysis nor a field sobriety test is required to establish appreciable impairment. A chemical analysis that reveals an alcohol concentration below the per se threshold does not create a presumption that a person is not appreciably impaired.[45] Substantial evidence of impairment may exist to prove appreciable impairment even when a person's alcohol concentration does not reach the per se threshold.[46]

(i) Opinion Testimony

North Carolina's courts have long held that a lay witness who has personally observed a person may express an opinion as to whether the person was impaired by an impairing substance.[47] Though officers frequently base such opinions in part upon their training and experience regarding the physical manifestations of having consumed alcohol or some other impairing substance in addition to their personal observations, courts have considered such opinions to be those of a lay rather than an expert witness.[48]

During trial in an impaired driving prosecution, an exchange similar to the following often occurs.

Prosecutor: Did you form an opinion, satisfactory to yourself, that the defendant had consumed a sufficient amount of some impairing substance so as to appreciably impair his mental or physical faculties or both?

Arresting Officer: Yes, I did.

Prosecutor: What was that opinion?

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44. There is at least one other circumstance in which our state appellate courts have permitted judges to instruct the jury as to its determination on a material fact. In *State v. Torain*, 316 N.C. 111 (1986), the state supreme court determined that the trial court did not err in instructing the jury in a first-degree rape trial that "a utility knife is a dangerous or deadly weapon." *Id.* at 116. The court relied on earlier opinions stating that when "the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly . . . *is one of law, and the Court must take the responsibility of so declaring.*" *Id.* at 119 (internal citations, quotation marks omitted) (emphasis in original). Even were this reasoning to be applied in the drugged driving context, however, it likely would authorize no more than instructing the jury that a specific substance scheduled under Chapter 90 is an impairing substance. Those substances are *per se* impairing in much the same way that certain weapons are *per se* deadly. The judge still must leave to the jury the determination of whether other types of "drugs or psychoactive substances" are impairing substances. *Cf.* Jessica Smith, North Carolina Crimes 120–21 (7th ed. 2012) (distinguishing circumstances involving weapons that "are deadly by their very nature" from those in which the jury must be permitted to decide whether the weapon is deadly).

45. State v. Sigmon, 74 N.C. App. 479, 482 (1985) (officer's observation of defendant's driving, odor of alcohol, and inability to perform certain sobriety tests was substantial evidence of impairment regardless of 0.06 breath test result).

46. *Id.*

47. *See* State v. Lindley, 286 N.C. 255 (1974).

48. *See id.*

Arresting Officer: It was my opinion that the defendant had consumed a sufficient quantity of an impairing substance so that his/her mental and physical faculties were both appreciably impaired.

Prosecutor: Did you have an opinion as to what the impairing substance was?

Arresting Officer: I believed it to be some type of alcohol [drug] [psychoactive substance].

This line of questioning is both proper and prevalent. Perhaps because this line of questioning is so common and the answers so typically uniform, defendants sometimes argue that the State's evidence is insufficient as matter of law if an officer does not testify as to his or her opinion that the defendant was "appreciably impaired" by an "impairing substance." Such opinion testimony is not, however, essential to proving the elements of impaired driving, even under the appreciable impairment theory.

Instead, an officer's testimony regarding his or her observations, which might include faulty driving; an odor of alcohol; red, glassy eyes; poor performance on field sobriety tests; and slurred speech, among other observations, often is legally sufficient, without the opinion based on those perceptions, to prove impairment. Thus, while the arresting officer's opinion often will be helpful to the jury or finder of fact,[49] it is not essential to the State's case.

(ii) Proving Impairment by Drugs

Proving impairment by an impairing substance other than alcohol can be more challenging for the State than proving impairment from alcohol. No particular form of evidence is required, and there is no requirement that the State prove the specific drug or impairing substance that the defendant consumed.[50] There are several ways in which the State may seek to prove impairment in such cases.

(A) Drug Recognition Expert Combined with Chemical Analysis

In the State's ideal case, it would elicit testimony from an officer certified as a Drug Recognition Expert (DRE)[51] regarding the defendant's impairment and its cause,[52] along with testimony from a chemical

49. *See* State v. Adkerson, 90 N.C. App. 333, 338 (1988).

50. *See* State v. Lindley, 286 N.C. 255 (1974) (State established prima facie case based in part on patrol officer's testimony that the defendant was under the influence of "some drug"); State v. Cousins, 152 N.C. App. 478 (2002) (unpublished) (evidence of defendant's poor performance on field sobriety tests, his refusal to submit to a blood test, and his admission to taking Lortab, a painkiller, were sufficient to show that he was impaired and that his impairment was caused by an impairing substance; the State was not required to produce expert testimony on the impairing effects of Lortab or as to whether defendant's condition was consistent with someone who had taken Lortab). In a jury trial in which the State's proof fails to identify a particular impairing substance, the court arguably should instruct the jury on the definition of "impairing substance" but should refrain from identifying any particular substance for which the State has failed to establish a prima facie case. See *supra* note 44.

51. DREs are trained to administer a twelve-step protocol designed to determine whether a person is impaired by drugs, and, if so, what category of drug (central nervous system depressant, central nervous system stimulant, hallucinogen, dissociative anesthetic, narcotic analgesic, inhalant, or cannabis) caused the impairment. *See* Shea Denning, *Expert Testimony Regarding Impairment*, N.C. Crim. L., UNC Sch. of Gov't Blog (June 9, 2010), http://nccriminallaw.sog.unc.edu/?p=1335; *see also* Shea Denning, *Daubert and Expert Testimony of Impairment*, N.C. Crim. L., UNC Sch. of Gov't Blog (July 1, 2014), http://nccriminallaw.sog.unc.edu/?p=4834 (analyzing admission of DRE testimony under amended N.C. R. Evid. 702).

52. *See* N.C. R. Evid. 702(a1)(2) (providing that a certified DRE may give expert testimony on the issue of whether a person was under the influence of one or more impairing substances and on the category of such impairing substance or substances).

analyst corroborating the DRE's conclusions.[53] In many cases, however, no DRE will be available to examine the defendant. The results of a chemical analysis, standing alone, may be inconclusive. The analysis may not reveal how recently the substance was ingested or the level of concentration of a particular drug. In addition, the chemical analyst may lack the necessary expertise to testify about the impairing effects of a particular substance. Fortunately for the State, it can establish impairment by drugs in a less ironclad way.

(B) Opinion Testimony from Experienced Officer

The North Carolina Supreme Court held in *State v. Lindley*[54] that the trial court in an impaired driving case properly allowed a patrol officer with five years' experience to testify that in his opinion the defendant was under the influence of some drug. The officer in *Lindley* stopped the defendant for erratic driving. When the defendant got out of his car, the officer saw that he was unsteady on his feet, the pupils of his eyes were contracted nearly to pinpoints, and there was a white substance on his lips. Two passengers in the car were in the same condition. The officer smelled no alcohol on the defendant, who subsequently performed poorly on dexterity tests and appeared to be in a mental stupor. The officer asked the defendant if he had diabetes, had physical defects, was sick, limped, had been injured, had recently seen a doctor or dentist, or had taken any medication. The defendant answered no to all of these questions. Based on these responses, the officer ruled out other causes of the defendant's condition and concluded that he was under the influence of a drug. The state supreme court held that the officer was competent to express that opinion as he was "better qualified than the jury to draw inferences and conclusions from what he saw and heard."[55] The court also held that the State's evidence, which consisted solely of the officer's testimony, was sufficient to establish a prima facie case.

(C) Defendant's Admission Corroborated by Expert Testimony

State v. Highsmith[56] illustrates another manner in which the State might establish impairment by drugs. After an officer stopped the defendant in *Highsmith* for erratic driving, the defendant said he was on the way home from the dentist and had taken a pain medication known as Floricet. The officer testified that the defendant's movements were sluggish and his speech was slurred but that he did not smell alcohol. At trial, the officer testified to his observations and the defendant's statements. The State also elicited testimony from an expert in pharmaceuticals, who testified that Floricet was an impairing substance and that a healthcare professional should have warned the defendant of its effects. The North Carolina Court of Appeals held that this evidence was sufficient to establish that the defendant drove while under the influence of an impairing substance.

c. Per Se Impairment

G.S. 20-138.1(a)(2) prohibits a person from driving a vehicle upon a highway, street, or public vehicular area after having consumed sufficient alcohol that the person has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. This type of impairment generally is referred to as *per se*

53. The final step in the DRE evaluation protocol is to obtain a blood or urine specimen, which is sent to a laboratory for chemical analysis. *See* State of North Carolina, Forensic Tests for Alcohol Branch, Division of Public Health, Department of Health and Human Services, North Carolina Drug Evaluation & Classification (DEC) Program, "The 12 Steps of the Drug Evaluation Process," www.ncdistrictattorney.org/dwi/dre/dre_info_app.pdf, at 4.

54. 286 N.C. 255 (1974).

55. *Id.* at 259.

56. 173 N.C. App. 600 (2005).

impairment. An outwardly sober person is impaired under this theory if his or her alcohol concentration reaches or exceeds the threshold level. G.S. 20-138.1(a)(2) further provides that "[t]he results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration."

(i) Alcohol Concentration

A person's alcohol concentration may be expressed either as grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.[57] These formulas are based on the average ratio that the concentration of alcohol in an individual's blood bears to that in his or her breath: 2,100 to 1. The court of appeals in *State v. Cothran*[58] held that it is immaterial that this formulation is based only on an average blood to breath ratio and that breath test results based on this formula may thus overstate (in the case of an individual with a lower blood to breath ratio) or understate (in the case of an individual with a higher ratio) the person's blood-alcohol concentration.[59] The defendant in *Cothran* sought to introduce testimony from a chemist that the defendant's blood to breath ratio was 1,722 to 1, which meant that his breath test result was 18 percent higher than his blood-alcohol concentration. The appellate court upheld the trial court's exclusion of this testimony, explaining that the legislature adopted a breath-alcohol concentration per se offense as an alternative method of committing the offense of impaired driving. Thus, the court deemed irrelevant the relationship of a particular defendant's breath-alcohol concentration to his or her blood-alcohol concentration.

(ii) Relevant Time after Driving

Every state and the District of Columbia prohibits driving with an alcohol concentration of 0.08 or more, though state laws vary regarding whether to establish a violation of the per se impaired driving law an alcohol concentration of 0.08 or more must exist at the time of driving[60] or, instead, at the time of testing.[61] Some of the states that base the per se offense on the time of driving presume, subject to rebuttal by the defendant, that a 0.08 result from a chemical test performed within a designated time period after the driving establishes that the person drove with an alcohol concentration of 0.08. Some states have a hybrid system, prohibiting driving with a 0.08 alcohol concentration at the time of driving or within a specified time period after driving.[62]

These distinctions in the time of measurement can be significant given that a person's alcohol concentration, which depends upon the rate at which alcohol is absorbed into the bloodstream and at which it is eliminated from the body, changes over time. Alcohol absorption rates vary depending upon many individual factors, including gender,[63] whether a person consumes food with alcohol,[64] whether a person is a heavy or light drinker,[65] the concentration of the alcohol[66] in the beverage,

57. G.S. 20-4.01(1b).

58. 120 N.C. App. 633 (1995).

59. *Id.* at 635.

60. *See, e.g.*, Ala. Code § 32-5A-191; Ark. Code Ann. § 5-65-103; Cal. Veh. Code § 23152(b); Fla. Stat. § 316.193; Iowa Code § 321J.2; Ind. Code § 9-30-5-1; Va. Code Ann. § 18.2-266.

61. *See, e.g.*, Ariz. Rev. Stat. Ann. § 28-1381; D.C. Code § 50-2206.01.

62. *See, e.g.*, Colo. Rev. Stat. § 42-4-1301; Ga. Code Ann. § 40-6-391.

63. Martin S. Mumenthaler et al., *Gender Differences in Moderate Drinking Effects*, 23 Alcohol Research 55 (1999), http://pubs.niaaa.nih.gov/publications/arh23-1/55-64.pdf.

64. J. B. Saunders & A. Paton, *Alcohol in the Body*, 283 Brit. Med. J. 1380, 1380 (1981), www.ncbi.nlm.nih.gov/pmc/articles/PMC1507801/pdf/bmjcred00686-0036.pdf.

65. Neil R. Wright & Douglas Cameron, *The Influence of Habitual Alcohol Intake on Breath-Alcohol Concentrations Following Prolonged Drinking*, 33 Alcohol & Alcoholism 495, 497–99 (1998), http://alcalc.oxfordjournals.org/content/33/5/495.full.pdf.

66. Saunders & Paton, *supra* note 64, at 1380.

and even whether the beverage is mixed with regular or diet soda.[67] On an empty stomach, alcohol concentration peaks about an hour after consumption,[68] depending on the amount drunk. Alcohol is removed from the blood at a rate of about 15mg per 100ml per hour, though this rate likewise varies.[69]

In a state that measures its per se impaired driving violations based on a person's alcohol concentration at the time of driving, a defendant might successfully argue that he or she consumed a large quantity of an alcoholic beverage just before being stopped by police and that the alcohol had not been absorbed into his or her body at the time of the driving. Termed the "big gulp," or delayed absorption, defense, this argument gave rise to 2004 amendments to Alaska's impaired driving laws, which now provide that a person is guilty of impaired driving if a chemical test conducted within four hours of driving detects an alcohol concentration of at least 0.08, regardless of the person's alcohol concentration at the time of driving.[70]

North Carolina neither requires the State to prove a defendant's alcohol concentration at the time of driving nor sets a specific hourly limit in which a chemical analysis must be performed. Instead, G.S. 20-138.1(a)(2) provides that a person commits the offense of impaired driving by driving after having consumed sufficient alcohol such that he or she has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. A "relevant time after . . . driving" is defined as "[a]ny time after the driving in which the driver still has in his body alcohol consumed before or during the driving."[71] As the state supreme court explained in *State v. Rose*,[72] "[a] person whose blood-alcohol concentration, as a result of alcohol consumed before or during driving, was at some time after driving 0.10 or greater must have had some amount of alcohol in his system at the time he drove. The legislature has decreed that this amount, whatever it might have been, is enough to constitute an offense."[73] Thus, the big gulp defense is no defense at all to a charge of impaired driving based upon an alcohol concentration of 0.08 or more in North Carolina.

To prove impaired driving based upon a per se alcohol concentration, the State must demonstrate that at least 0.08 of the defendant's alcohol concentration was based on alcohol consumed before or during the driving. Such proof is made more complicated when there is evidence that the defendant consumed alcohol after driving. In *State v. Ferrell*,[74] the court of appeals rejected the defendant's argument that breath test results were inadmissible given the defendant's admission that he drank several big swallows from a Jack Daniels bottle given to him by the person who picked him up after the accident where defendant also admitted that he had consumed three beers before the accident. The court, however, granted the defendant a new trial based on the prosecutor's improper questioning of the defendant regarding his failure to testify in district court as part of the State's effort to establish that the defendant fabricated his post-accident drinking after learning that it was a defense to the impaired driving charge. In *State v. Mumford*,[75] the court likewise held that the State's evidence was

67. Keng-Liang Wu et al., *Artificially Sweetened Versus Regular Mixers Increase Gastric Emptying and Alcohol Absorption*, 119 Am. J. Med. 802, 803 (2006), www.sciencedirect.com/science/article/pii/S0002934306001823#.

68. Alex Paton, *Alcohol in the Body Clinical Review*, 330 Brit. Med. J. 85, 86 (2005), www.bmj.com/content/330/7482/85.pdf%2Bhtml.

69. Saunders & Paton, *supra* note 64, at 1381.

70. *See* Valentine v. State, 215 P.3d 319 (Alaska 2009).

71. G.S. 20-4.01(33a).

72. 312 N.C. 441 (1984).

73. *Id.* at 447. The per se threshold was reduced from 0.10 to 0.08 for offenses committed on or after October 1, 1993. 1993 Sess. Laws, ch. 285.

74. 75 N.C. App. 156 (1985).

75. 201 N.C. App. 594, *rev'd in part on other grounds by* 364 N.C. 394 (2010).

sufficient for a reasonable juror to conclude that the defendant was impaired at the time of the incident where a breath test administered three hours after the accident revealed a blood-alcohol concentration of 0.09 and defendant admitted to drinking one 32-ounce beer, having a few swallows of another beer, and drinking a shot of liquor in the hours before the accident, despite the defendant's contention that his alcohol concentration resulted from his drinking of part of a beer after the accident.[76]

(iii) Results Shall Be Deemed Sufficient

As noted earlier, G.S. 20-138.1(a)(2) provides that "[t]he results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration."[77] The court of appeals in *State v. Narron*[78] upheld the provision as constitutional, explaining that it did not establish a mandatory presumption that compels the jury or fact finder to find that the results of a chemical analysis accurately reflect a defendant's alcohol concentration. Instead, the provision sets forth the prima facie standard for proof of impairment under the per se prong of G.S. 20-138.1. Thus, the "results of a chemical analysis are sufficient evidence to submit the issue of a defendant's alcohol concentration to the factfinder," who "may find [them to be] adequate proof."[79]

(iv) Per Se Impairment Sufficient as a Matter of Law

One argument made with some frequency by defendants prosecuted under the per se impairment theory is that the defendant showed no outward signs of impairment. That is, he or she drove well and satisfactorily performed field sobriety tests. This, the defendant argues, casts doubt on the veracity of the alcohol concentration results reported from the chemical analysis. This sort of argument is proper and supported in law. Determining whether the evidence establishes the defendant's guilt beyond a reasonable doubt unquestionably is the province of the finder of fact.[80] Moreover, "[t]he State's introduction of evidence supporting the statutory elements in a per se criminal statute does not endow the evidence with infallibility."[81]

There's a variant on this argument, however, that is not supported in law. Defendants sometimes argue that the State's evidence is insufficient as a matter of law to establish impaired driving under the per se prong unless, in addition to proving the defendant's alcohol concentration, the State also proves that the defendant was appreciably impaired. This argument may be a hold-over from the statutory scheme that preceded the Safe Roads Act of 1983, which defined a per se violation of the impaired driving laws as a lesser-included offense of driving under the influence and under which the results of a chemical test yielding a result of 0.10 or more created a presumption that the person was under the influence.[82] Whatever its origins, this argument reflects a misunderstanding of the impairment

76. *See also* State v. George, 77 N.C. App. 470 (1985) (evidence was sufficient for conviction where defendant testified that he drank additional alcohol subsequent to driving; a test taken three hours and forty-five minutes after the driving was admissible, and jury could consider delay in determining the weight afforded to the test results).

77. G.S. 20-138.1(a)(2). This provision was added by S.L. 2006-253, effective for offenses committed on or after December 1, 2006.

78. 193 N.C. App. 76 (2008).

79. *Id.* at 81, 84.

80. *See, e.g.,* State v. Finch, 244 P.3d 673, 679 (Kan. 2011) (stating that proof of the elements of a per se criminal statute will not compel conviction as a matter of law, as "[t]he defense may still attack the State's proof and attempt to discredit its witnesses, their machines, and their methods during the State's case-in-chief or later" and "[t]he jury may finally agree that reasonable doubt prevents a conviction").

81. *Id.*

82. *See* G.S. 20-138 (Cum. Supp. 1981); 20-139.1 (Cum. Supp. 1981); State v. Shuping, 312 N.C. 421 (1984).

element of impaired driving as a single element that may be proved in any one of three ways.[83] As the court of appeals clarified in *State v. Arrington*,[84] "it is not necessary for the State to prove that the defendant was appreciably impaired, uncooperative, or driving in an unsafe manner in order to prove that defendant is guilty of a violation of [G.S. 20-138.1(a2)]. To prove guilt, the State need only show that defendant had an alcohol concentration of .08 or more . . . ."[85]

(v) Margin of Error

Another argument sometimes made by defendants is that the "margin of error" for the breath-testing instrument renders the State's proof of per se impairment based on a breath-alcohol concentration of 0.08 unreliable. The argument generally points to one of two sources for the margin of error. First, administrative regulations deem a breath-testing instrument to be accurate if the control sample used to verify instrument accuracy before the defendant's test measures at the expected result of 0.08 or 0.01 less than the expected result.[86] Second, G.S. 20-139.1(b3) deems admissible results of a chemical analysis consisting of "two consecutively collected breath samples [that] do not differ from each other by an alcohol concentration greater than 0.02" and provides that "[o]nly the lower of the two . . . can be used to prove a particular alcohol concentration."[87] Under the first basis, the margin of error is 0.01 (though any such variance engenders a lower alcohol concentration result than actually is present); under the second, the margin of error is 0.02. While alleged unreliability based upon a margin of error, like other questions about the reliability of a reported alcohol concentration result, is fair game for the fact-finder's consideration,[88] an alleged margin of error does not render the State's evidence of impairment insufficient as a matter of law.[89]

(vi) Proving Per Se Impairment with a Chemical Analysis

The usual way for the State to establish that a person drove while impaired under the per se prong of G.S. 20-138.1 is to introduce the results of a chemical analysis demonstrating that the person had an alcohol concentration of 0.08 or more at any relevant time after the driving. Not only are the results of a chemical analysis "deemed sufficient evidence to prove a person's alcohol concentration," but they also may be admitted at trial without the foundation required for similar types of scientific evidence.[90] Not just any test of a person's breath, blood, or bodily fluid, however, constitutes a "chemical analysis."[91] To qualify, the test must be performed in accordance with G.S. 20-139.1.

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83. *See* State v. Coker, 312 N.C. 432, 440 (1984); *Narron*, 193 N.C. App. at 79.

84. 215 N.C. App. 161 (2011).

85. *Id.* at 165.

86. *See* Title 10A of the North Carolina Administrative Code (hereinafter N.C.A.C.), Subchapter 41B, Section .0101.

87. G.S. 20-139.1(b3).

88. *See, e.g.*, State v. Finch, 244 P.3d 673, 679 (Kan. 2011).

89. *See* State v. Shuping, 312 N.C. 421, 430 (1984) (rejecting defendant's challenge to the sufficiency of the evidence based on an alleged margin of error and characterizing the 0.01 deviation allowance below the expected reading as "a safeguard to insure that when the actual test is subsequently run, any possible error during actual testing is in favor of defendant"); *Arrington*, 215 N.C. App. at 164 (rejecting defendant's contention that since his reported alcohol concentration of 0.08, the result from both breath tests, was the lowest for which he could be convicted of a per se violation, the "margin of error of the [instrument] should be taken into account to undermine the State's case against him"; determining that the testing satisfied statutory requirements, was reliable, and accurately identified the defendant's level of impairment).

90. G.S. 20-139.1 (quoted language from *id.* § 20-138.1(a)(2)).

91. *Id.* § 20-4.01(3a).

A breath test "administered pursuant to the implied-consent law" and performed in accordance with rules of the Department of Health and Human Services (DHHS) by a person with a current DHHS permit for the type of instrument employed is an admissible chemical analysis.[92] In addition, the results of a chemical analysis of blood or urine reported by the North Carolina State Crime Laboratory; the Charlotte, N.C., Police Department Laboratory; or any other laboratory approved for chemical analysis by DHHS, including a hospital laboratory, are admissible without further identification.[93]

(A) Confrontation Clause and Notice and Demand

The Sixth Amendment to the United States Constitution, made applicable to the states via the Fourteenth Amendment,[94] provides, in a portion of its text known as the Confrontation Clause, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[95] The United States Supreme Court in *Ohio v. Roberts*[96] interpreted the right as allowing the admission of an unavailable witness's statement against a criminal defendant if the statement bore "adequate 'indicia of reliability.'"[97] To meet that test, evidence had to either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness."[98]

The Supreme Court overruled *Roberts* in the landmark case of *Crawford v. Washington,*[99] in which it rejected the view that the application of the confrontation right to out-of-court statements depended on the "vagaries of the rules of evidence" or "amorphous notions of 'reliability.'"[100] Instead, the Court reasoned that the protection applied to those who "bear testimony"[101] against an accused and requires that reliability be assessed "by testing in the crucible of cross-examination."[102] *Crawford* held that the Confrontation Clause bars the admission of testimonial hearsay statements against the defendant unless the witness who made the statements testifies at trial or the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.[103] *Crawford* declared the statements at issue in that case—statements made in response to formal police interrogation—to be testimonial but "le[ft] for another day . . . a comprehensive definition of 'testimonial.'"[104]

It was thus unclear for several years post-*Crawford* whether the affidavits issued by chemical analysts in implied consent cases were testimonial for purposes of the Confrontation Clause. Indeed, the North Carolina Supreme Court concluded in *State v. Heinricy*[105] that they were not, reasoning that such affidavits were limited to "objective analysis of the evidence and routine chain of custody information."[106] Though noting that such affidavits were prepared with the understanding that their

92. *Id.* § 20-139.1(b).
93. *Id.* § 20-139.1(c1).
94. Pointer v. Texas, 380 U.S. 400, 403 (1965).
95. U.S. Const. amend. VI.
96. 448 U.S. 56 (1980).
97. *Id.* at 66.
98. *Id.* (footnote omitted).
99. 541 U.S. 36 (2004).
100. *Id.* at 61.
101. *Id.* at 51 (citation omitted).
102. *Id.* at 61.
103. *Id.* at 53–54.
104. *Id.* at 68 (footnote omitted).
105. 183 N.C. App. 585 (2007), *overruled by Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).
106. *Id.* at 591.

use in court was probable, the court characterized the analysts as "ha[ving] no interest in the outcome of the trial."[107] Post-*Crawford*, the General Statutes continued to permit the admission in an implied consent trial of affidavits prepared by chemical analysts without requiring the analyst to testify as a witness.[108]

But five years after *Crawford,* the U.S. Supreme Court held in *Melendez-Diaz v. Massachusetts*[109] that certified forensic analyses prepared for purposes of prosecution by employees of a state crime lab were testimonial statements within the meaning of *Crawford*. The Court further held that a defendant's ability to subpoena analysts—a right then afforded by North Carolina's implied consent statutes—did not obviate the prosecution's duty to present at trial the witnesses whose statements it sought to introduce.[110] The Court signaled its approval, however, of notice and demand statutes that "require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial."[111] The North Carolina legislature responded to the ruling by amending G.S. 20-139.1 to incorporate notice and demand provisions, which are discussed below.

(1) Chemical Analysis of Breath in District Court

In a hearing in trial in district court, the State may introduce a chemical analyst's affidavit reporting information related to the administration of a breath test or the collection of blood or urine samples for analysis without calling the analyst as a witness at trial if it provides proper notice to a defendant and the defendant fails to file a timely written objection.[112] To avail itself of this provision, the State must (1) notify the defendant at least fifteen business days before the proceeding at which the affidavit would be used of its intention to introduce the affidavit and (2) provide a copy of the affidavit to the defendant. To prevent the introduction of the affidavit without an appearance from the chemical analyst, the defendant must, at least five business days before the proceeding at which the affidavit would be used, file a written notification with the court, with a copy provided to the State, stating that the defendant objects to the introduction of the affidavit into evidence.[113] A properly executed affidavit from a chemical analyst is admissible in evidence without further authentication and without the testimony of the analyst in any hearing or trial in district court with respect to: (1) the alcohol concentrations or the presence or absence of an impairing substance; (2) the time of the collection of the blood, breath, and/or bodily fluid for testing; (3) the type of chemical analysis administered and the procedures followed; (4) the type and status of any permit issued by DHHS that the analyst held when he or she performed the chemical analysis; and (5), if the chemical analysis is performed on a breath-testing instrument for which regulations require preventative maintenance, the date the

107. *Id.*

108. G.S. 20-139.1(c1) (2008) (rendering affidavit reporting results of a chemical analysis of blood or urine by an approved laboratory admissible in any court); 20-139.1(e1) (2008) (rendering affidavit by chemical analyst admissible in district court without testimony from analyst unless defendant subpoenaed analyst); *see also* State v. Smith, 312 N.C. 361 (1984) (determining pre-*Crawford* that a defendant's right to confrontation was not violated by the procedure that permitted the affidavit of an analyst who did not testify at trial to be introduced into evidence in district court).

109. 557 U.S. 305 (2009).

110. *Id.* at 324.

111. *Id.* at 326 (citations omitted).

112. G.S. 20-139.1(e1).

113. *Id*. § 20-139.1(e2).

most recent preventative maintenance procedures were performed as shown on the maintenance records for the instrument.

(2) Chemical Analysis of Blood or Urine in District or Superior Court

The State may introduce the certified results of a chemical analysis of blood or urine without further authentication and without the testimony of the analyst in cases tried in district and superior court and in adjudicatory hearings in juvenile court if (1) the State (a) notifies the defendant at least fifteen business days before the proceeding at which the evidence would be used of its intention to introduce the report into evidence and (b) provides a copy of the report to the defendant; and (2) the defendant fails to file a written objection with the court, with a copy provided to the State, at least five business days before the proceeding at which the report would be used stating that he or she objects to the introduction of the report.[114] If the defendant timely files a written objection, the admissibility of the report is determined by the appropriate rules of evidence.

(a) Remote Testimony

The General Assembly enacted in 2014 a provision allowing an analyst, with the defendant's acquiescence, to testify remotely regarding the results of a chemical analysis of the defendant's blood or urine.[115] To utilize this provision, the State must provide (1) notice to the defendant at least fifteen business days before the proceeding at which the evidence would be used that it intends to introduce the evidence using remote testimony and (2) a copy of the analyst's report to the defendant at least fifteen business days before the proceeding.[116] If the defendant fails to object to the remote testimony by filing a written objection with the court at least five business days before the proceeding at which the testimony will be presented, the analyst may testify remotely.[117] The method used for remote testimony must allow the trier of fact and all parties to observe the demeanor of the analyst as the analyst testifies in a similar manner as if the analyst were testifying in person.[118] The court must ensure that the defendant has a full and fair opportunity to examine and cross-examine the analyst.[119] While the statutory provisions for remote testimony became effective September 1, 2014, the legislative act further provided that its provisions did not obligate the Administrative Office of the Courts or the State Crime Laboratory to incur expenses related to remote testimony absent an appropriation of funds for this purpose.[120] Given that no such funds have yet been appropriated, no analysts were testifying remotely as of the date of this publication.

(3) Chemical Analysis of Blood or Urine in Administrative Hearings

Certified results of a chemical analysis may be introduced in an administrative hearing before the North Carolina Division of Motor Vehicles (NC DMV) without the testimony of the analyst, regardless of whether the State notifies the defendant in advance of its intent to introduce such results. The protections of the Confrontation Clause apply only to criminal prosecutions, and thus are not implicated in administrative license hearings conducted by NC DMV.

(B) Proving Per Se Impairment Without a Chemical Analysis

The State is not limited to proving a defendant's alcohol concentration by means of a chemical analysis performed in accordance with G.S. 20-139.1. Instead, the State also may prove a defendant's alcohol concentration by introducing the results of other reliable tests showing the presence of a controlled

114. *Id.* § 20-139.1(c1).
115. S.L. 2014-119, sec. 8.(b).
116. G.S. 20-139.1(c5).
117. *Id.*
118. *Id.*
119. *Id.*
120. S.L. 2014-119, secs. 8.(b), (c).

substance.[121] One circumstance in which the State might rely upon a test that is not a chemical analysis occurs when a defendant is hospitalized after an incident of suspected impaired driving and his or her blood or urine is analyzed for purposes of medical treatment. In such a case, testing is performed pursuant to hospital laboratory procedures rather than the procedures required by G.S. 20-139.1. In *State v. Drdak*,[122] the state supreme court determined that the trial court did not err by denying the defendant's motion to suppress blood test results from a hospital laboratory proffered by the State at the defendant's trial on impaired driving charges to prove his alcohol concentration. The court characterized the defendant's contention that the blood test results were inadmissible because the test was not performed in accordance with the procedures set forth in G.S. 20-16.2 and 20-139.1 as "fl[ying] squarely in the face of the plain reading of [G.S.20-139.1(a)],"[123] which states that "[t]his section 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."[124]

Of course, results of tests performed outside the scope of implied consent laws are not afforded the presumptive admissibility of chemical analyses satisfying the requirements of G.S. 20-139.1. Instead, the State must provide a proper foundation for the introduction of such results, which may require that the State demonstrate their reliability.[125]

The *Drdak* court determined that the State established a proper foundation for introduction of hospital blood test results by showing, among other facts, that "the hospital's blood alcohol test was performed less than an hour after the defendant's car crashed into the tree, that an experienced phlebotomist withdrew the blood sample under routine procedure pursuant to the doctor's orders, and that a trained laboratory technician analyzed the blood sample using a Dupont Automatic Clinical Analyzer which was capable of testing either whole blood or serum."[126] The court of appeals in *State v. Mac Cardwell*[127] likewise concluded that the trial court, in denying the defendant's motion to suppress evidence of hospital blood test results in an impaired driving trial, did not abuse its discretion in determining that the Dupont ACA Star Analyzer ("Analyzer") used by the hospital to measure the defendant's alcohol concentration was a "reliable scientific method of proof."[128] The *Mac Cardwell* court further noted that the trial court properly allowed the defendant to present evidence to the jury attacking the reliability of the Analyzer and the defendant's results.[129]

Hospital laboratories sometimes calculate a patient's plasma-alcohol concentration rather than the alcohol concentration in whole blood. To prove a specific alcohol concentration based on such results, the State must provide testimony from an expert capable of converting the results to grams of alcohol per 100 milliliters of blood in order to prove that the defendant had a specific alcohol concentration.[130]

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121. G.S. 20-139.1(a).

122. 330 N.C. 587 (1992).

123. *Id.* at 592.

124. G.S. 20-139.1(a).

125. Hospital records are business records for purposes of the business records hearsay exception in North Carolina Rule of Evidence 803(6). Yet, as described below, North Carolina's appellate courts have indicated that some greater foundational showing may be required to support the introduction of a defendant's alcohol concentration as contained in such records. That mode of analysis comports with a trend of distinguishing among opinions in business records. *See generally* Imwinkelreid et al., 1 Courtroom Criminal Evidence § 1220 (5th ed. 2011).

126. 330 N.C. at 592.

127. 133 N.C. App. 496 (1999).

128. *Id.* at 506.

129. *Id.* at 507.

130. *See* G.S. 20-4.01(1b) (requiring that the concentration of alcohol be expressed either as "a. Grams of alcohol per 100 milliliters of blood; or b. Grams of alcohol per 210 liters of breath").

The *Mac Cardwell* court held that the trial court did not abuse its discretion in finding the conversion ratio of 1 to 1.18 utilized by a forensic chemist at the State Bureau of Investigation laboratory reliable.[131] As it had with respect to the test results, the court noted the propriety of permitting the defendant to present evidence attacking the conversion ratio used by the State.[132]

(C) Retrograde Extrapolation

Retrograde extrapolation is a methodology used to estimate a person's alcohol concentration at some earlier point in time based upon a later reported alcohol concentration.[133] The calculation of a person's earlier alcohol concentration is based upon the time that elapsed between the specified earlier event (such as a vehicle crash) and the time of the chemical analysis and the average rate of elimination of alcohol from a person's blood. North Carolina's appellate courts have, on numerous occasions, recognized retrograde extrapolation as a reliable method of proving a person's alcohol concentration and have allowed qualified experts to testify about alcohol concentration results derived from such calculations.[134]

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131. *Mac Cardwell*, 133 N.C. App. at 506–07.

132. *Id.* at 507.

133. *See generally* Justin Noval & Edward J. Imwinkelried, *Retrograde Extrapolation of Blood Alcohol Concentration*, 50 Crim. L. Bull., no. 1, art. 7 (Winter 2014) (describing the technique of retrograde extrapolation).

134. *See, e.g.*, State v. Green, 209 N.C. App. 669 (2011); State v. Taylor, 165 N.C. App. 750 (2004); State v. Davis, 142 N.C. App. 81 (2001); State v. Catoe, 78 N.C. App. 167 (1985); *but see* State v. Davis, 208 N.C. App. 26 (2010) (holding that expert testimony as to the defendant's blood-alcohol concentration at the time of the crash was improper and prejudicial, where that testimony was founded solely on the fact that an officer who talked to the defendant more than ten hours after the accident smelled alcohol on her breath).

Courts in other states have viewed retrograde extrapolation testimony with skepticism. The Texas Court of Criminal Appeals in *Mata v. Texas*, 46 S.W.3d 902 (Tex. Crim. App. 2001) (en banc), summarized its view of the limitations of retrograde extrapolation as follows:

> Initially, we recognize that even those who believe retrograde extrapolation is a reliable technique have utilized it only if certain factors are known, such as the length of the drinking spree, the time of the last drink, and the person's weight. . . . In addition, there appears to be general disagreement on some of the fundamental aspects of the theory, such as the accuracy of Widmark's formulas, . . . whether a standard elimination rate can be reliably applied to a given subject, . . . and the effect that food in the stomach has on alcohol absorption. . . . Nevertheless, given the studies, other concepts seem indisputable, including that multiple tests will increase the ability to plot a subject's BAC [blood-alcohol concentration] curve, a test nearer in time to the time of the alleged offense increases the ability to determine the subject's offense-time BAC, and the more personal information known about the subject increases the reliability of an extrapolation. . . .
>
> We believe that the science of retrograde extrapolation can be reliable in a given case. The expert's ability to apply the science and explain it with clarity to the court is a paramount consideration. In addition, the expert must demonstrate some understanding of the difficulties associated with a retrograde extrapolation. He must demonstrate an awareness of the subtleties of the science and the risks inherent in any extrapolation. Finally, he must be able to clearly and consistently apply the science.

Id. at 915–16 (footnotes omitted). *See also* Burns v. State, 298 S.W.3d 697, 702 (Tex. App. 2009) (trial court abused its discretion by admitting retrograde extrapolation testimony where expert "admitted he knew none of the factors required by *Mata*"; such testimony was unreliable); State v. Dist. Ct. (Armstrong), 267 P.3d 777, 783 (Nev. 2011) (citing *Mata* favorably and finding that, while retrograde extrapolation evidence was relevant, the trial court did not abuse its discretion by precluding such evidence where significant personal characteristics of defendant were unknown to expert). *But see* Bigon v. State, 252 S.W.3d 360, 368 (Tex. Crim. App. 2008) (trial court did not abuse its discretion by admitting retrograde extrapolation testimony where expert clearly explained the underlying theory and explained the specific methodologies utilized as required by *Mata*; fact that two tests were administered diminished the importance of expert's lack of knowledge of defendant's personal characteristics); Kennedy v. State, 264 S.W.3d 372, 381 (Tex. App. 2008) (same); United States v. Tsosie, 791 F. Supp. 2d 1099, 1113 (D.N.M. 2011) (trial court did not abuse its discretion by admitting

As a general matter, the admissibility of retrograde extrapolation evidence tends to turn on traditional evidentiary analyses related to expert testimony rather than on jurisdiction-specific views of the reliability of retrograde extrapolation as a scientific technique in the abstract.[135] In determining the admissibility of such evidence courts tend to consider an expert's qualifications,[136] the particular methods employed in a given case,[137] and a jurisdiction's statutory scheme[138] rather than the soundness of retrograde extrapolation as a scientific theory.[139]

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retrograde extrapolation testimony where expert used assumptions favorable to defendant to account for certain unknown personal factors); People v. Ikerman, 973 N.E.2d 1008, 1019 (Ill. App. Ct. 2012) (retrograde extrapolation evidence admissible through testimony of qualified expert; no mention of personal factors).

See also United States v. DuBois, 645 F.2d 642, 644, 645 (8th Cir. 1981) (evaluating sufficiency of the evidence, "emphasiz[ing] that this was a criminal trial," and finding expert's extrapolation based on a test taken two and one-half hours after the accident and after the undisputed consumption of an unknown amount of beer subsequent to the accident insufficient to establish intoxication at time of accident); *Cf.* Weinstein v. Siemens, No. 2:07-CV-15000, 2010 WL 4825205 (E.D. Mich. Nov. 22, 2010) (finding retrograde extrapolation testimony from expert with Ph.D. in toxicology admissible to prove driver's alcohol concentration at the time of accident where expert relied on three consecutive blood draws to determine the driver's rate of elimination and applied that rate in his extrapolation analysis to conclude that driver's alcohol concentration was in the range of 0.36 to 0.39, depending upon whether his alcohol concentration was increasing or decreasing). *See generally* A.W. Jones, "Disposition and Fate of Ethanol in the Body," in Medical-Legal Aspects of Alcohol 95 (James C. Garriott ed., 4th ed. 2003) ("Requests to back extrapolate [blood-alcohol concentration] from time of sampling to time of driving are common in DUI litigation although this is a dubious practice with many variables to consider.").

135. *See generally* Noval & Imwinkelried, *supra* note 133 (asserting that "[e]ven if the courts are generally receptive to retrograde extrapolation testimony, post-*Daubert* the testimony should be admitted only if the scientific theory underlying such testimony is empirically valid").

136. *Compare* People v. Barham, 788 N.E.2d 297, 308–09 (Ill. App. Ct. 2003) (state failed to lay proper foundation for expert testimony regarding rate at which alcohol is eliminated from the human system where there was no evidence of the expert's relevant education, training, or experience), *with Ikerman*, 973 N.E.2d at 1019 (retrograde extrapolation evidence admissible through testimony of qualified expert).

137. *Compare Davis*, 208 N.C. App. 26 (finding retrograde extrapolation based on a "smell test" which lacked independent verification, had never been submitted to peer review, and had never been previously utilized by the expert to be an insufficiently reliable method of proof), *with Green*, 209 N.C. App. at 680 (finding retrograde extrapolation testimony based on the results of a test performed with an Intoxilyzer 5000 to be admissible).

138. *Compare* State v. Day, 176 P.3d 1091, 1098 (N.M. 2008) (retrograde extrapolation admissible to prove defendant's blood-alcohol concentration (BAC) at the time of driving), *with* People v. Emery, 812 P.2d 665, 667 (Colo. App. 1990) (retrograde extrapolation evidence should not have been admitted because it was irrelevant where test results were statutorily deemed to relate back to the offense by virtue of "within a reasonable time [of the offense]" language), State v. Tischio, 527 A.2d 388, 395 (N.J. 1987) (legislative intent precluded defendant's extrapolation evidence meant to show a lower BAC at the time of driving than at the time of testing; a reliable breathalyzer test administered within a reasonable time after driving which reported a BAC exceeding statutory limit was sufficient to prove the offense notwithstanding the fact that a strict reading of statute suggested that crime was in the nature of an "at the time of driving" offense), *and* State v. Daniel, 979 P.2d 103, 105 (Idaho 1999) (statute explicitly prohibiting prosecution where test shows BAC less than 0.10 (now 0.08) precluded extrapolation evidence; statute meant to incentivize submission to testing and allowing extrapolation would eliminate incentive); *see also* Noval and Imwinkelried, *supra* note 133 (indentifying "weaknesses in the popular method of applying the retrograde extrapolation technique" and suggesting improvements for more accurate results).

139. *But see* State v. Burgess, 5 A.3d 911, 916 (Vt. 2010) (noting that "Vermont courts have accepted evidence regarding retrograde extrapolation for a number of decades" and determining that trial court "went too far in holding that the test results . . . were unreliable as a matter of law").

d. Schedule I Controlled Substance

The third way in which a person may be deemed impaired is if there is any amount of a Schedule I controlled substance or its metabolites in his or her blood or urine. Schedule I controlled substances are listed in G.S. 90-89, a provision of the Controlled Substances Act.[140] This schedule includes specified opiates, opium derivatives, hallucinogenic substances, central nervous system depressants, and stimulants. Some of the more commonly known substances included on this schedule are heroin,[141] lysergic acid diethylamide (LSD), [142] and MDMA (ecstasy).[143] Cocaine is a Schedule II,[144] not a Schedule I, controlled substance. Hydrocodone and oxycodone likewise are Schedule II rather than Schedule I controlled substances.[145] Thus, the presence of cocaine, hydrocodone, oxycodone, or the metabolites of any of these substances in a person's blood or urine does not establish per se impairment pursuant to G.S. 20-138.1(a)(3). The State may, however, establish that a person was appreciably impaired by a controlled substance not included on Schedule I.[146]

B. Pleading Requirements

A pleading charging misdemeanor impaired driving in violation of G.S. 20-138.1 "is sufficient if it states the time and place of the alleged offense in the usual form and charges that the defendant drove a vehicle on a highway or public vehicular area while subject to an impairing substance."[147] The State is not required to allege the specific hour and minute that the offense occurred.[148] Nor must the State allege the theory of impairment under which the defendant is charged.[149] A defendant who feels he or she may be surprised at trial by the pleadings' lack of specificity may request a bill of particulars.[150]

Moreover, while the State must provide the defendant with notice of any aggravating sentencing factor it intends to use for an impaired driving conviction appealed to superior court, no such notice requirement applies in district court.[151]

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140. G.S. Chapter 90, Article 5.

141. G.S. 90-89(2)j.

142. *Id.* § 90-89(3)m.

143. *Id.* § 90-89(3)c.

144. *Id.* § 90-90(1)d.

145. *Id.* § 90-90(1).

146. *See, e.g.*, State v. Norton, 213 N.C. App. 75, 80 (2011) (evidence that the defendant drove recklessly and that he consumed alcohol and cocaine was sufficient to establish his guilt on charges of driving while impaired).

147. G.S. 20-138.1(c).

148. State v. Friend, 219 N.C. App. 338 (2012).

149. State v. Coker, 312 N.C. 432, 434 (1984).

150. *Id.* at 437.

151. G.S. 20-179(a1)(1). *See infra* chapter 5 for a detailed discussion of this requirement. The notice provisions of G.S. 20-179(a1)(1) were crafted to protect a defendant's Sixth Amendment right to be informed of the charges against him or her—as contrasted with a defendant's Sixth Amendment right to confront witnesses.

For a thorough analysis of the impetus for imposing similar notice requirements upon the State in structured sentencing cases post-*Blakely v. Washington*, see Jessica Smith, *North Carolina Sentencing after* Blakely v. Washington *and the* Blakely *Bill* (UNC School of Government, Sept. 2005) (hereinafter *Blakely Bill*), 10–13, www.sog.unc.edu/sites/www.sog.unc.edu/files/Blakely%20Update.pdf.

It is well settled that all of the constitutional protections that apply in superior court need not be afforded a defendant at the first level of a two-tier trial system. *See* Ludwig v. Massachusetts, 427 U.S. 618 (1976) (defendant's Fourteenth Amendment right to jury trial not violated by bench trial at first tier of two-tier system where defendant had right to trial by jury at second tier). Thus, there is some questions as to whether *Blakely v. Washington,* 530 U.S. 466 (2000), applies to non-Structured Sentencing Act misdemeanors tried in district court. The issue has been stated this way:

C. Aiding and Abetting

A defendant may be convicted of impaired driving in violation of G.S. 20-138.1 under the common law concept of aiding and abetting. A defendant aids and abets impaired driving when he or she knowingly advises, instigates, encourages, or aids another person to drive while impaired and his or her actions cause or contribute to the commission of the crime.[152]

One situation clearly covered by the aiding and abetting theory is that in which a person knowingly gives control of his or her vehicle to an impaired person who then drives the vehicle on a street, highway, or public vehicular area while the owner rides along as a passenger.[153]

> One view is that *Blakely* is not simply a ruling on the constitutional right to a jury trial, but also rests on rights (such as notice and proof beyond a reasonable doubt) that flow from a sentence that exceeds the statutory maximum as defined in the ruling. Therefore, requirements of a criminal pleading providing notice (either by specific allegations or a statutory short-form pleading) and proof beyond a reasonable doubt apply . . . in district court . . . just as they apply in superior court—except that a district court judge, not a jury, decides whether these factors have been proved beyond a reasonable doubt. . . .
>
> Another view is that *Blakely* rests squarely on the constitutional right to a jury trial. The United States Supreme Court ruled in *Ludwig v. Massachusetts*, 427 U.S. 618 (1976), that there is no federal constitutional right to a jury trial at the first level of a state's trial de novo system. If *Blakely* is based solely on the protection of that right, then it apparently does not apply to the first level of a system, such as North Carolina's, where jury trials are provided only on de novo appeal.

See Smith, *Blakely Bill*, at 28.

As Smith discusses in the article cited above, the North Carolina Supreme Court held in *State v. Speight*, 359 N.C. 602 (2005), *vacated and remanded*, 548 U.S. 923 (2006) (remanding case for reconsideration in light of *Washington v. Recuenco*, 548 U.S. 212 (2006) (reversing lower court's determination that *Blakely* violations could never be harmless)), that grossly aggravating and aggravating factors in an impaired driving case need not be alleged in an indictment. However, the state supreme court in *State v. Hunt*, 357 N.C. 257 (2003), recognized that the Sixth Amendment imposes a notice requirement on the State. In *Hunt*, the short-form murder indictment combined with an exclusive statutory list of aggravating circumstances was held to provide sufficient notice. G.S. 20-138.1(c) provides for a short-form criminal pleading for impaired driving, though as previously noted, G.S. 20-179(a1)(1) requires additional pleadings in superior court. *Hunt* can be read to suggest that in district court this short-form pleading combined with the exclusive list of grossly aggravating factors in G.S. 20-179(c) provides sufficient notice as to grossly aggravating factors. The same argument could be made regarding the aggravating factors in G.S. 20-179(d), with the exception of the catch-all aggravating factor in G.S. 20-179(d)(9). *Hunt* might be read to suggest that some sort of additional notice would be required for this factor, if, in fact, *Blakely* applies in district court. However, given that this catch-all aggravating factor must be based on conduct that occurs during the same transaction or occurrence as the impaired driving offense, it may be sufficiently circumscribed so as to place the defendant on notice. *Contrast* G.S. 15A-1340.16(d)(20) (listing as a catch-all "[a]ny other aggravating factor reasonably related to the purposes of sentencing").

152. *See* State v. Goode, 350 N.C. 247, 260 (1999).

153. *See* State v. Gibbs, 227 N.C. 677, 678 (1947) (citations omitted) ("When an owner places his motor vehicle in the hands of an intoxicated driver, sits by his side, and permits him, without protest, to operate the vehicle on a public highway, while in a state of intoxication, he is as guilty as the man at the wheel."); State v. Whitaker, 43 N.C. App. 600, 605 (1979) (citations omitted) ("[W]e hold that when a death results from the operation of a motor vehicle by an intoxicated person not the owner of that vehicle, the owner who is present in the vehicle and who with his knowledge and consent permits the intoxicated driver to operate the vehicle, is as guilty as the intoxicated driver."); *see also* Story v. United States, 16 F.2d 342, 344 (D.C. Cir. 1926) (owner of and passenger in vehicle convicted as aider and abettor where impaired passenger asked defendant for and was given permission to drive); State v. Satern, 516 N.W.2d 839, 840 (Iowa 1994) (owner of and passenger in vehicle convicted as an accomplice where he "turned over" the driving to a person who was impaired); State v. Stratton, 591 A.2d 246, 248 (Me. 1991) (owner of and passenger in vehicle convicted as an accomplice where he asked his impaired employee to drive because employee was "soberer"); State v. Lemacks, 996 S.W.2d 166, 172 (Tenn. 1999) (owner of and passenger in vehicle convicted as an accomplice where evidence uncertain if

It is somewhat less clear whether a person may be convicted of aiding and abetting impaired driving if he or she knowingly gives control of his or her vehicle to a person who is impaired, but does not himself/herself accompany the driver. No North Carolina appellate court cases consider this circumstance, though it seems likely that such conduct would support a conviction for aiding and abetting DWI. The vehicle owner's presence in the car in the aiding and abetting cases previously cited[154] was probative of his or her consent to the driving as well as his or her knowledge of the driver's impairment. Yet a vehicle owner who hands over his or her keys to an impaired driver but does not himself/herself ride along has provided the same degree of assistance and appears no less culpable than the owner who elects to accompany the driver. Indeed, the Court of Appeals of Georgia concluded in *Guzman v. State*[155] that the owner of a vehicle who was neither the driver nor a passenger in the car aided and abetted driving under the influence where he gave beer and his car keys to the 14-year-old driver.

A person may not be convicted of aiding and abetting impaired driving based on nothing more than his or her failure to stop from driving a person he or she knows to be impaired.[156] The North Carolina Court of Appeals considered such a claim in *Smith v. Winn-Dixie Charlotte, Inc.*[157] *Smith* was a civil action in which the plaintiff, who was injured when a 17-year-old impaired driver struck her vehicle, alleged negligence by the grocery store who sold beer to the driver's underage friend and negligence per se by the driver's friends whom she contended aided and abetted the underage driver in violating G.S. 20-138.1.

The record in *Smith* established that the driver's friends drank with him on the evening of the accident and that they saw the driver consume six beers in a short period of time. They did not attempt to stop him from driving his own car afterwards. The court of appeals determined, for purposes of the defendant-friends' motions for summary judgment, that this evidence was not sufficient to establish that the friends aided and abetted the driver in committing the offense of driving while impaired. The court noted the lack of evidence that the friends intended to aid the driver or that they communicated any such intent. Moreover, the court stated that even assuming the friends knew or should have known the driver was impaired, they had no duty to prevent him from getting into his car and attempting to drive.

The Supreme Court of Vermont wrestled with more difficult facts in *State v. Millette*.[158] There, the evidence established that the defendant and his friend left a night club in the early morning hours after a day and night of drinking. The defendant, whose car was parked in the parking lot, suggested to his friend that they pull the car behind the night club and sleep. The defendant's friend removed the keys from the defendant's pocket and said he would drive the defendant home. The friend wrecked the car on the way home and was killed. The court concluded that these facts failed to establish that the defendant aided and abetted driving while impaired, noting that cases predicated on this theory of criminal liability rested on "more active participation" by the defendant than was present in *Millette*.[159]

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he was driving but where, in any event, he gave keys to impaired co-defendant); Williams v. State, 352 S.W.2d 230, 230 (Tenn. 1961) (owner of and passenger in vehicle convicted as aider and abettor where he had no valid license and had impaired friend drive).

154. See *supra* note 153.

155. 586 S.E.2d 59 (Ga. Ct. App. 2003).

156. *See* State v. Sanders, 288 N.C. 285, 290 (1975) (citations omitted) ("The mere presence of the defendant at the scene of the crime, even though he is in sympathy with the criminal act and does nothing to prevent its commission, does not make him guilty of the offense.")

157. 142 N.C. App. 255, 264 (2001).

158. 795 A.2d 1182 (Vt. 2002).

159. *Id.* at 1184.

DWI Overview

Shea Denning
School of Government
September 2015

What is an Implied Consent Offense?

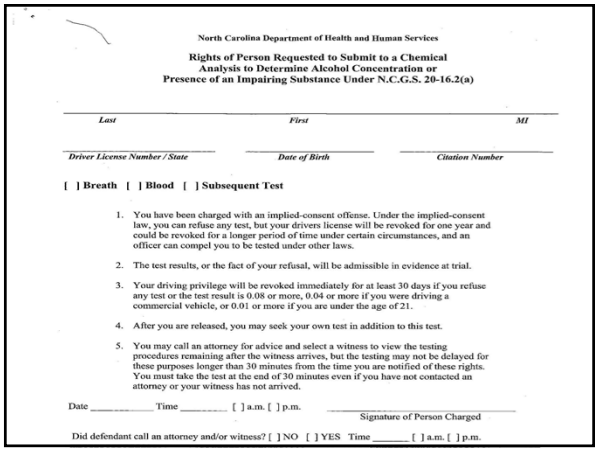
- A person charged with such an offense may be required to undergo chemical testing for alcohol or drugs
- Refusal to participate will result in license revocation
- And will be used as evidence of guilt

Implied Consent Offenses

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

Detailed Statutory Scheme

- Defendant must be taken before chemical analyst with permit from DHHS (can be arresting officer)
- Defendant must be advised orally and in writing of implied consent rights.
- G.S. 20-16.2(b) states that no notice of rights and request is required before testing if person is unconscious or otherwise capable of refusal*



North Carolina Department of Health and Human Services

Rights of Person Requested to Submit to a Chemical Analysis to Determine Alcohol Concentration or Presence of an Impairing Substance Under N.C.G.S. 20-16.2(a)

Last *First* *MI*

Driver License Number / State *Date of Birth* *Citation Number*

[ ] Breath [ ] Blood [ ] Subsequent Test

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

Date _____ Time _____ [ ] a.m. [ ] p.m. _____ Signature of Person Charged

Did defendant call an attorney and/or witness? [ ] NO [ ] YES Time _____ [ ] a.m. [ ] p.m.

Failure to Advise/Afford Rights

- *State v. Shadding*, 17 N.C. App. 279 (1973)
  - Failure to offer evidence that defendant was advised of implied consent rights renders breath test results inadmissible
  - Results of test admissible only if testing was delayed to give defendant opportunity to exercise rights
- *State v. Myers*, 118 N.C. App. 452 (1995); *State v. Hatley*, 190 N.C. App. 639 (2008); *State v. Buckheit*, 735 S.E.2d 345 (N.C. App. 2012)
  - Denial of statutory right to have witness present during administration of breath test bars admission of results

Advantage: Admissibility

- Any competent evidence of a defendant's alcohol concentration may be introduced at trial
  - State must lay foundation
- Results of a chemical analysis admissible if performed in accordance with G.S. 20-139.1
  - State not required to establish scientific reliability of instrument used or validity of underlying scientific principles
  - Results are "deemed sufficient evidence to prove a person's alcohol concentration."

Theory of Implied Consent

- Implied consent testing is a Fourth Amendment search
  - Must satisfy Fourth Amendment's reasonableness requirement
  - Traditional standard: PC + Warrant
  - Exceptions
    - Search incident to arrest (exception to both)
    - Consent search (exception to both)
    - Special governmental needs (exception to both)
    - Exigent circumstances (warrant exception)

Implied Consent & the 4th Amendment

- G.S. 20-16.2 requires probable cause for alcohol-related offense
  - (not so for misdemeanor death by vehicle)
- What about warrant requirement?
  - Minimal intrusion?
  - Incident to arrest?
  - Exigency?
  - Consent?

PUBLIC SERVICE ANNOUNCEMENT:

You are hereby advised that anyone who walks down the streets or sidewalks of Safecity, NC after 11 p.m. is subject to search by a law enforcement officer.

Reasonableness Test?

- Gov. has compelling interest in highway safety
- Safe, commonplace and relatively painless method is used
- PC required
- Advance notice provided by implied consent statutes

Compelled Testing after Refusal

- Person refuses implied consent testing.
- May State compel testing?
  - Yes.
  - But sometimes it must have a warrant.

Schmerber v. California, 384 U.S. 757 (1966)

- Defendant injured in automobile accident
- Taken to hospital
- Police officer ordered blood test over defendant's objection
- S. Ct.: Warrant requirement applies generally to searches that intrude into human body
  - Warrantless blood draw permissible as officer might reasonably have believed that delay necessary to obtain a warrant threatened the destruction of evidence, given the natural dissipation of alcohol from a person's blood
  - Time had to be taken to bring D to hospital and to investigate accident scene

Exigency Analysis

- Post-*Schmerber*, courts disagreed as to whether
  - Dissipation of alcohol alone provided a sufficient exigency to excuse the Fourth Amendment's warrant requirement; or
  - Special facts of exigency were required
- State v. Fletcher, 202 N.C. App. 107 (2010)
  - Dissipation plus evidence regarding delay established exigency

Missouri v. McNeely, 133 S. Ct. 1552 (2013)

- Natural dissipation of alcohol does not create a per se exigency
  - If officer can obtain warrant without "significantly undermining" search, must do so
  - Whether nonconsensual warrantless blood draw is reasonable must be determined case by case on totality of circumstances
    - May have exigency w/o accident
    - Warrant procedures relevant
    - Availability of magistrate relevant

Post-*McNeely* Jurisprudence

- State v. Dahlquist, __ N.C. App. __, 752 S.E.2d 665 (2013)
- Four to five hour delay created exigency
- Dicta.
  - G.S. 15A-245 allows search warrant to be issued based on audiovisual transmission of oral testimony under oath
  - Better practice is to verify waiting times

Post-*McNeely* Jurisprudence

- State v. Granger, __ N.C. App. __, 761 S.E.2d 923 (2014)
- Exigent circumstances justified warrantless, nonconsensual blood draw
  - Blood drawn 1.5 hours after defendant drove
  - Would have taken an additional 40 minutes to get warrant
  - Lone investigating officer could not leave D at hospital

Does *McNeely* Affect Implied Consent?

- Must courts reconsider whether "consensual" blood draws, carried out under implied-consent laws, are constitutional?
  - *State v. Butler*, 302 P.3d 609 (Ariz. 2013) (en banc) (independent of state's implied consent law, arrestee's consent must be voluntary)
  - *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013) (determining that defendant consent based on totality of circumstances, not because state law provides that drivers consent)

G.S. 20-16.2(b)

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

Special Procedural Rules

- Chapter 20, Article 2D.
- Applies to implied consent offenses

2005 Task Force Report

- No pre-trial requirement, and State can't appeal motions to suppress
- DA has no notice of motion
- These motions resolve the case
- The proceedings of District Court should be modified to require:
  - Written motions filed before trial
  - Procedures that more closely resemble those in Superior Court.
  - Written findings of fact and conclusions of law
  - Appeals by the State

G.S. 20-38.6

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

Summary Rulings

- State stipulation
- Failure to move pretrial

Preliminary Determinations

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

G.S. 20-38.7

- State may appeal a district court preliminary determination granting a motion to suppress or dismiss
- Dispute about findings of fact? Superior court is not bound. Shall determine matter *de novo*.

What happens in superior court?

- Superior court must remand matter to district court with instructions to finally grant or deny the motion.
  - State has no right to appeal from the superior court's remand order
  - But court of appeals has granted cert on several occasions

Motions to Suppress

- G.S. 15A-974: Evidence must be suppressed if
  - Exclusion required by Constitution
  - Obtained as a result of a substantial violation of the provisions of this Chapter
    - Includes substantial violations of Chapter 20.
    - *State v. White*, __ N.C. App. __, 753 S.E.2d 698 (2014)
      - (evidence from checkpoint properly suppressed where there was no written checkpoint policy as required by G.S. 20-16.3A).

Motions to Suppress

- Violation of implied consent laws in Chapter 20
  - *State v. Shadding*, 17 N.C. App. 279 (1973)
    - Failure to offer evidence that defendant was advised of implied consent rights renders breath test results inadmissible
    - Results of test admissible only if testing was delayed to give defendant opportunity to exercise rights
  - *State v. Myers*, 118 N.C. App. 452 (1995); *State v. Hatley*, 190 N.C. App. 639 (2008); *State v. Buckheit*, 735 S.E.2d 345 (N.C. App. 2012)
    - Denial of statutory right to have witness present during administration of breath test bars admission of results

Not all violations are the same

- State v. Buckner, 34 N.C. App. 447 (1977)
  - Delay of less than 30 minutes permissible as there was no evidence that a witness would have arrived had the operated delayed the test another 10 minutes
- State v. Green, 27 N.C. App. 491 (1975)
  - Garbled notice of right to independent test did not require suppression

Questions 1 & 2

Motions to Dismiss

- G.S. 15A-954
- *State v. Knoll*, 322 N.C. 535 (1988)
  - Violation of a defendant's statutory rights to pre-trial release in an impaired driving case that prejudices the defendant requires dismissal
- *State v. Hill,* 277 N.C. 547 (1971)
  - Denial of a defendant's constitutional right to communicate with counsel and friends that deprives him of the opportunity to confront the State's witnesses with other testimony requires dismissal
- Grounds are limited
  - *State v. Joe*, 365 N.C. 538 (2012) (trial court had no authority to enter order dismissing case on its own motion)

Suppression & Dismissal: Not Interchangeable

State v. Wilson, 225 N.C. App. 246 (2013)

State v. Wilson,
225 N.C. App. 246 (2013)

- G.S. 15A-954(a) (1) Statute alleged to have been violated is unconstitutional on its face or as applied
  - Ct. App.: This concerns the statute under which the defendant is charged
- G.S. 15A-954(a)(4) Flagrant violation of constitutional rights, resulting in irreparable prejudice
  - Ct. App.: No prejudice

Questions 3 -6

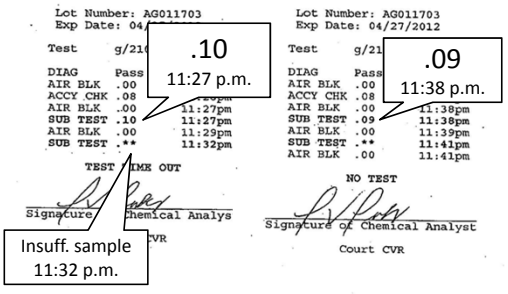
Question 7

G.S. 20-139.1(b3)

"The results of the chemical analysis of all breath samples are admissible if the test results from any two consecutively collected breath samples do not differ from each other by an alcohol concentration greater than 0.02. Only the lower of the two test results of the consecutively administered tests can be used to prove a particular alcohol concentration."

Question 8

State v. Cathcart (N.C. App. 2013)



Questions 9 & 10

G.S. 20-16.3

(d) Use of Screening Test Results or Refusal by Officer. – The fact that a driver showed a positive or negative result on an alcohol screening test, but not the actual alcohol concentration result, or a driver's refusal to submit may be used by a law-enforcement officer, is admissible in a court, or may also be used by an administrative agency in determining if there are reasonable grounds for believing:

(1) That the driver has committed an implied-consent offense under G.S. 20-16.2; and

(2) That the driver had consumed alcohol and that the driver had in his or her body previously consumed alcohol, but not to prove a particular alcohol concentration. . . .

DWI Sentencing

Sentencing for impaired driving

- Drive
- A vehicle
- On a street, highway, or public vehicular area
- While impaired

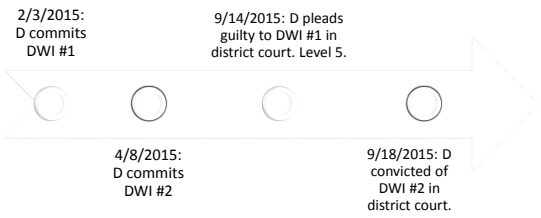
Level	Factors	Minimum Sentence	Max Sentence	If Suspended, Special Probation Requiring:	Max Fine
A1	3 GAFs	12 months	36 months	Imprisonment of at least 120 days + 120 days CAM	$10,000
1	2 GAFs or 1 minor/ disabled GAF	30 days	24 months	Imprisonment of at least 30 days, or imprisonment of at least 10 days + at least 120 days CAM	$4,000
2	1 GAF	7 days	12 months	Imprison. of at least 7 days, or at least 90 consec. days CAM* (*10/1/13: 240 hr. CS req.)	$2,000
3	Agg . > Mitig.	72 hours	6 months	Imprison. of at least 72 hrs And/or at least 72 hrs CS	$1,000
4	Agg= Mitig.	48 hours	120 days	48 hrs imprisonment And/or 48 hrs CS	$500
5	Mitig. > Agg.	24 hours	60 days	24 hrs imprisonment And/or 24 hrs CS	$200

Grossly Aggravating Factors

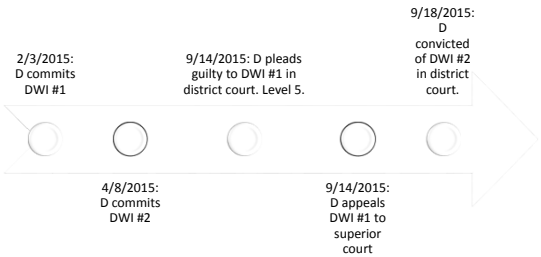
1. Prior conviction (within 7 years)
2. DWLR while license revoked for impaired driving revocation
3. Serious Injury
4. Driving with any of the following in the vehicle
   a. Child under 18, or
   b. Person with mental development of child under 18, or
   c. Person with disability barring unaided exit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

Question 11

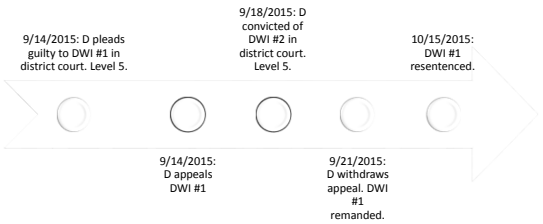
Is the conviction in DWI #1 a GAF for DWI #2?



Now is the conviction in DWI #1 a GAF for DWI #2?



What will happen if appeal for DWI #1 is withdrawn?



Changes effective 12/1/2015

- District court sentence is not vacated and no new sentencing hearing is required if:
  - Appeal is properly withdrawn
  - Case is remanded
  - Prosecutor certifies to clerk in writing that she has no new sentencing factors to offer the court
  - Effective for appeals filed on or after 12/1/2015

Question 12

What counts as a prior conviction?

- District Court sentence vacated upon notice of appeal to superior court for trial de novo

District Court

Superior Court

- Appeal may be withdrawn before case is calendared
- Case may be remanded only with consent of prosecutor & sup. ct.

- D. Ct. must hold new sent. hearing & consider any new convictions
- Def. may appeal if sentence based on addt'l facts for which D is entitled to jury det.

District Court

Question 13

STATE OF NORTH CAROLINA

County

File No.

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

STATE VERSUS

Name Of Defendant

IMPAIRED DRIVING
DETERMINATION OF SENTENCING FACTORS
(For Offenses Committed On Or After Dec. 1, 2011)

G.S. 20-179

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

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

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

- ☐ i. drove, at the time of the current offense, while a child under the age of 18 years was in the vehicle.
- ☐ j. drove, at the time of the current offense, while a person with the mental development of a child under the age of 18 years was in the vehicle.
- ☐ k. drove, at the time of the current offense, while a person with a physical disability preventing unaided exit from the vehicle was in the vehicle.

No. 1.i., 1.j., or 1.k.) applies to this defendant.

☐ 3. There are no grossly aggravating factors.

Question 14

G.S. 15A-1351(a)

- Total of all periods of confinement for special probation
- May not exceed ¼ maximum penalty allowed by law
- For Level One, maximum is 24 months
- Special probation max: 6 months

Question 15

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

- G.S. 20-28 and
- Impaired driving revocation

S.L. 2015-186 (H 529)

- Amends G.S. 20-179(c)(2)
  - "Driving by the defendant at the time of the offense while his driver's license was revoked under G.S. 20-28(a1), and the revocation was an impaired driving revocation under G.S. 20-28.2(a)."
  - Effective December 1, 2015

Question 16

Basis for revocation?

10-25-10	INDEF	SUSP: 1 OFFENSE OF DRIVING WHILE IMPAIRED
6-25-10	10-25-10	CONV: *(625) DRIVING WHILE IMPAIRED
		COURT: CLEVELAND COUNTY COURT
		COURT: AOC #: 10CR 12345

Where is time served?

- Defendants sentenced to active terms of imprisonment for DWI are committed to the Statewide Misdemeanant Confinement Program
- Special probation is served in designated local confinement or treatment facility

How is time served?

- Good time is awarded for active terms of imprisonment at the rate of one day deducted for each day served without a violation
  - No good time awarded for terms of special probation
  - Good time may not reduce defendant's sentence below statutory mandatory minimum
  - No good time awarded for a Level A1 DWI sentence

How is time served?

- Active terms of imprisonment and special probation may be continuous or noncontinuous
- If noncontinuous, then
  - Must be served in increments of at least 48 hours
  - Credit for jail time is hour for hour
- DWI sentences may run concurrently
  - But judgments may not be consolidated

Parole

- Defendant must have completed substance abuse treatment/education or be paroled into residential treatment program
- Parole eligible after serving minimum sentence or 1/5 maximum allowed by law, whichever is less.
- Defendant sentenced to 24 months min, 24 months max for Level One DWI
  - Parole eligible in 2.4 months
- No parole for Level A1 DWIs

Level A1 sentences

- Defendant must serve maximum term of imprisonment less four months
- Post-release supervision of four months follows imprisonment
- May receive credit for inpatient treatment
- May serve time on weekends
- If sentence is suspended, 120 days of special probation is required + 120 days alcohol abstinence and CAM

Question 17

- Eligible for limited driving privilege?
- If revoked solely under G.S. 20-17(a)(2)
- This defendant also revoked under G.S. 20-13.2(b)

Other Limited Privilege Requirements

- Sentenced at Levels 3, 4, or 5
- Validly licensed or license expired < 1 year at time of offense
- Not convicted of DWI offense within previous 7 years
- Subsequent to offense, person has not been convicted of or had unresolved charge for DWI offense
- Substance abuse assessment filed with court
- Proof of financial responsibility or exemption from requirement

DRIVING RECORDS:

GETTING YOUR CLIENT BACK ON THE ROAD

Getting Your Client Back on the Road: Restoring the Right to Drive

2015 new misdemeanor defender training
September 15, 2015

Mike Paduchowski – Partner
Law office of matthew charles suczynski pllc
Chapel hill, nc ◆ Durham, nc

www.matthewcharleslaw.com

Revised August 2015

The Story of Dudley Do-Right

Dudley gets a ticket for a seatbelt violation…

Dudley gets a court date . . .

Dudley Should Take Care of the Ticket, but…

- Dudley blows off his court date

OR

- Dudley forgets

OR

- Dudley comes to court but does not pay his fines . . .

The Process Continues…

The clerk puts Dudley's file in "Called and Failed" or "20 Day Failure" or "Failure To Comply" if he failed to pay…

Dudley continues to drive and not address the ticket…

DMV Attempts to Notify Dudley

DMV sends a letter to Dudley's last known address, warning that his license will be suspended/revoked in 60 days if he does not address his ticket . . .

Dudley either does not receive or ignores the letter…

Dudley Loses His License

Dudley gets his license revoked… § 20-24.1

Dudley keeps driving. He is pulled over again, gets a ticket for speeding 81/65 AND, this time, a charge of Driving While License Revoked (DWLR).

Dudley Needs Your Help

Dudley Is Your Client

Dudley is charged with:
1) Speeding 81 mph in 65 mph zone ┐ *and*
2) Driving While License Revoked

IF Dudley gets any moving violation while his license is in a state of suspension AND he is subsequently CONVICTED of the moving violation…..

If Dudley ends up getting convicted of:

1) Speeding 81 in 65;
OR
2) Any lesser-included speed
OR
3) Driving While License Revoked (before 12/1/15)

HIS LICENSE WILL BE REVOKED
FOR *AT LEAST ONE YEAR*

(see N.C.G.S. N.C.G.S. § 20-28.1)

2 Types of Suspension

- (1) N.C. Gen. Stat. § 20-24.1 (Indefinite Suspension)
  - Revocation (INDEF) for FTA or FTP/FTC
  - Remains in effect until the FTA case is disposed or FTC case is paid

(2) N.C. Gen. Stat. § 20-28 (a) and N.C. Gen. Stat. § 20-28.1
(Definite Suspension)

- Any Moving violation conviction requires additional suspension of 1 year, 2 years or permanently if the moving violation was committed while in a state of suspension (20-28.1).
  - Same with any conviction of DWLR-Impaired
  - Same with any conviction of DWLR-Non-Impaired until 12/1/2015

Other Possible Causes of a Revocation

North Carolina General Statute § 20-16 provides, that the Division of Motor Vehicles has the authority to suspend the license of any driver, if a driver has:

- Accumulated twelve or more points within a three year period;
- Been convicted of Driving While Impaired;
- Been convicted of Speeding more than 80 MPH in a 70 MPH zone;
- Been convicted of Speeding more than 75 MPH in a less than 70 MPH zone;
- Been convicted in 12 months of Speeding 55 to 80 MPH and:
  - Speeding 55 to 80 MPH; or
  - Careless and Reckless Driving; or
  - Aggressive Driving;
- Committed Fraud involving a Driver's License or Learner's Permit;
- Been Convicted of Illegally Transporting Alcohol; or
- Been Ordered Suspended as part of a Court Order.

Moving vs. Non-Moving Violations

Moving Violations

- DWLR (Impaired)
- Speeding
- Stop Sign/Stoplight
- No Insurance
- Unsafe movement
- Reckless Driving (C&R)
- Move Over Law
- DWLR Non-Impaired**
- No Operator's License (NOL)**
  - **Before Dec 1, 2015
- Driving While Impaired (DWI)
- Open Container
- Following Too Closely
- Left of Center
- Passing a Stopped School Bus
- Failure to Yield to Emergency Vehicle
- Illegal Passing
- Child Seat/Child Seatbelt (<16 years)

Moving vs. Non-moving

Non-moving Violations

- Improper Equipment
- Adult Seatbelt (≥16)
- Exp./Rev./Fict. Registration
- Exp. Inspection
- Fictitious Info to Officer
- Parking in a Handicapped Space
- Failure to Notify DMV of Address Change
- Window Tint
- All City Ordinance Violations
- DWLR (Non-Impaired)*
- No Operators License*
  - *On or After Dec 1, 2015

Alternatives to a Moving Violation Conviction

- Dismissal or Acquittal
- Reduce or Amend to Non-Moving Violation
- Prayer for Judgment Continued (PJC)

Dismissal/Acquittal

- Acquittal (i.e. a NG verdict) usually impractical route in these cases (exceptions apply)
- Outright dismissal of moving violations (rare)
  - Exception: Defendant agrees to plea to another moving violation, a non-moving violation, a criminal charge, etc. (Dismissal per plea)
  - Exception: Unsafe movement in a wreck case – Defendant presents a letter from his insurance company
  - Exception: Expired DL – renew and show valid DL
- BUT, a dismissal of CHARGED non-moving violation is quite common – FIX IT and show proof!
  - Expired Inspection, Registration
  - Improper Equipment, Window Tint – Fix It!

Reduce or Amend to Non-moving Violation

- Speeding → Improper Equipment-Speedometer
  - Exception: IE is NOT available if speed > 25mph over
- Stoplight/Stop Sign → City Code Violation (or Improper Equipment-Brakes)
- DWLR → A non-moving violation as of Dec 1, 2015

Prayer for Judgment Continued (PJC)

- PJC is unique to North Carolina
- Guilty but not a "conviction" (court agrees to continue the judgment indefinitely)
- NOTE: **only 2 PJCs per *driver* every 5 years for DMV purposes**
- **BUT only 1 PJC per *household* every 3 years for insurance purposes**
  - See N.C. Gen. Stat. § 58-36-75(f)

- DMV will not honor a PJC for the following:
  - DWI
  - Passing Stopped School Bus
  - Speed > 25mph over
  - Any offense committed while driving a commercial vehicle OR possessing a commercial drivers license

Extraordinary Relief

- (1) FTA Sent In Error
- (2) Nunc pro tunc
- (3) Motion for Appropriate Relief (MAR)
- (4) Chapter 14 criminal charge of FTA

FTA Sent In Error

- Judge orders the Clerk to transmit to the DMV that the Clerk sent the FTA in error.
- If the FTA is removed (on the original charge), the moving violation no longer occurred while in a state of suspension. Dudley now can plead to the current moving violation. This effectively removes the FTA INDEF Suspension (and the FTA fee).
- Practical Tip: Prepare an order saying the FTA is "Stricken and Sent In Error by no fault of the clerk"

Nunc Pro Tunc (now for then)

- Rewrite history by changing the date a conviction, PJC or other action is entered. Has a retroactive legal effect. It is as though the action had occurred at an earlier date.
- Can use on an open or closed case. BUT, if want to Nunc Pro Tunc a date on a closed case, you need a way to open the closed case (see MAR…)
- VERY Difficult to do in most counties

Motion for Appropriate Relief (MAR)

- N.C. Gen. Stat. § Section 15A-1415
- Allows an old case to be opened and change what happened in the past. Use when:
  - -PJC was used improperly and need to get it back to use today
  - -PJC was available and was not used
  - -Pled to speed when IE was an option
  - Change a Speeding plea to Exceeding a Safe Speed in a situation where there are two speeds greater than 55mph within a year

Chapter 14 Criminal Charge of FTA

- Ask DA to amend the Chapter 20 traffic ticket (DWLR or moving violation) to the *criminal* charge of Failure to Appear (Chapter 14).
- Chapter 14 is not a traffic charge. If person pleads Guilty to a Chapter 14 charge of Failure to Appear, their DL will NOT be revoked because this is NOT a Chapter 20 moving violation.

Limited Driving Privilege

- N.C. Gen. Stat. § 20-20.1 Petition and Order (2 step process)
- COURT order allowing a person with a revoked license to drive on a limited basis. Prior to implementation of this statute, a DMV hearing was the only way to obtain a driving privilege.
- License is still revoked but Judge grants a limited driving privilege (work, school, household maintenance)

Limited Driving Privilege (cont'd)

- Does not need a DMV hearing (issued by Judge).
- The person's license must be currently revoked under N.C. Gen. Stat. § G.S. 20-28.1 and this must be the ONLY revocation currently in effect.
- Cannot be granted if person currently has any Indefinite Suspensions, has pending traffic charges or a suspension was a result of a DWI.

Limited Driving Privilege Cont'd

- Eligible to file petition in district court in the county of the person residence:
  - 90 days after 1 year revocation period begins
  - 1 year after 2 year revocation period begins
  - 2 years after Permanent revocation period begins

  If Judge issues, clerk of court sends copy of the limited driving privilege to DMV.

Misdemeanor Reclassification

- DWLR – Impaired Revocation is still a Class 1 misdemeanor where counsel may be appointed
- DWLR – Non-Impaired Revocation is a Class 3 misdemeanor with a cost/fine disposition therefore eliminating the ability to apply for appointed counsel
  - Exception: Where a defendant has 4 or more previous convictions, a disposition other than a cost/fine is possible so the defendant may apply for court appointed counsel

NC Drivers License Restoration Act

What Does the NC DL Restoration Act do?

- The Act provides some weapons in the fight against the License Revocation Cycle
- The Act makes great strides in ending additional license suspensions from "Driving While Poor"

In a Nutshell…

- The Act makes DWLR (Non-Impaired) a NON-MOVING violation
  - This eliminates any suspensions for DWLR (as they currently stand…like moving violations while suspended)
  - Applies to anyone who is CONVICTED of DWLR on or after December 1, 2015
    - NOTE: "Convicted", not "Charged"

What Will This Do?

- You can now enter a plea to DWLR to (hopefully) get the accompanying moving violation (speeding, etc) dismissed ➔ No Additional Suspension (Stops the DWLR Cycle)
- The Act encourages those with old charges to add them on to a docket and resolve them by plea. They can enter a plea of guilty to DWLR charges, pay off what they owe, and get a license back.
- Get more licensed, insured drivers on the road (or reduce the amount of unlicensed/uninsured drivers)

Potential Pitfalls

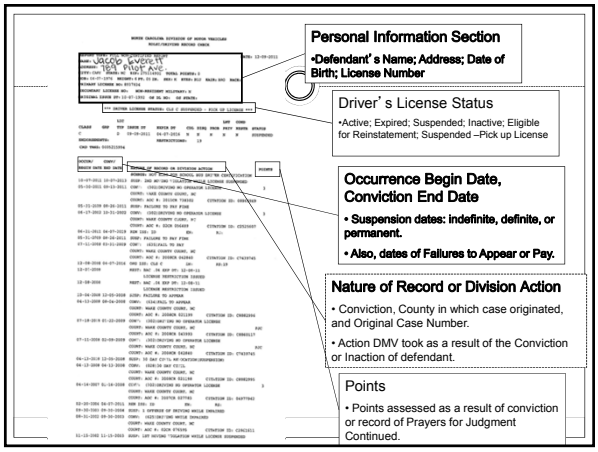
- DMV may still view any pleas to non-moving violations as evidence of driving.
  - Even though a non-moving violation will not make a defendant ineligible for a hearing, it can be used against them as evidence of driving during the suspension (very common)
    - Potential Solution: Evidence of driving is irrelevant in consideration for the limited driving privilege and after successfully having the privilege for 1 year, the license is reinstated

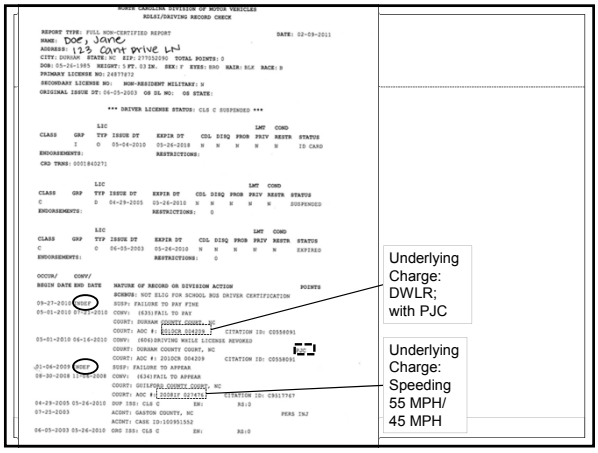
Potential Pitfalls

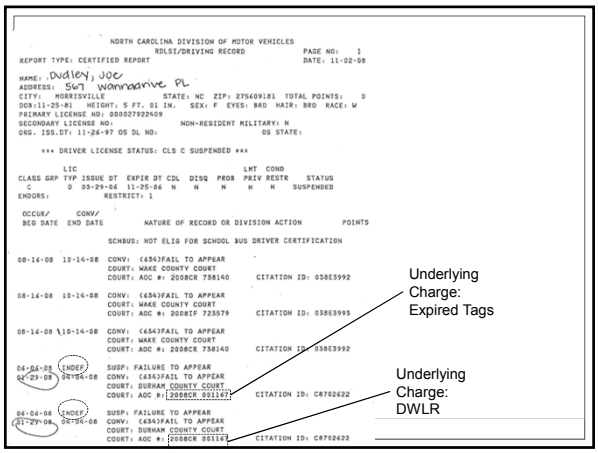
- The Act encourages pleas that will result in a criminal record
  - DWLR will not suspend you further…Speeding 1mph over the limit will suspend you for 1 year, 2 years, or permanently
  - There is a strong motivation to enter a plea of guilty to a Misdemeanor (creating a criminal record if otherwise clean) instead of a Traffic Infraction to avoid a license suspension

How To Read a NC Driving Record

- Be familiar with abbreviations
  - PERM – Permanent Revocation
    - Permanently means forever?!? Yes, but that is where you come in
  - INDEF – Indefinite Revocation
    - Revoked until the revocation is ended
  - PJC – Prayer for Judgment Continued
    - Shows when a PJC was used
  - ACDNT – Accident
    - If an accident was reported, then it is on the record. This does not mean the person was at fault, just that they were involved.
  - CLS – Class
    - Describes the class of license to let you know if a Commercial Drivers License (CDL) is in play (Class C is a typical non-CDL)







NORTH CAROLINA DIVISION OF MOTOR VEHICLES
RDLSI/DRIVING RECORD
PAGE NO: 1
REPORT TYPE: CERTIFIED REPORT
DATE: 11-02-08

NAME: Dudley, Joe
ADDRESS: 567 Wannarrive PL
CITY: MORRISVILLE STATE: NC ZIP: 275409181 TOTAL POINTS: 0
DOB:11-25-81 HEIGHT: 5 FT. 01 IN. SEX: F EYES: BRO HAIR: BRO RACE: W
PRIMARY LICENSE NO: 000027922409
SECONDARY LICENSE NO: NON-RESIDENT MILITARY: N
ORG. ISS.DT: 11-26-97 OS DL NO: OS STATE:

*** DRIVER LICENSE STATUS: CLS C SUSPENDED ***

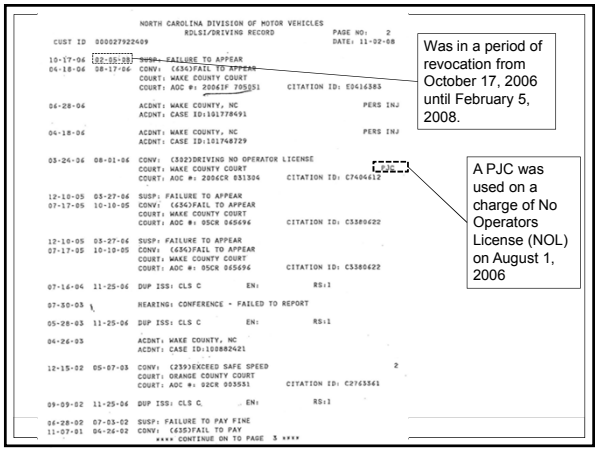
CLASS	GRP	TYP	ISSUE DT	EXPIR DT	CDL	DISQ	PROB	LMT PRIV	COND RESTR	STATUS
C		D	03-29-06	11-25-06	N	N	N	N	N	SUSPENDED

ENDORS: RESTRICT: 1

OCCUR/ BEG DATE	CONV/ END DATE	NATURE OF RECORD OR DIVISION ACTION	POINTS
		SCHBUS: NOT ELIG FOR SCHOOL BUS DRIVER CERTIFICATION	
08-16-08	10-14-08	CONV: (634)FAIL TO APPEAR COURT: WAKE COUNTY COURT COURT: AOC #: 2008CR 758140 CITATION ID: 058E3992	
08-16-08	10-14-08	CONV: (634)FAIL TO APPEAR COURT: WAKE COUNTY COURT COURT: AOC #: 2008IF 725579 CITATION ID: 038E3995	
08-16-08	10-14-08	CONV: (634)FAIL TO APPEAR COURT: WAKE COUNTY COURT COURT: AOC #: 2008CR 758140 CITATION ID: 038E3992	
04-04-08	INDEF	SUSP: FAILURE TO APPEAR	
02-29-08	04-04-08	CONV: (634)FAIL TO APPEAR COURT: DURHAM COUNTY COURT COURT: AOC #: 2008CR 001147 CITATION ID: C8702622	
04-04-08	INDEF	SUSP: FAILURE TO APPEAR	
01-29-08	04-04-08	CONV: (634)FAIL TO APPEAR COURT: DURHAM COUNTY COURT COURT: AOC #: 2008CR 001147 CITATION ID: C8702622	

Underlying Charge: Expired Tags

Underlying Charge: DWLR



NORTH CAROLINA DIVISION OF MOTOR VEHICLES
RDLSI/DRIVING RECORD
PAGE NO: 2
DATE: 11-02-08

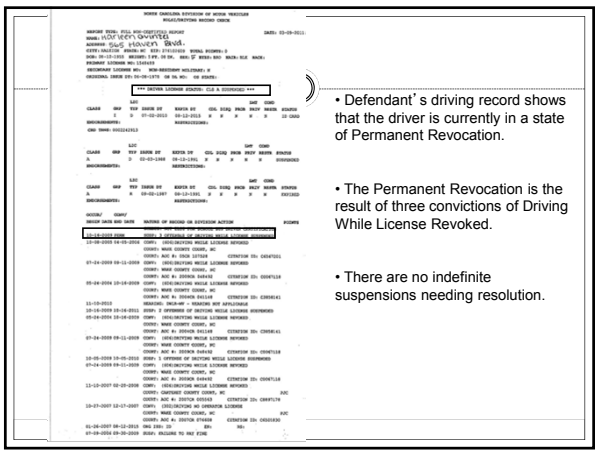
CUST ID 000027922409

10-17-06	02-05-08	SUSP: FAILURE TO APPEAR	
04-18-06	08-17-06	CONV: (634)FAIL TO APPEAR COURT: WAKE COUNTY COURT COURT: AOC #: 2006IF 705851 CITATION ID: E0416385	
04-28-06		ACDNT: WAKE COUNTY, NC ACDNT: CASE ID:101778491	PERS INJ
04-18-06		ACDNT: WAKE COUNTY, NC ACDNT: CASE ID:101748729	PERS INJ
03-24-06	08-01-06	CONV: (302)DRIVING NO OPERATOR LICENSE COURT: WAKE COUNTY COURT COURT: AOC #: 2006CR 031304 CITATION ID: C7404612	[illegible]
12-10-05	03-27-06	SUSP: FAILURE TO APPEAR	
07-17-05	10-10-05	CONV: (634)FAIL TO APPEAR COURT: WAKE COUNTY COURT COURT: AOC #: 05CR 065696 CITATION ID: C5380622	
12-10-05	03-27-06	SUSP: FAILURE TO APPEAR	
07-17-05	10-10-05	CONV: (634)FAIL TO APPEAR COURT: WAKE COUNTY COURT COURT: AOC #: 05CR 065696 CITATION ID: C5380622	
07-14-04	11-25-04	DUP ISS: CLS C EN: RS:1	
07-30-03		HEARING: CONFERENCE - FAILED TO REPORT	
05-28-03	11-25-04	DUP ISS: CLS C EN: RS:1	
04-26-03		ACDNT: WAKE COUNTY, NC ACDNT: CASE ID:100882421	
12-15-02	05-07-03	CONV: (259)EXCEED SAFE SPEED COURT: ORANGE COUNTY COURT COURT: AOC #: 02CR 035551 CITATION ID: C2763561	2
09-09-02	11-25-04	DUP ISS: CLS C EN: RS:1	
04-28-02	07-03-02	SUSP: FAILURE TO PAY FINE	
11-07-01	04-26-02	CONV: (635)FAIL TO PAY	

**** CONTINUE ON TO PAGE 3 ****

Was in a period of revocation from October 17, 2006 until February 5, 2008.

A PJC was used on a charge of No Operators License (NOL) on August 1, 2006



- Defendant's driving record shows that the driver is currently in a state of Permanent Revocation.
- The Permanent Revocation is the result of three convictions of Driving While License Revoked.
- There are no indefinite suspensions needing resolution.

Tips For License Restoration

- Always keep the DL in mind when resolving criminal cases. Even if unrelated, you can often help get a license back by getting charges dismissed with the same plea you were going to enter anyway. Always check ACIS before a plea!
- You can never have a license if you don't resolve the INDEF suspensions!
  - If indefinite suspensions exist you will be revoked
  - If definite/permanent suspensions exist you have an end date

Tips for License Restoration

- Keep money in mind! Your client definitely will.
  - An FTA can cost $200 extra.
  - Before the new NC DL Restoration Act, entering plea to old cases (that caused the revocation) to avoid additional suspension was/is common.
  - Post- Act, you can save the $200 fee and avoid the additional suspension by entering a plea on the new DWLR charge (non-moving violation)
    - Remember: It is a criminal charge

Tips for License Restoration

- Use and Build Your Network!
  - Call around and find out how a client can reset an old case in another county and if that is feasible to do without an attorney
  - Some counties will really try to help those who are trying to help themselves obtain a valid license
  - You will be surprised how many people will volunteer to help and can often just get an old case dismissed by showing what the client has done/paid so far

Questions, Comments, Concerns?

Feel free to contact me at any point in the future if I can help you out in any way.

Mike Paduchowski – Partner
Law Office of Matthew Charles Sucyznski PLLC
Offices in Chapel Hill and Durham
www.MatthewCharlesLaw.com
mike@matthewcharleslaw.com
919-619-3242

PLEADINGS

Chapter 8
Criminal Pleadings

8.1 Importance of Criminal Pleadings

A. Purposes of Pleadings

Pleadings are the tools that the State uses to charge criminal offenses. In cases tried in district court and on appeal for trial de novo in superior court, pleadings include arrest warrants, criminal summonses, citations, magistrate's orders, and statements of charges. In cases initially tried in superior court, the State must obtain an indictment or information. For a discussion of the pleading in juvenile cases (the petition), see Chapter 6 of the North Carolina Juvenile Defender Manual, available at www.ncids.org (select "Training & Resources," then "Reference Manuals").

A properly-drafted criminal pleading fulfills three main functions. It:

- provides the court with jurisdiction to enter judgment on the offense charged;
- provides notice of the charges against which the defendant must defend; and
- enables the defendant to raise a double jeopardy bar to a subsequent prosecution for the same offense.

See generally State v. Greer, 238 N.C. 325 (1953) (stating above purposes).

Proper pleadings protect important constitutional entitlements, such as the Sixth Amendment right to fair notice of the charge and the Due Process protection against double jeopardy. *See Hamling v. United States*, 418 U.S. 87 (1974) (recognizing these constitutional requirements); *Russell v. United States*, 369 U.S. 749 (1962) (to same effect); s*ee also* N.C. CONST. art. 1, §23 (right to be informed of accusation). Also, under North Carolina law, certain pleading defects strip the court of jurisdiction to enter judgment against the defendant. *See State v. Wallace*, 351 N.C. 481 (2000) (where an indictment is invalid on its face, it deprives the court of jurisdiction); *accord State v. Lawrence*, 352 N.C. 1 (2000); *State v. Sturdivant*, 304 N.C. 293 (1981). Thus, it is critical to examine the pleadings closely, compare the allegations in the pleadings to the State's proof at trial, and be prepared to raise timely objections to deficiencies in the pleadings.

B. Chapter Summary

Section 8.2 below summarizes the different types of pleadings that may be used in district court and common pleading problems that arise in that forum. Section 8.3 addresses pleading issues that may arise on appeal from district to superior court. Sections 8.4 and 8.5 address pleading requirements and issues that arise in superior court. Section 8.6 addresses posttrial challenges involving pleadings, including double jeopardy and due process bars to successive prosecutions for the same offense. And, section 8.7 discusses the need for the State to plead what were formerly characterized as sentencing factors to avoid *Blakely* error.

C. References

Consult the following materials from the School of Government for additional information about some of the issues discussed in this chapter:

JEFFREY B. WELTY, ARREST WARRANT AND INDICTMENT FORMS (6th ed. 2010) (contains form language for charging criminal offenses); *see also* JEFFREY B. WELTY, UPDATE TO ARREST WARRANT AND INDICTMENT FORMS (June 2012), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/awif2012update.pdf

Jessica Smith, *North Carolina Sentencing after* Blakely v. Washington *and the* Blakely *Bill* (UNC School of Government, Sept. 2005), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/Blakely%20Update.pdf

Daniel Shatz, *Beyond Blakely* (Spring Public Defender Conference, May 2006), *available at* www.ncids.org/Defender%20Training/2006%20Spring%20Conference/Dan%20Shatz.pdf

Jeff Welty, *North Carolina's Habitual Felon, Violent Habitual Felon, and Habitual Breaking and Entering Laws*, ADMINISTRATION OF JUSTICE BULLETIN No. 2013/07 (UNC School of Government, Aug. 2013), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1307.pdf; *see also infra* § 8.4E, Habitual Felon Pleading Requirements.

Jessica Smith, *The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/03 (UNC School of Government, July 2008) [Smith, *Criminal Indictment*] (reviews general pleading requirements, such as allegation of victim's name, date of offense, etc., and specific pleading requirements for particular types of offenses, such as arson, robbery, drug offenses, etc.), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0803.pdf.

Jessica Smith, *Criminal Procedure for Magistrates*, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/08 (UNC School of Government, Dec. 2009) (summarizes criminal procedure for magistrates, including criminal process and pleadings), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0908.pdf

Robert L. Farb, *The "Or" Issue in Criminal Pleadings, Jury Instructions, and Verdicts; Unanimity in Jury Verdict* (UNC School of Government, Feb. 2010) (discusses disjunctive pleadings and jury instructions), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/verdict.pdf; *see also infra* § 8.6G, Disjunctive Pleadings.

Robert L. Farb, *Criminal Pleadings, State's Appeal from District Court, and Double Jeopardy Issues* (UNC School of Government, Feb. 2010), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/pleadjep.pdf

John Donovan and Amanda Maris, *District Court Pleadings to Go* (Spring Public Defender Conference, May 2011) (checklist), *available at* www.ncids.org/Defender%20Training/2011SpringConference/DistrictCourtPleadings.pdf

8.2 Misdemeanors Tried in District Court

A. Process as Pleading

The criminal process issued to the defendant—that is, the citation, criminal summons, magistrate's order, or arrest warrant—usually doubles as the criminal pleading in a misdemeanor case in district court. *See* N.C. GEN. STAT. § 15A-922(a) (hereinafter G.S.) (listing types of process that may serve as pleading in misdemeanor case); Official Commentary to G.S. Ch. 15A, Article 49.

An order for arrest is the one form of criminal process not considered a criminal pleading. An order for arrest can be issued in conjunction with a criminal pleading. By itself, however, it does not charge a crime. *See infra* § 8.2C, Types of Misdemeanor Pleadings.

B. Requirements for Misdemeanor Pleadings

Generally. Misdemeanor pleadings are subject to the general requirements for valid pleadings in G.S. 15A-924(a), which states that a pleading must contain:

- a plain and concise factual statement supporting every element of the offense charged;
- a separate count addressed to each offense charged;
- a reference to the statute or other provision of law that the defendant allegedly violated;
- the name or other identification of the defendant;
- the county where the offense took place; and
- the date on which, or time period during which, the offense took place.

G.S. 15A-924(a) also requires in felony cases that the State allege in the pleading certain aggravating factors if it intends to use them. *See infra* § 8.7B, Notice and Pleading Requirements after *Blakely*. This requirement does not apply to misdemeanor impaired

driving cases tried in district court; however, if the defendant is tried for an impaired driving offense in superior court, including in a trial de novo following appeal of a district court conviction, the State must give written notice of its intent to use any aggravating or grossly aggravating factors. G.S. 20-179(a1)(1).

Courts may be more lenient in permitting amendments or tolerating technical mistakes in misdemeanor pleadings than in superior court pleadings. (For a discussion of application of these requirements in superior court, see *infra* § 8.4C, Sufficiency of Pleadings.) Nevertheless, every pleading must be sufficient to serve the basic purposes listed at the beginning of this chapter. Common errors in district court are addressed *infra* in § 8.2F, Common Pleading Defects in District Court; errors in superior court are addressed *infra* in § 8.5, Common Pleading Defects in Superior Court.

Pleading rules for certain offenses. There are specific statutory pleading requirements for some offenses, such as larceny, forgery, and receiving stolen goods. *See* G.S. 15-148 through G.S. 15-151. Some examples are discussed *infra* in § 8.2F, Common Pleading Defects in District Court and § 8.5C, Common Pleading Defects in Superior Court.

Short-form pleadings. The North Carolina General Assembly has enacted statutes permitting abbreviated forms of pleadings for some misdemeanors. *See* G.S. 20-138.1(c) (pleading requirements for impaired driving); G.S. 20-138.2(c) (pleading requirements for commercial impaired driving); *see also* G.S 20-179(a1)(1) (requiring State to file written notice of intent to use aggravating factors in impaired driving cases in superior court). For a discussion of pleading requirements for aggravating factors in implied consent cases, see *infra* "Misdemeanors, including impaired driving offenses" in § 8.7B, Notice and Pleading Requirements after *Blakely*.

Probable cause. A criminal charge must be supported by probable cause that a crime was committed and that the person in question committed the crime. Probable cause must exist to support each element of the offense and must be established by an affidavit or by oral testimony under oath or affirmation. Jessica Smith, *Criminal Procedure for Magistrates*, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/08, at 5 (UNC School of Government, Dec. 2009), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0908.pdf.

C. Types of Misdemeanor Pleadings

Citation. A citation is a written charge issued by a law enforcement officer. The principal difference between a citation and other forms of process is that a law enforcement officer rather than a judicial official issues it. An officer may issue a citation for any misdemeanor or infraction for which the officer has probable cause. *See* G.S. 15A-302(b). An officer may arrest a person for a misdemeanor if grounds exist for a warrantless arrest under G.S. 15A-401(b), but has no authority to arrest for an infraction. *See* G.S. 15A-1113; ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 82 (4th ed. 2011). A person arrested without a warrant must be taken before a

magistrate. If the magistrate finds probable cause that a crime has been committed, the magistrate may issue a magistrate's order, discussed below.

Under G.S. 15A-922(c), the defendant has the right to object to being tried on a citation. Upon the defendant's objection, the prosecution must prepare a separate pleading. Usually the new pleading is a statement of charges, discussed below. (If a magistrate signs a citation, it becomes a magistrate's order, and it is no longer considered a citation and is not subject to this objection.) Objecting to trial on a citation may not be advisable because the objection gives the prosecution an opportunity before trial to correct errors or add new charges in a statement of charges. If the defendant wishes to object to being tried on a citation, he or she must do so in district court; the objection may not be raised for the first time in superior court on a trial de novo. *See State v. Monroe*, 57 N.C. App. 597 (1982).

Legislative note: For offenses committed on or after December 1, 2013, S.L. 2013-385 (H 182) amends G.S. 15A-1115 to delete subsection (a), which provided defendants with the right to appeal to superior court for a trial de novo when the defendant denied responsibility for an infraction in district court and was found responsible.

In addition to the requirements of G.S. 15A-924(a), the citation must:

- identify the crime charged, including the date and, where material, the property and other people involved;
- list the name and address of the person cited or provide other identification if that information cannot be determined;
- identify the officer issuing the citation; and
- direct the person cited to appear in a designated court at a designated time and date.

See G.S. 15A-302(c).

If a person fails to appear in court on an *infraction* charged in a citation, the person may not be arrested for failing to appear or for criminal contempt; instead, the court must issue a criminal summons. *See* G.S. 15A-1116(b); *see also* G.S. 15A-302 Official Commentary (since citation is issued by officer and not judicial official, failure to appear is not contempt of court). G.S. 15A-305(a)(3), however, permits the court to issue an order for arrest if a person fails to appear for a *misdemeanor* charged in a citation.

Magistrate's order. A magistrate's order is used when a person has been arrested without a warrant. A magistrate may issue an order for any criminal offense (felony or misdemeanor) for which the magistrate finds probable cause. *See* G.S. 15A-511(c) (describing procedures magistrate must follow). If an officer issues a citation for a misdemeanor and arrests the person, the magistrate may convert the citation into a magistrate's order by signing the citation, or he or she may prepare a separate magistrate's order on a form similar to an arrest warrant. A magistrate sometimes will issue an arrest warrant instead of a magistrate's order when a person has been arrested without a warrant. Although technically improper (since the person already is under

arrest), the error is probably inconsequential. *See generally State v. Matthews*, 40 N.C. App. 41 (1979) (failure of magistrate to issue magistrate's order after defendant was cited and arrested for traffic offenses did not render arrest unlawful).

Criminal summons. A judicial official may issue a criminal summons for any criminal offense or infraction for which probable cause exists. *See* G.S. 15A-303. A summons may charge a felony, but it is typically used for misdemeanors only. If a judicial official issues a summons, the person is not taken into custody or placed under pretrial release conditions; he or she is only directed to appear in court. A criminal summons must contain a statement of the crime or infraction charged and must inform the defendant that he or she may be held in contempt of court for failure to appear as directed. A court date must be set within one month of issuance of the summons unless the judicial official notes cause in the summons for setting a later court date. *Id.*

Arrest warrant. A judicial official may issue an arrest warrant for any criminal offense supported by probable cause when the person has not been taken into custody previously for the charge. *See* G.S. 15A-304. The warrant must include a statement of the crime charged. *Id.* The law expresses a preference for the use of a criminal summons, discussed above, but many counties continue to rely heavily on arrest warrants. *See* G.S. 15A-304(b); Official Commentary to G.S. 15A-303 and G.S. 15A-304 (expressing preference for summons when circumstances do not necessitate taking person into custody).

Statement of charges. A misdemeanor statement of charges is a criminal pleading prepared by the prosecutor, charging a misdemeanor. A statement of charges supersedes all previous pleadings in the case. Only those charges alleged in the statement of charges (not those in the original warrant or other process) may proceed to trial. *See* G.S. 15A-922(a).

Before arraignment in district court, a prosecutor may file a statement of charges adding new charges or amending charges that are insufficient. *See* G.S. 15A-922(d); *State v. Madry*, 140 N.C. App. 600 (2000). If a prosecutor files a statement of charges before arraignment in district court, the defendant is entitled to a continuance of at least three working days unless the judge finds that the statement of charges does not materially change the pleadings and that no additional time is necessary. *See* G.S. 15A-922(b)(2).

After arraignment in district court, the prosecutor may file a statement of charges only if it does not change the nature of the offense. *See* G.S. 15A-922(e). If the judge finds that the original warrant or other pleading is insufficient and that a statement of charges would not impermissibly change the offense, the judge may permit the prosecutor to correct the pleading by filing a statement of charges. However, the judge's order must set a time limit on filing—ordinarily, three working days. The order also must provide that if the statement of charges is not filed within the time allowed, the charges must be dismissed. *See* G.S. 15A-922(b)(3). If the prosecutor files a statement of charges, the defendant is entitled to a continuance of at least three working days unless the judge finds that a continuance is not required under G.S. 15A-922(b)(2).

A statement of charges adding new offenses or amending charges that are insufficient must be filed within the statute of limitations. *See Madry*, 140 N.C. App. 600; *State v. Caudill*, 68 N.C. App. 268 (1984).

Order for arrest. An order for arrest is an order issued by a judicial official directing law enforcement to take the named person into custody. *See* G.S. 15A-305. An order for arrest is the one form of criminal process that is not considered a criminal pleading. An order for arrest is often issued for a defendant's failure to appear in court after a pleading has been issued, but it may be issued in conjunction with a pleading, as when a judge issues an order for arrest after a grand jury returns a true bill of indictment. *See* G.S. 15A-305(b) (listing circumstances in which an order for arrest may be issued). The order for arrest standing alone does not charge a crime, however.

D. Amendment of Misdemeanor Pleadings

A prosecutor may not amend a warrant or other process if the amendment changes the nature of the offense charged. *See* G.S. 15A-922(f); *see also infra* § 8.4D, Amendment of Indictments (discussing restrictions on amendments to superior court indictments). *But cf. infra* § 8.3B, Required Pleadings in Superior Court (discussing statute allowing amendment of warrant in superior court to change name of rightful owner of property). Thus, even before trial the prosecution may not amend a warrant if the amendment changes the nature of the charged offense. *See State v. Madry*, 140 N.C. App. 600 (2000). Any amendment must be in writing; otherwise, it is not effective. *See State v. Powell*, 10 N.C. App. 443 (1971).

A prosecutor may prepare a statement of charges that changes the nature of the offense alleged in a warrant or other process, but only before arraignment and if the statute of limitations has not run. *See* G.S. 15A-922(d); *see also supra* § 8.2C, Types of Misdemeanor Pleadings.

E. Timing and Effect of Motions to Dismiss in District Court

There are two basic grounds for moving to dismiss based on the pleadings: (1) the pleading fails to charge an offense properly—in other words, the pleading is fatally defective; and (2) the proof does not support the allegations in the pleading—in other words, there is a fatal variance between the pleading and proof.

Motion to dismiss for defective pleading. The remedy for a defective pleading is a motion to dismiss under G.S. 15A-952. *See* G.S. 15A-924(e). A motion to dismiss is the equivalent of a motion to quash under pre-15A practice. *See State v. Brown*, 81 N.C. App. 281 (1986). Some defects, including the failure to include an element of the offense or the misidentification of the victim, may strip the district court of jurisdiction over the offense. A defendant may move to dismiss for a jurisdictional defect "at any time." *See* G.S. 15A-952(d); G,S. 15A-954(c); *see also State v. Wallace*, 351 N.C. 481, 503 (2000) ("where an indictment is alleged to be invalid on its face, thereby depriving the trial court

of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court").

Generally, defense counsel should move to dismiss for a defective pleading at or after arraignment in district court. Thus, when the court or prosecutor calls the case and asks the defendant how he or she pleads, counsel may say, "Mr. Jones pleads not guilty and moves to dismiss the pleading as fatally defective because [state ground]." Unless the defect concerns a matter on which an amendment is allowable, the court "must" dismiss. *See* G.S. 15A-924(e). If the motion to dismiss is made before arraignment, the State can correct the error by filing a statement of charges. *See supra* § 8.2C, Types of Misdemeanor Pleadings. If counsel does not move to dismiss until after the State has presented its evidence, the judge may be less receptive to the motion; the judge may be more invested in the case, having spent time on it and heard evidence of guilt.

If the pleading error involves "duplicity"—that is, the pleading alleges more than one offense in a single count—counsel should make a motion to require the State to elect (in effect, a motion to require the State to dismiss all but one of the offenses alleged in the particular count). *See* G.S. 15A-924(b); *see also infra* § 8.2F, Common Pleading Defects in District Court.

Motion to dismiss for variance. Even if the pleading properly charges a crime, the proof may vary from the pleading. "The State's proof must conform to the specific allegations contained in the indictment [or other pleading]. If the evidence fails to do so, it is insufficient to convict the defendant." *State v. Pulliam*, 78 N.C. App. 129, 132 (1985); *see also State v. Miller*, 137 N.C. App. 450 (2000) (Due Process precludes convicting defendant of offense not alleged in warrant or indictment); *State v. Bruce*, 90 N.C. App. 547, 550 (1988) ("defendant must be convicted, if he is convicted at all, of the particular offense with which he has been charged in the bill of indictment").

A challenge to a variance between pleading and proof should be raised by a motion to dismiss for insufficient evidence at the close of the State's evidence and at the close of all of the evidence. *State v. Faircloth*, 297 N.C. 100, 107 (1979) (explaining that a fatal variance between the indictment and the proof is properly raised by a motion to dismiss). When moving to dismiss, counsel should specifically allege a fatal variance between the pleading and proof to alert the judge to the nature of the problem. For example, if the pleading charges assault on an officer, and the proof shows resisting an officer but not an assault, move to dismiss for insufficient evidence of assault and for fatal variance between the crime alleged in the charging instrument and the State's evidence. In superior court, the failure to specifically assert fatal variance when moving to dismiss waives the error on appeal. *See State v. Mason*, ___ N.C. App. ___, 730 S.E.2d 795 (2012) (by failing to assert fatal variance as a basis for his motion to dismiss in superior court, defendant failed to preserve the argument for appellate review).

A related problem arises when the pleading charges one offense and the prosecution seeks conviction of a greater offense—for example, the pleading charges simple assault and the prosecution seeks to prove assault with a deadly weapon. The prosecution is

bound by its pleading, and defense counsel should object to judgment on the greater offense. *See, e.g.*, *State v. Moses*, 154 N.C. App. 332 (2002) (State could not amend indictment alleging misdemeanor eluding arrest to add allegation of aggravating factor and charge felony eluding arrest; amendment substantially altered charge).

Effect of dismissal on subsequent charges. When the court dismisses a charge on the ground that the pleading is defective, double jeopardy ordinarily does not bar a second trial of the offense based on a proper pleading. *See, e.g., State v. Goforth*, 65 N.C. App. 302, 306 (1983) (where indictment failed to allege element of offense, court arrested judgment but noted that "[t]he State may proceed against the defendants if it so desires, upon new and sufficient bills of indictment"). In some instances, however, jeopardy may be a bar. *See, e.g., Moses*, 154 N.C. App. 332 (indictment charging assault with deadly weapon inflicting serious injury failed to identify weapon and so was insufficient; but, indictment adequately alleged and evidence supported lesser offense of assault inflicting serious injury, and court remanded for entry of judgment for that offense). Double jeopardy is discussed further *infra* in § 8.6A, Double Jeopardy.

When the court dismisses a charge on the ground that there was a fatal variance between pleading and proof, double jeopardy bars a second trial on the charge alleged in the pleading but does not necessarily bar a subsequent prosecution on offenses that were proven but not pled. *See, e.g., State v. Stinson*, 263 N.C. 283 (1965) (no bar to subsequent prosecution where indictment charged defendant with breaking and entering with intent to steal property of shop's corporate owner, but evidence showed the property was owned by an individual instead); *State v. Wall*, 96 N.C. App. 45 (1989) (no bar to subsequent prosecution for sale and delivery to intermediary when there was fatal variance between indictment charging defendant with sale and delivery to undercover officer and evidence showing sale and delivery to intermediary). Jeopardy may bar a subsequent prosecution, however, if the new charge is a greater offense of the charge that was properly pled. *See infra* § 8.6A, Double Jeopardy.

As a practical matter, a successful motion to dismiss may end a misdemeanor prosecution whether or not Double Jeopardy would constitute a bar.

Effect of statute of limitations. There is a two-year statute of limitations for most misdemeanors. *See* G.S. 15-1; *see also supra* § 7.1A, Statute of Limitations for Misdemeanors. When the misdemeanor pleading is defective, or the offense proven at trial was not the offense alleged in the pleading, the statute of limitations is not tolled. It continues to run. *See State v. Hundley*, 272 N.C. 491 (1968) (statute of limitations not tolled by issuance of void warrant). Thus, if a defendant successfully moves to dismiss, and the statute of limitations has run on the offense the State wishes to charge, the State cannot refile the charges. Even though it is permissible as a matter of pleading practice for a prosecutor to issue a statement of charges in place of a void warrant, such a statement of charges is barred if it is issued after the statute of limitations has expired. *See State v. Madry*, 140 N.C. App. 600 (2000).

G.S. 15-1 provides that if an indictment obtained within the statute of limitations period

is found to be defective, the State has one year from the time it abandons the indictment to correct the error and re-indict the defendant. This provision applies only to defective indictments; it does not apply to defective warrants. *Madry*, 140 N.C. App. at 603.

F. Common Pleading Defects in District Court

Below are common pleading problems you may see in district court. Similar problems may arise in indictments in superior court. *See infra* § 8.5, Common Pleading Defects in Superior Court. As discussed in the preceding section, if the pleading is defective you should file a motion to dismiss at or after arraignment. If the problem is a variance, move to dismiss on the ground of variance at the close of the State's evidence and at the close of all the evidence.

Failure to charge offense or element of offense. Like other pleadings, misdemeanor pleadings must state all of the essential elements of the crime. *See* G.S. 15A-924(a)(5); *State v. Palmer*, 293 N.C. 633, 639 (1977) (both indictments and warrants must "allege lucidly and accurately all the essential elements of the offense endeavored to be charged" (citation omitted)); *State v. Camp*, 59 N.C. App. 38 (1982) (stating these requirements for warrants); *see also State v. Cook*, 272 N.C. 728 (1968) (reference to statute allegedly violated was insufficient to cure failure of warrant to allege element of offense of driving without a license, namely, that the offense was committed on a public highway). *But cf. State v. Martin*, 13 N.C. App. 613 (1972) (warrant was not fatally defective where it failed to allege highway was a "public" highway).

If an essential element is missing, or if the charging language is too vague to identify an offense clearly, the defendant should move to dismiss. Any attempt to revise the charge may constitute a change in the nature of the offense and therefore be impermissible. *See State v. Moore*, 162 N.C. App. 268 (2004) (in pleading for possession of drug paraphernalia, State must apprise defendant of item State contends was drug paraphernalia; State could not amend indictment to change alleged item, which would constitute substantial alteration of charge); *State v. Madry*, 140 N.C. App. 600 (2000) (warrant that charged "taking bears with bait" too vague to charge offense where statute prohibited possessing, selling, buying, or transporting bears); *State v. Wells*, 59 N.C. App. 682 (1982) (citation that charged resisting arrest was fatally defective for omitting duty that officer was performing); *State v. Wallace*, 49 N.C. App. 475 (1980) (citation that charged unlawfully operating vehicle for purpose of hunting deer with dogs did not clearly and properly charge violation of deer hunting statute); *State v. Powell*, 10 N.C. App. 443 (1971) (the words "resist arrest" in citation were insufficient to charge offense). *But see State v. Mather*, ___ N.C. App. ___, 728 S.E. 2d 430 (2012) (when charging carrying a concealed gun under G.S. 14-269, the exception in G.S. 14-269(a1)(2) (having a permit) is a defense, not an essential element, and need not be alleged in the indictment); *State v. Ballance*, ___ N.C. App. ___, 720 S.E.2d 856 (2012) (statute governing the taking of black bears with bait does not create a separate offense for each type of bait listed; the crime may be established by evidence showing any one of various alternative elements); *State v. Bollinger*, 192 N.C. App. 241 (2008) (description of

weapon in pleading for carrying concealed weapon was surplusage), *aff'd per curiam*, 363 N.C. 251 (2009).

Misidentification of victim. A pleading must correctly identify the victim of the alleged offense. Failure to identify the victim constitutes grounds to dismiss. *See State v. Powell*, 10 N.C. App. 443 (1971) (failure to name officer who was victim of assault on officer rendered warrant invalid); *see also State v. Banks*, 263 N.C. 784 (1965) (warrant charging peeping into room occupied by female was fatally defective because it failed to name female); *In re M.S.*, 199 N.C. App. 260 (2009) (juvenile petitions alleging first-degree sexual offense that did not name the victim or give the victim's initials, but simply stated "a child under the age of 13 years," were fatally defective and deprived the court of jurisdiction to accept the juvenile's admission of delinquency); *State v. McKoy*, 196 N.C. App. 650 (2009) (use of initials "RTB" with no periods to identify victim upheld in second-degree rape and sexual offense case).

Sometimes the pleading will name a victim but misidentify him or her, which will not become apparent until the State puts on its evidence. If the State's proof of the identity of the victim varies from the allegation in the pleading, the variance constitutes grounds to dismiss the charge. *See State v. Call*, 349 N.C. 382 (1998) (judgment arrested on court's own motion because of fatal variance between name of victim alleged in indictment—Gabriel Hernandez Gervacio—and victim's actual name—Gabriel Gonzalez); *State v. Abraham*, 338 N.C. 315 (1994) (error to allow State to amend assault indictment to change name of victim from Carlose Antoine Latter to Joice Hardin, which fundamentally altered nature of charge).

A misspelling or incorrect order in the victim's name, if it does not mislead the defendant as to the identity of the victim, will not provide grounds for dismissal. *See, e.g.*, *State v. Williams*, 269 N.C. 376 (1967) (indictment sufficient where victim's name "Madeleine" was stated in indictment as "Mateleane"); *State v. Hewson*, 182 N.C. App. 196 (2007) (no error in allowing State to amend murder indictment to change victim's name from "Gail Hewson Tice" to "Gail Tice Hewson"; no indication defendant was surprised or confused about identity of victim); *State v. McNair*, 146 N.C. App. 674 (2001) (no error where State was allowed to change "Donald" to "Ronald" on two of seven indictments; defendant could not have been surprised or misled); *State v. Wilson*, 135 N.C. App. 504 (1999) (no fatal variance between indictment naming victim "Peter M. Thompson" and evidence at trial indicating victim's name was "Peter Thomas" where defendant's testimony revealed that he was aware of the identity of the victim); *State v. Isom*, 65 N.C. App. 223 (1983) (indictment adequate that named victim as "Eldred Allison" when actual name was "Elton Allison"; names were sufficiently similar to fall within doctrine of idem sonans, which means sounds the same).

For a further discussion of these principles, see Smith, *Criminal Indictment*, at 9–12, *available at* www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0803.pdf; Jessica Smith, *What's in a Name?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jan. 17, 2012), http://nccriminallaw.sog.unc.edu/?p=3211; Jeff Welty, *Use of Initials in Charging*

Documents, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jan. 23, 2009), http://nccriminallaw.sog.unc.edu/?p=5.

Allegation of ownership of property for larceny and related offenses. A pleading for theft offenses must correctly name the owner of the stolen property. *See State v. Greene*, 289 N.C. 578 (1976) (indictment in larceny case must allege person who has property interest in property stolen, and State must prove that alleged person is owner); *State v. Biller*, 252 N.C. 783 (1960) (judgment arrested where superior court judge denied defendants' motion to quash warrants that did not sufficiently name owner of stolen property) (per curiam); *State v. Thompson*, 6 N.C. App. 64 (1969) (warrant charging theft from "Belk's Department Store" was fatally defective for failure to allege owner of property was either a natural person or a legal entity capable of owning property).

The failure to identify the owner, or to identify an entity capable of owning property, makes the pleading defective and subject to dismissal. *See, e.g., State v. Patterson*, 194 N.C. App. 608 (2009) (indictment charging larceny of church property was fatally defective where it did not indicate that church was a legal entity capable of owning property); *State v. Woody*, 132 N.C. App. 788 (1999) (indictment alleging conversion was fatally defective and could not support conviction because it failed to allege that victim, P & R Unlimited, was a legal entity capable of owning property; court declines to extend holding of *Wooten*, below); *State v. Hughes*, 118 N.C. App. 573 (1995) (error to allow amendment to indictment that changed alleged victim of embezzlement from individual, "Mike Frost, President of Petroleum World, Inc.," to corporation, "Petroleum World, Inc."). *But see State v. Wooten*, 18 N.C. App. 652 (1973) (State need not allege corporate status of store in shoplifting prosecution).

Misidentification of the rightful owner is grounds for dismissal if the State's evidence on ownership varies from the allegations in the pleading. *See State v. Eppley*, 282 N.C. 249 (1972) (fatal variance when person named in indictment as owner of shotgun testified that gun was property of his father). *But cf. State v. Warren*, ___ N.C. App. ___, 738 S.E.2d 225 (2013) (no fatal variance in embezzlement case where indictment named Smokey Park Hospitality, Inc., d/b/a Comfort Inn; while evidence showed Smokey Park Hospitality never owned the hotel, it acted as a management company and ran the business and thus had a special property interest in the embezzled money); *State v. Lilly*, 195 N.C. App. 697 (2009) (no fatal variance in injury to real property case where indictment named townhome tenant as owner of property; sufficient to name lawful possessor); *State v. Holley*, 35 N.C. App. 64 (1978) (no fatal variance where larceny indictment named owner of gun and lawful possessor while evidence was presented only as to identity of lawful possessor); *State v. Robinette*, 33 N.C. App. 42 (1977) (no fatal variance where indictment alleged ownership of stolen property in father, but evidence showed that it belonged to his minor child and was kept in the father's residence where father had custody and control of minor child's property).

Some offenses involving theft do not require that the owner of the property be alleged. *State v. Thompson*, 359 N.C. 77 (2004) (indictment for armed robbery need not name subject of robbery); *State v. Jones*, 151 N.C. App. 317 (2002) (not necessary to allege

name of owner of goods in prosecution for possession of stolen goods); *State v. Burroughs*, 147 N.C. App. 693 (2001) (indictment for robbery need not name actual legal owner of property).

A statutory exception allows the State to amend a warrant in superior court to change the name of the rightful owner of property if the amendment does not prejudice the defendant. *See* G.S. 15-24.1; *State v. Reeves*, 62 N.C. App. 219 (1983).

For a further discussion of alleging ownership in larceny and other cases, see Smith, *Criminal Indictment*, at 32–38, *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0803.pdf.

Misidentification of defendant. All criminal pleadings must name or otherwise identify the defendant. *See* G.S. 15A-924(a)(1). Omission of the defendant's name constitutes grounds to dismiss. *See State v. Simpson*, 302 N.C. 613 (1981) (failure to name or otherwise identify defendant was fatal defect in indictment). A criminal pleading that identifies the defendant by a nickname or street name may be acceptable. *See State v. Spooner*, 28 N.C. App. 203 (1975) (pleading that named Michael Spooner as "Mike Spooner" acceptable); *State v. Taylor*, 61 N.C. App. 589 (1983) (warrant that included only defendant's street name "Blood" was not invalid; warrant had correct address, and State knew defendant's street name only); *see also State v. Young*, 54 N.C. App. 366 (1981) (in superior court, defendant waived objection to misnomer regarding his name by entering plea and going to trial without making objection), *aff'd*, 305 N.C. 391 (1982).

Date, time, and place of offense. A pleading must allege the time and place of an offense with enough specificity to enable the defendant to defend against the charge. *See* G.S. 15A-924(a)(3), (a)(4); *see also State v. Smith*, 267 N.C. 755 (1966) (per curiam) (pleading alleging breaking and entering was fatally defective where it did not identify building with particularity); *State v. McCormick*, 204 N.C. App. 105 (2010) (no fatal variance where burglary indictment alleged defendant broke and entered house located at 407 Ward's Branch Road, Sugar Grove Watauga County" but evidence at trial was house number was 317). A defendant who objects to the lack of specificity in the date of a pleading must demonstrate that the vagueness impaired his or her defense. *See* G.S. 15A-924(a)(4) ("Error as to a date or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice."); G.S. 15-155 ("No judgment upon any indictment . . . shall be stayed or reversed . . . for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly . . . ."). The N.C. Supreme Court has stated that the requirement of temporal specificity diminishes in cases of sexual offenses on children; it remains a requirement, however. *See State v. Everett*, 328 N.C. 72 (1991) (child sex offense indictment where date could have been February or March was not too vague to support conviction); *State v. Custis*, 162 N.C. App. 715 (2004) (explaining that a variance as to time, even in child sexual abuse cases, is material and of the essence if the variance deprives the defendant the opportunity to adequately present a defense).

The North Carolina courts have often permitted amendments of pleadings to correct

errors in the date or place of an offense. *See, e.g., State v. Grady*, 136 N.C. App. 394 (2000) (allowing amendment of indictment to change address of dwelling where controlled substance was used); *State v. Campbell*, 133 N.C. App. 531(1999) (allowing amendment of dates alleged in indictment where defendant was not misled as to nature of charges). However, variance between the State's proof as to the date or time of an offense and the date and time alleged in the pleading is material, and grounds for dismissal of the charge, when it deprives the defendant of an opportunity to present his or her defense, such as when the defendant relies on an alibi defense. *See State v. Christopher*, 307 N.C. 645 (1983) (fatal variance where defendant prepared alibi defense based on conspiracy to commit larceny indictment alleging a specific date, but State offered evidence showing crime might have occurred over a three-month period); *State v. Avent*, ___ N.C. App. ___, 729 S.E.2d 708 (2012) (no error to allow State to amend date of offense from December 28, 2009, to December 27, 2009 in first-degree murder indictment; defendant was not deprived of his opportunity to present alibi defense because alibi testimony covered Dec. 27, and other pieces of State's evidence cited Dec. 27 date).

Ordinance violations. Generally, the failure to cite the statute violated is not grounds for dismissal. *See* G.S. 15A-924(a)(6). For violations of city or county ordinances, however, the rule appears to be different. *See* G.S. 160A-79(a) (requiring for city ordinance violations that codified ordinance be identified in pleading by section number and caption, that uncodified ordinance be identified by caption, and that uncodified ordinance without caption be set forth in pleading); G.S. 153A-50 (requiring same for county ordinance violations); *State v. Pallet*, 283 N.C. 705, 714 (1973) ("In a criminal prosecution for violation of a rule or regulation of a government board or commission, the indictment should set forth such rule or regulation or refer specifically to a permanent public record where it is recorded and available for inspection"; State failed to plead and prove contents of ordinance that had no section number or caption, and warrant therefore failed to allege facts sufficient to identify crime with which defendant was charged); *In re Jacobs*, 33 N.C. App. 195 (1977) (motion to quash juvenile petition granted where pleading did not allege caption of ordinance or set forth ordinance itself).

Resist, obstruct, or delay. "A warrant or bill of 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 point out, in a general way at least, the manner in which the defendant is charged with having resisted, delayed, or obstructed such officer." *State . Smith*, 262 N.C. 472, 474 (1964); *see also State v. Wells*, 59 N.C. App. 682 (1982) (citation that charged resisting arrest was fatally defective for omission of duty officer was performing); *State v. Powell*, 10 N.C. App. 443 (1971) (the words "resist arrest" in citation were insufficient to charge offense).

Assault on officer. In contrast with a prosecution for resisting arrest, in a prosecution for assault on an officer under G.S. 14-33(c)(4) it is not necessary to allege the specific duty being performed by the officer at the time of the assault. *See State v. Noel***,** 202 N.C. App. 715 (2010) (indictments alleging malicious conduct by a prisoner and assault on a governmental official do not have to allege the duty officer was performing; where the duty was alleged it was surplusage and variance between allegations and proof was not

material); *State v. Bethea*, 71 N.C. App. 125 (1984) (sufficient to state that officer was performing a duty of his or her office when the assault occurred; not necessary to allege the particular duty in the indictment).

As in other assault cases, however, the victim must be identified correctly. *See State v. Powell*, 10 N.C. App. 443 (1971) (the words "assault on an officer" were insufficient because the victim—that is, the officer allegedly assaulted—was not identified); *see also State v. Thomas*, 153 N.C. App. 326 (2002) (indictment did not need to allege that defendant knew or had reasonable grounds to believe that named victim was officer where indictment alleged defendant "willfully" committed assault on law enforcement officer). For a further discussion of this issue, see *supra* "Misidentification of Victim" in this subsection F.

Other assaults. *See, e.g.*, *State v. Palmer*, 293 N.C. 633 (1977) (not necessary for indictment to describe size, weight, or particular use of potentially deadly weapon, but it must (i) name weapon, and (ii) state that weapon was used as "deadly weapon" or allege facts demonstrating deadly character of weapon); *State v. Moses*, 154 N.C. App. 332 (2002) (indictment failed to allege assault inflicting serious injury with deadly weapon because it did not name weapon); *State v. Garcia*, 146 N.C. App. 745 (2001) (arrest warrant charging assault by show of violence was insufficient where it omitted facts showing reasonable apprehension of immediate bodily harm on part of victim). *See also supra* "Misidentification of Victim" in this subsection F (fatal variance results from failure to correctly identify victim in pleading).

Duplicity. Each separate offense charged against a defendant must be pled in a separate pleading or a separate count within a single pleading. *See* G.S. 15A-924(a)(2). A pleading may be challenged for duplicity if it contains more than one charge in a single count. When a pleading is challenged on this ground, the State must elect between the offenses charged; if the State fails to elect, the court may dismiss the entire count. *See* G.S. 15A-924(b); *State v. Rogers*, 68 N.C. App. 358 (1984) (with leave of court, prosecutor may amend indictment to state in separate counts charges that were initially alleged in single count); *State v. Beaver*, 14 N.C. App. 459 (1972) (stating same principle but finding that in circumstances presented defendant was entitled to have prosecutor elect). The problem of duplicity often arises where the initial pleading is a Uniform Citation. (Sometimes a magistrate will sign the citation, converting it to a magistrate's order). A Uniform Citation contains two counts *only*. The first count (numbers 1 through 15 on the citation) may be used to charge one offense only; and the second count (number 16) likewise may charge one offense only. If the citation charges more than one offense in either count, the defendant may move to require the State to elect a single offense alleged in the particular count.

Ordinarily in district court, defendants may make motions addressed to the pleadings at or after arraignment. *See* G.S. 15A-953 (motions in district court ordinarily should be made upon arraignment or during trial); *see also supra* § 8.2E, Timing and Effect of Motions to Dismiss in District Court. To be safe, however, counsel should make a duplicity motion before the defendant enters a plea. *See* G.S. 15A-924(b) (duplicity

motion must be "timely"); *cf.* G.S. 15A-952(b)(6) (in superior court, certain motions addressed to pleadings must be made before arraignment); *State v. Williamson*, 250 N.C. 204 (1959) (in pre-15A case involving appeal for trial de novo in superior court, court states that motion to quash for duplicity is waived if not made before defendant enters plea).

Prior convictions of charged offense and other enhancements. North Carolina law raises a number of offenses to a higher class, subject to increased punishment, based on the defendant's prior convictions of the charged offense. *See, e.g.*, G.S. 14-72(b) (habitual misdemeanor larceny); G.S. 14-33.2 (habitual misdemeanor assault); G.S. 14-72.1 (shoplifting); G.S. 14-107 (worthless check); G.S. 14-56.1 (breaking into a coin operated machine); G.S. 90-95(a)(3) (possession of marijuana). The pleading must allege the prior conviction to subject the accused to the higher penalty. *See* G.S. 15A-928; *State v. Miller*, 237 N.C. 427 (1953); *State v. Williams*, 21 N.C. App 70 (1974); *cf. State v. Stephens*, 188 N.C. App. 286 (2008) (charge against defendant was not substantially altered where State amended indictment for stalking by striking the allegation of the prior conviction, which was included in single count of indictment with current offense, and making allegation into separate count in indictment in compliance with the requirements of G.S. 15A-928). North Carolina law requires generally that all essential elements of an offense be alleged (G.S. 15A-924(a)(5)) and requires specifically that prior convictions raising an offense to a higher class be alleged. *See* G.S. 15A-928; *see also supra* "Failure to charge offense or element of offense" in this subsection F.

Practice note: G.S. 15A-928 contains procedures specific to superior court for alleging and proving prior convictions that increase an offense to a higher class. Essentially, the statute requires that prior convictions be alleged in a separate indictment or other pleading to limit disclosure of the information to the jury during a trial of the current offense. The requirement of a separate pleading does not apply to cases tried in district court, but a district court pleading still must allege any prior conviction that raises an offense to a higher class. G.S. 15A-928(d) implicitly recognizes this basic pleading requirement in cases tried in district court, stating that on appeal for a trial de novo the State must replace the district court pleading with superseding statements of charges alleging separately the current offense and any prior convictions.

In addition to the defendant's prior convictions, there are a number of statutory factors that may subject a defendant to higher punishment. These factors are elements of the offense carrying the higher punishment and must be alleged in the pleading. *See* G.S. 15A-924(a)(5); *see also supra* "Failure to charge offense or element of offense" in this subsection F., and *infra* § 8.7, *Apprendi* and *Blakely* Issues. Examples of such enhancements for misdemeanors include: G.S. 14-72.1(d1) (shoplifting using lead-lined or aluminum-lined bag or clothing); G.S. 14-50.22 (committing misdemeanor at direction of, for benefit of, or in association with criminal street gang); G.S. 14-3(c) (committing misdemeanor because of victim's race, color, religion, nationality, or country of origin); G.S. 14-3(b) (committing certain misdemeanors in secrecy, with malice, or with deceit and intent to defraud); *see also State v. Bell*, 121 N.C. App. 700 (1996) (superior court had no jurisdiction over misdemeanor that State wanted to elevate to a felony under G.S.

14-3(b) where indictment failed to charge that offense was "infamous," "done in secrecy and malice," or done "with deceit and intent to defraud").

8.3 Misdemeanor Appeals

A. Scope of Jurisdiction on Appeal

Generally. On appeal of a misdemeanor conviction, the general rule is that the superior court's jurisdiction is "derivative" of the district court's jurisdiction. *See* G.S. 7A-271(b). Thus, the superior court ordinarily has jurisdiction on appeal only if: (1) the charge in superior court is the same as, or a lesser offense of, the charge alleged in the pleading in district court; *and* (2) the defendant was convicted in district court.

Requirement of same or lesser charge. On appeal of a misdemeanor conviction to superior court, the prosecution may not amend the pleadings or file a statement of charges alleging additional or different misdemeanors. *See State v. Caudill*, 68 N.C. App. 268 (1984) (superior court did not have jurisdiction to try defendant on statement of charges filed in superior court for nonsupport of illegitimate child where case arose on defendant's appeal from district court conviction for nonsupport of legitimate child; prosecution could not file statement of charges alleging new offense); *State v. Killian*, 61 N.C. App. 155 (1983) (prosecution may not file statement of charges in superior court alleging acts of nonsupport that occurred after district court trial); *State v. Clements*, 51 N.C. App. 113 (1981) (allowing amendment in superior court that did not change nature of offense).

The superior court ordinarily does not have jurisdiction over any offenses that are not strictly lesser included offenses of the conviction below. *See State v. Hardy*, 298 N.C. 191 (1979) (defendant was charged with and convicted of assault on officer in district court; on appeal, superior court did not have jurisdiction to try defendant for resisting arrest); *State v. Caldwell*, 21 N.C. App. 723 (1974) (defendant was charged with and convicted of assault on officer in district court; on appeal, superior court did not have jurisdiction to try defendant for assault by pointing gun). If the prosecution wants to charge a new misdemeanor, it must start again in district court except in the rare circumstance in which the grand jury initiates a misdemeanor prosecution by presentment in superior court. (Presentments are discussed *infra* in § 8.5B, Types of Pleadings and Related Documents.) For a discussion of potential Double Jeopardy and Due Process concerns involved in charging greater offenses in superior court following a district court proceeding, see *infra* § 8.6, Limits on Successive Prosecution.

Requirement of conviction. To confer appellate jurisdiction on the superior court, the defendant ordinarily must have been convicted of the offense charged in district court; it is not enough that a defendant was charged with the offense in district court. *See State v. Reeves*, ___ N.C. App. ___, 721 S.E.2d 317 (2012) (where defendant was charged with impaired driving and reckless driving and State took voluntary dismissal of reckless

driving in district court that was not pursuant to a plea agreement, reckless driving charge was not properly before superior court on appeal for trial de novo); *State v. Guffey*, 283 N.C. 94 (1973) (district court judgment indicated that defendant was convicted of impaired driving and was silent on whether defendant was convicted of charge of driving while license revoked; superior court did not have jurisdiction over charge of driving while license revoked); *State v. Phillips*, 127 N.C. App. 391 (1997) (in district court, defendant was tried and convicted of impaired driving, but State took voluntary dismissal of speeding charge; superior court lacked jurisdiction to try speeding charge on appeal of impaired driving conviction where voluntary dismissal was not pursuant to plea agreement); *see also State v. Joyner*, 33 N.C. App. 361 (1977) (reviewing court may assume procedural regularity in district court and may examine entire record to determine whether there was conviction that would support derivative jurisdiction of superior court); *State v. Wesson*, 16 N.C. App. 683 (1972) (sufficient evidence of conviction where district court judge sentenced defendant and set superior court bond, even though judge failed to fill in the disposition "guilty" on the judgment sheet).

Exceptions. There are two exceptions to the above rules. First, if the defendant appeals a district court judgment imposed pursuant to a plea agreement, the superior court has jurisdiction over any misdemeanor that was dismissed, reduced, or modified pursuant to that agreement. *See* G.S. 15A-1431(b); G.S. 7A-271(b).

Second, on appeal of a misdemeanor conviction, the superior court has jurisdiction to accept a guilty plea (but not to try the defendant) on any "related charge." G.S. 7A-271(a)(5). To utilize this provision, the prosecution must file an information in superior court charging the related misdemeanor, to which the defendant then enters a guilty plea. *See State v. Craig*, 21 N.C. App. 51 (1974) (on appeal of impaired driving conviction, superior court accepted plea to reckless driving; if reckless driving is "related charge" for which superior court may accept guilty plea, prosecution must file written information); G.S. 15A-922(g) (when misdemeanor is initiated in superior court, prosecution must be on information or indictment). If the defendant pleads guilty or is found guilty in superior court, the defendant also may request permission to enter a guilty plea to other misdemeanor charges pending in the same or other districts if certain procedural rules are followed. *See* G.S. 15A-1011(c); *see also infra* "Waiver by certain guilty pleas" in § 11.2D, Waiver (venue waived in this instance).

B. Required Pleadings in Superior Court

The pleading in district court may be used as the pleading in superior court on a trial de novo. *See State v. Chase*, 117 N.C. App. 686 (1995) (information or indictment not required on appeal of misdemeanor because the case was not initiated in superior court within meaning of G.S. 15A-923(a)). Although the prosecution need not obtain an indictment or information, the warrant or other district court pleading still must meet the rules for proper pleadings (discussed *supra* in § 8.2, Misdemeanors Tried in District Court). *See also State v. Jones*, 157 N.C. App. 472 (2003) (like other pleadings, citation may not be read to jury). Thus, the defendant may move to dismiss in superior court if the

warrant or other pleading is defective. *See State v. Biller*, 252 N.C. 783 (1960) (judgment arrested where superior court judge erroneously denied defendants' motion to quash fatally defective warrants) (per curiam)*; State v. Madry*, 140 N.C. App. 600 (2000) (motion to dismiss for failure to charge an offense was permissible in superior court on appeal for trial de novo); *see also* G.S. 15A-952(d) (defendant may move to dismiss for a jurisdictional defect "at any time").

If the defendant objects to the sufficiency of a warrant or other criminal process in superior court, the prosecution may file a statement of charges curing the defect as long as it does not change the nature of the offense alleged in district court. *See* G.S. 15A-922(e); *State v. Martin*, 46 N.C. App. 514 (1980) (stating rule); *see also State v. Killian*, 61 N.C. App. 155 (1983) (prosecution may not file statement of charges in superior court unless defendant objects to sufficiency of pleading); *State v. Clements*, 51 N.C. App. 113 (1981) (allowing amendment of warrant in superior court that did not change nature of offense). Thus, even if the defendant files a motion to dismiss before trial commences in superior court, the prosecution may not amend the pleading or file a statement of charges changing the nature of the offense alleged.

A statutory exception allows the State to amend a warrant in superior court to change the name of the rightful owner of property if the amendment does not prejudice the defendant. *See* G.S. 15-24.1; *State v. Reeves*, 62 N.C. App. 219 (1983).

In an impaired driving case, if the defendant appeals to superior court and the State intends to use an aggravating or grossly aggravating factor, the State must provide the defendant with written notice no later than 10 days before trial. G.S. 20-179(a1)(1).

C. Refiling of Misdemeanor Charges

If the prosecution takes a voluntary dismissal in superior court of a misdemeanor appealed for a trial de novo, the prosecution may not refile the charge in superior court except in limited circumstances. The prosecution may do so if: (1) the case falls within one of the categories of misdemeanors that may be filed initially in superior court under G.S. 7A-271(a) (allowing misdemeanor to be filed initially in superior court if joined with related felony or if initiated by presentment) and the statute of limitations has not run; or (2) the earlier dismissal was with leave under G.S. 15A-932 (allowing reinstitution of case after dismissal with leave based on failure to appear or deferred prosecution agreement).

D. Due Process Limits

Under the Due Process clause, if the defendant is convicted of a misdemeanor in district court and appeals for a trial de novo, the State may not initiate felony charges arising out of the same incident. Such charges are considered presumptively vindictive. *See infra* § 8.6D, Due Process.

8.4 Felonies and Misdemeanors Initiated in Superior Court

A. Scope of Original Jurisdiction

The superior court has original jurisdiction over all felonies and over misdemeanors joined with felonies. The superior court also has original jurisdiction over misdemeanors initiated by presentment. *See* G.S. 7A-271. Jurisdiction over an offense gives the court jurisdiction over all lesser included offenses of the crime charged. So, where the defendant is indicted for a felony, the superior court can accept a plea of guilty to a lesser included offense that is a misdemeanor, or it can enter judgment on a jury verdict for a lesser included misdemeanor.

B. Types of Pleadings and Related Documents

In superior court, a prosecution must be initiated by indictment or information. *See* G.S. 15A-923(a). A bill of particulars may be used to supplement, but it does not replace an indictment or information. A presentment, described below, is not a formal charging document but may lead to the initiation of charges.

Indictment. An indictment is a written accusation by a grand jury stating that it has found probable cause to believe that the defendant committed a specific crime. A prosecution in superior court must be by an indictment, although a noncapital defendant may waive the right to an indictment and be tried on an information. Indictments typically charge felonies. Misdemeanors may be charged in an indictment only if the charge is initiated by presentment or if the offense is joined with a charged felony. *See* G.S. 15A-923; G.S. 7A-271.

Information. An information is an accusation drafted by the prosecutor and filed in superior court, charging one or more criminal offenses. It permits the prosecution of a felony without an indictment by grand jury where the defendant and the defendant's attorney sign a waiver of indictment, consenting to have the case tried on the information. *See* AOC Form AOC-CR-123, "Bill of Information" (Jan. 2013), *available at* www.nccourts.org/Forms/FormSearch.asp. An information may be filed only if the defendant waives indictment. Defendants who are unrepresented or who are charged with capital crimes may not waive indictment. *See* G.S. 15A-642(b).

A defendant might agree to waive indictment and proceed on an information to permit immediate disposition of the case. For example, a plea bargain may involve a defendant pleading guilty to an offense for which he or she has not been indicted, thus requiring a waiver of indictment and filing of an information if the case is to be resolved promptly.

Presentment. A presentment is a written accusation by the grand jury, filed in superior court, charging a defendant with one or more crimes. A presentment is initiated by the grand jury. It does not commence a criminal proceeding and is not a pleading. The district attorney is statutorily required to investigate the allegations in a presentment and to submit a bill of indictment to the grand jury if appropriate. A misdemeanor prosecution

that is not joined to a related felony may not be commenced in superior court except by presentment. *See* G.S. 7A-271(a)(2); G.S. 15A-641(c); G.S. 15A-644; G.S. 15A-922(g); G.S. 15A-923(a).

Bill of particulars. A bill of particulars is prepared by the prosecutor and filed with the court. It is not a pleading, but it supplements an indictment or information by providing the defendant with additional information. *See* G.S. 15A-925. The defendant must file a motion for a bill of particulars before arraignment. *See* G.S. 15A-952. In the motion, the defendant must request specific information and allege that the defendant cannot adequately prepare or conduct his or her defense without such information. *See* G.S. 15A-925(b); *State v. Garcia*, 358 N.C. 382 (2004) (trial court did not abuse discretion in denying bill of particulars specifying underlying felony in felony murder prosecution; concurrence finds no error but observes that North Carolina law regarding bill of particulars contains more promise than substance; dissent would have found error); *State v. Randolph*, 312 N.C. 198 (1984) (trial court must order State to respond to motion for bill of particulars when defendant shows that requested information is necessary to adequately prepare defense; denial of motion is error if lack of timely access to information significantly impaired defendant's preparation and conduct of case; trial court did not abuse discretion in denying motion in this case); *see also State v. Tunstall*, 334 N.C. 320 (1993) (trial court granted motion for bill of particulars requiring State to provide date, time, and location of murder and certain information about theory of crime).

A bill of particulars does not cure defects or omissions in an indictment or information. *See* subsection C., Sufficiency of Pleadings, below. It does, however, limit the scope of the case against the defendant. The State may not vary in its proof at trial from the allegations stated in a bill of particulars. *See* G.S. 15A-925(e) (so stating but allowing amendment at any time before trial). This limitation applies only if the State files a formal, written bill of particulars. If the State responds to a defendant's request for additional details by orally supplying information in court, such a response is not the same as a bill of particulars, and the State's proof at trial will not have to conform to its earlier in-court representations. *See State v. Stallings*, 107 N.C. App. 241 (1992) (prosecutor's oral statements were not a bill a particulars; statute requires that a bill of particulars be in writing). Counsel should therefore request that the court order the State to file a written bill of particulars in order to "marry" the State to facts that the prosecutor has stated orally.

C. Sufficiency of Pleadings

General Requirements. G.S. 15A-924(a) states the general requirements for criminal pleadings. All superior court pleadings must contain:

- a plain and concise factual statement supporting every element of the offense charged;
- a separate count addressed to each offense charged;
- a reference to the statute or other provision of law that the defendant allegedly violated;

- the name or other identification of the defendant;
- the county where the offense took place; and
- the date on which, or time period during which, the offense took place; and
- a statement that the State intends to use certain aggravating factors, with a plain and concise factual statement indicating the factors it intends to use.

The last requirement about aggravating factors applies to felony cases only. *See infra* § 8.7B, Notice and Pleading Requirements after *Blakely*. It does not apply to misdemeanor impaired driving cases; however, in impaired driving cases in superior court, the State must give written notice of its intent to use any aggravating or grossly aggravating factors. G.S. 20-179(a1)(1).

An indictment or information must be sufficient in itself. The State may not rely on allegations in a warrant or bill of particulars to cure defects or omissions. *See State v. Benton*, 275 N.C. 378 (1969) (allegations in warrant may not cure defects in indictment); *State v. Stokes*, 274 N.C. 409 (1968) (allegations in bill of particulars do not cure defects in indictment); *accord State v. Banks*, 263 N.C. 784 (1965). Consent to amendment does not cure an indictment that lacks an essential element. *State v. De la Sancha Cobos*, 211 N.C. App. 536 (2011) (error to amend indictment by adding amount of the cocaine, an essential element of the offense; indictment may not be amended by consent).

Some pleading errors may be subject to amendment or not be of consequence. *See, e.g., State v. Jones*, 110 N.C. App. 289 (1993) (incorrect statutory reference was not fatal defect where body of indictment properly charged elements of offense). *But see State v. Blakney*, 156 N.C. App. 671 (2003) (in prosecution for felony, pleading must charge that defendant acted "feloniously" or reference statutory section making crime a felony). *See also* subsection D., Amendment of Indictments, below.

Pleading errors that may affect the ability of the State to proceed are discussed *infra* in § 8.5, Common Pleading Defects in Superior Court. Generally, if a case is dismissed because the indictment is fatally defective, the State is not barred from refiling the charges in an appropriately-worded pleading. In some circumstances, however, refiling may be barred. *See supra* § 8.2E, Timing and Effect of Motions to Dismiss in District Court (effect of dismissal on subsequent charges); *see also infra* § 8.6, Limits on Successive Prosecution (discussing double jeopardy and other limits on successive prosecution).

Short-form indictment. The North Carolina General Assembly has enacted statutes permitting abbreviated forms of indictment for certain offenses, known as "short-form" indictments. Short-form indictments are permitted for murder (G.S. 15-144); forcible rape (G.S. 15-144.1(a)); statutory rape (G.S. 15-144.1(b)); forcible sex offense (G.S. 15-144.2(a)); and statutory sex offense (G.S. 15-144.2(b)). A short-form indictment does not allege the elements that elevate these offenses to the first-degree level. For example, where the State contends that the defendant committed first-degree murder, the indictment need not state that the murder was committed in the course of a felony, after premeditation and deliberation, or in any other manner that would increase the level of

the offense. It is sufficient for the indictment to allege that the named defendant, with malice aforethought, murdered the victim. *See* Smith, *Criminal Indictment*, at 16–18, 29–32, *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0803.pdf.

North Carolina courts have continued to uphold the adequacy of short-form indictments against constitutional challenges. *See, e.g.*, *State v. Wallace*, 351 N.C. 481 (2000) (upholding short-form indictment for rape and murder); *State v. Avery*, 315 N.C. 1 (1985); *State v. Hasty*, 181 N.C. App. 144 (2007).

Pleading rules for certain offenses. Certain offenses and certain elements of crimes have specific pleading requirements, either as a matter of statute or case law. Counsel should review the pleading requirements for each offense charged. *See* Smith, *Criminal Indictment*, at 16–53, *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0803.pdf.

D. Amendment of Indictments

Generally. G.S. 15A-923(e) states that indictments may not be amended. Despite the literal language of this statute, courts have permitted the amendment of indictments where the amendment does not *substantially* alter the charge. *See State v. Price*, 310 N.C. 596 (1984). The meaning of "substantially" in this context is ambiguous. Typically, prosecutors have been allowed to amend indictments to change the date or place of an offense or to correct "technical" errors, such as misspellings (although the motion to amend should be denied where time is of the essence to the defense or when the defendant is surprised and prejudiced by the change. *Id.* at 598–99). Amendments that change the name of the defendant, the identity of the victim, or the nature of the offense have not been allowed.

The following cases are a sample of decisions that have ruled on amending pleadings. Counsel should review the pleading requirements for the particular offense with which the defendant is charged.

Decisions permitting amendment of indictment. In the following cases, the court permitted amendment of the indictment:

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

State v. Tucker, ___ N.C. App. ___, 743 S.E.2d 55, 58 (2013) (trial court did not err by allowing State to amend embezzlement indictment, where indictment originally stated "the defendant . . . was the employee of MBM Moving Systems, LLC . . . ," to add the words "or agent" after the word "employee"; court rejected defendant's argument that the nature of his relationship to the victim was critical to the charge and held that the terms "employee" and "agent" "are essentially interchangeable" for purposes of this offense)

State v. White, 202 N.C. App. 524 (2010) (trial court did not err in allowing State to amend habitual impaired driving indictment to allege that prior impaired driving convictions, which were accurately identified in indictment, occurred within ten years of the current offense rather than seven years). *Cf. State v. Winslow*, 360 N.C. 161 (2005) (per curiam) (error, under prior version of statute, to allow State to amend habitual impaired driving indictment to correct the date of a prior conviction, thereby bringing it within the seven-year look-back period)

State v. Coltrane, 188 N.C. App. 498 (2008) (no error in allowing State to amend date and county of prior conviction in possession of firearm by felon indictment; time is not an essential element of the crime)

State v. Stephens, 188 N.C. App. 286 (2008) (no error in allowing amendment to indictment for stalking that originally included allegation of prior stalking conviction in same count to separate out the allegation regarding prior conviction that elevated punishment to a felony, as required by G.S. 15A-928)

State v. Hewson, 182 N.C. App. 196 (2007) (no error in allowing State to amend murder indictment to change victim's name from "Gail Hewson Tice" to "Gail Tice Hewson"; no indication defendant was surprised or confused about identity of victim)

State v. McCallum, 187 N.C. App. 628 (2007) (no error in allowing State to amend indictments to remove allegations concerning the amount of money taken during the robberies because allegations as to value of property were surplusage; amended indictments alleged that defendant took an unspecified amount of U.S. Currency)

State v. Whitman, 179 N.C. App. 657 (2006) (State was entitled to amend the alleged dates 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"; victim would have been fifteen under either version of indictment and defendant was on notice that if he wished to present an alibi defense, he was going to have to address all of 1998 because an incest indictment, which was not amended, alleged dates from "January 1998 through June 1999")

State v. Van Trusell, 170 N.C. App. 33 (2005) (no error in allowing amendment from attempted armed robbery to armed robbery; offenses are punished the same)

State v. May, 159 N.C. App. 159 (2003) (no error in allowing State to amend date in false pretenses indictment; time was not an essential element of the crime)

State v. Grady, 136 N.C. App. 394 (2000) (permissible to amend address of dwelling in prosecution for maintaining dwelling for use of controlled substance)

State v. Hyder, 100 N.C. App. 270 (1990) (permissible to change name of county from which grand jury issued indictment)

State v. Marshall, 92 N.C. App. 398 (1988) (permissible to amend name of victim where three of the indictments stated victim's name correctly and victim's last name had been inadvertently left off fourth indictment)

Decisions not permitting amendment of indictment. In the following cases, the court found that amendment was not permissible:

State v. Silas, 360 N.C. 377 (2006) (error for State to amend felony breaking or entering indictment to reflect that defendant broke with intent to commit assault where State had indicted on theory that defendant broke with intent to commit murder)

State v. Winslow, 360 N.C. 161 (2005) (per curiam) (error, under prior version of statute, to allow State to amend habitual impaired driving indictment to correct the date of a prior conviction, thereby bringing it within the seven-year look-back period)

State v. Abraham, 338 N.C. 315 (1994) (error for State to amend felonious assault indictment to change name of victim from Carlose Antoine Latter to Joice Hardin; court notes that error in name of victim may be more serious than error in name of defendant)

State v. Abbott, __ N.C. App. __, 720 S.E.2d 437 (2011) (error for State to amend owner of property in indictment alleging larceny by employee by striking the word "Incorporated" from "Cape Fear Carved Signs, Incorporated"; change from corporate entity to sole proprietorship was substantial alteration)

State v. Morris, 185 N.C. App. 481 (2007) (trial court erred in allowing State to amend indictment charging kidnapping to change purpose from facilitating a felony to facilitating inflicting serious injury where amendment was "obviously intended to elevate the crime to the first degree")

State v. Cathey, 162 N.C. App. 350 (2004) (error to allow amendment to felony larceny indictment regarding owner of property to reflect that owner was corporation)

State v. Hughes, 118 N.C. App. 573 (1995) (error to change name of alleged victim in embezzlement prosecution from "Mike Frost, President of Petroleum World, Incorporated" to "Petroleum World, Incorporated"; amendment changed ownership from individual to corporation, substantially altering offense)

In re Davis, 114 N.C. App. 253 (1994) (error for court to allow amendment of juvenile petition that alleged unlawful burning of public building to allegation of unlawful burning of personal property within building)

E. Habitual Offender Pleading Requirements

Generally. The following discussion focuses on the pleading requirements in habitual felon cases under G.S. 14-7.1 through G.S. 14-7.6. It does not discuss the substantive requirements for conviction as a habitual felon—for example, the timing of prior

convictions. For a further discussion of habitual felon cases, see Jeff Welty, *North Carolina's Habitual Felon, Violent Habitual Felon, and Habitual Breaking and Entering Laws*, ADMINISTRATION OF JUSTICE BULLETIN No. 2013/07 (UNC School of Government, Aug. 2013) [hereinafter Welty, *Habitual Felon Laws*], *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1307.pdf; Robert L. Farb, *Habitual Offender Laws* (UNC School of Government, Feb. 2010), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/habitual.pdf; Jamie Markham, *Changes to the Habitual Felon Law*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Nov. 10, 2011), http://nccriminallaw.sog.unc.edu/?p=3042.

Charging a person as a violent habitual felon is subject to similar pleading requirements. *See* G.S. 14-7.7 through G.S. 14-7.12. The charge of habitual breaking and entering, enacted in 2011, is likewise subject to similar pleading requirements. *See* G.S. 14-7.25 through G.S. 14-7.31; Jamie Markham, *Habitual Breaking and Entering*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Nov. 22, 2011), http://nccriminallaw.sog.unc.edu/?p=3077.

Legislative note: Effective for offenses committed on or after October 1, 2013, S.L. 2013-369 (H 937) adds new Article 3D in G.S. Ch. 14 (G.S. 14-7.35 through G.S. 14-7.41) creating the status of armed habitual felon, which applies to a person who commits a firearm-related felony after having previously been convicted of a firearm-related felony as defined in the new statutes. The procedures for charging armed habitual felon status is similar to the current habitual felon procedures, discussed above.

Other enhancements for prior convictions. In addition to the habitual offender cases described above, North Carolina law raises a number of offenses to a higher class, subject to increased punishment, based on the defendant's prior convictions. *See, e.g.*, 14-33.2 (habitual misdemeanor assault); G.S. 14-56.1; (breaking into a coin operated machine); G.S. 14-72(b)(6) (habitual misdemeanor larceny); G.S. 14-72.1 (shoplifting); G.S. 14-107 (worthless check); G.S. 90-95(a)(3) (possession of marijuana). Such offenses are subject to the pleading requirements in G.S. 15A-928, which requires that the pleading allege the prior convictions that subject the accused to the higher penalty. *See also State v. Miller*, 237 N.C. 427 (1953) (reaching same result before adoption of G.S. Ch. 15A); *State v. Williams*, 21 N.C. App 70 (1974) (to same effect); G.S. 15A-924(a)(5) (requiring that all essential elements of offense be alleged). For cases in superior court, the prior conviction must be alleged in a separate indictment or other pleading. G.S. 15A-928(b) (indictment and information); G.S. 15A-928(d) (superseding statement of charges for misdemeanors appealed for trial de novo); *cf. State v. Stephens*, 188 N.C. App. 286 (2008) (charge against defendant was not substantially altered where State amended indictment for stalking by striking the allegation of the prior conviction, which was included in single count of indictment with current offense, and making allegation into separate count in indictment in compliance with the requirements of G.S. 15A-928).

Felon in possession of firearm. Possession of a firearm by a felon is a criminal offense in its own right. For reasons similar to the requirement that prior convictions be separate from allegations of other offenses, an indictment for possession of a firearm by a felon must be charged in a separate indictment from other charges. G.S. 14-415.1(c); *State v.*

Wilkins, ___ N.C. App. ___, 737 S.E.2d 791 (2013) (indictment for felon in possession of a firearm was fatally defective because the charge was included as a separate count in a single indictment charging the defendant with assault with a deadly weapon).

Other enhancements. In addition to the defendant's prior convictions, there are a number of statutory factors that subject a defendant to higher punishment and must be alleged in the pleading. *See, e.g.*, G.S. 14-72.1(d1) (shoplifting using lead-lined or aluminum-lined bag or clothing); G.S. 15A-1340.16C (wearing or possessing bullet-proof vest during commission of felony). For a discussion of these enhancements, see *infra* "Firearm and Other Enhancements" in § 8.7B, Notice and Pleading Requirements after *Blakely*. *See also supra* "Prior convictions of charged offense and other enhancements" in § 8.2F, Common Pleading Defects in District Court.

Timing of challenge in habitual felon cases. Counsel ordinarily should raise objections to habitual felon charging errors after the trial has commenced on the principal felony or at the commencement of the habitual felon proceedings. If the charging error is raised before attachment of jeopardy on at least the principal felony (when the jury is empanelled and sworn), the State conceivably could dismiss the case altogether and seek new indictments. (If the defendant is challenging the validity of a prior conviction, the basis of the challenge will determine whether the defendant may challenge the conviction in the current case or must file a motion for appropriate relief to vacate the conviction in the original proceeding. *See* Welty, *Habitual Felon Laws*, at 25–26, *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1307.pdf; *see also infra* § 12.2A, Suppressing Prior Uncounseled Conviction.

Pleading requirements in habitual felon cases. Below are the basic requirements for habitual felon pleadings.

1. *State must obtain separate habitual felon charge.* To charge a defendant as a habitual felon, the State should prepare a separate indictment from the indictment for the principal felony being tried. *See* G.S. 14-7.3 (habitual felon); *State v. Patton*, 342 N.C. 633 (1996); Welty, *Habitual Felon Laws*, at 16–17. *But see State v. Young*, 120 N.C. App. 456 (1995) (not error to charge habitual felon status in separate count of indictment for principal felony; if it was error, defendant was not prejudiced). The State is not required to obtain a separate habitual felon indictment for each principal felony; one is sufficient for all pending felony indictments. *See Patton*, 342 N.C. at 635.

2. *State must obtain timely habitual felon indictment.* Three principles limit the timing of a habitual felon indictment.

   First, the N.C. courts have held that being a habitual felon is not an offense—it is a status that elevates the punishment for the felony with which the defendant is charged. Consequently, habitual felon charges are necessarily ancillary to a felony charge and may not stand alone. *See State v. Cheek*, 339 N.C. 725, 727 (1995) (habitual felon law does not authorize "an independent proceeding to determine

defendant's status as a habitual felon separate from the prosecution of a predicate substantive felony"). Thus, the State may not wait until the defendant is convicted and sentenced for a felony and then obtain a habitual felon indictment. *See State v. Allen*, 292 N.C. 431 (1977); *see also State v. Davis*, 123 N.C. App. 240 (1996) (trial court could not sentence defendant as habitual felon after arresting judgment on all principal felonies). The courts have not been picky, however, about which indictment is obtained first—the habitual felon indictment or the indictment for the principal felony—as long as there is a felony prosecution to which the habitual felon indictment may attach. *See State v. Ross*, ___ N.C. App. ___, 727 S.E.2d 370 (2012) (in reliance on *Flint* [discussed next], court vacates habitual felon plea and remands for sentencing on principal felony because habitual felon indictment was returned before commission of principal felony); *State v. Flint*, 199 N.C. App. 709 (2009) (habitual felon indictment may be returned before, after, or simultaneously with a principal felony indictment, but it is improper if issued before substantive felony occurred; there were other substantive felonies to which the habitual felon indictment attached, however); *State v. Bradley*, 175 N.C. App. 234 (2005) (trial court lacked jurisdiction to sentence defendant as habitual felon for subsequent charges absent new habitual felon indictment where defendant had already pled guilty to original charges to which habitual felon indictment attached, although sentencing was still pending for original charges); *State v. Blakney*, 156 N.C. App. 671 (2003) (habitual felon indictment that predated indictment for principal felony by two weeks was not void where notice and procedural requirements for habitual felon cases were satisfied); *State v. Murray*, 154 N.C. App. 631 (2002) (State obtained felony indictment, then habitual felon indictment, then superseding felony indictment for which defendant was ultimately convicted; court holds that State could proceed on habitual felon indictment even though it predated superseding felony indictment). In cases in which a habitual felon indictment was quashed for technical reasons (and therefore probably could have been amended), the courts have continued the proceedings without entering judgment and have allowed the State to obtain a superseding habitual felon indictment even after the defendant was convicted of the principal felony. *See* paragraph no. 4., below.

Second, the N.C. courts have held that the State may not obtain the initial habitual felon indictment, or obtain a superseding habitual felon indictment that makes substantive changes, once the defendant has entered a plea (guilty or not guilty) to the principal felony. The defendant has entered the plea in reliance on the charges then pending, on the likelihood of the State succeeding on those charges, and on the maximum punishment those charges permit. *See State v. Little*, 126 N.C. App. 262 (1997) (finding that initial habitual felon pleading was valid because it was returned before plea in principal felony case but that superseding habitual felon indictment, which was obtained after conviction of principal felony and alleged different prior convictions, was invalid); *see also* paragraph no. 4., below, regarding amendments. In *State v. Cogdell*, 165 N.C. App. 368 (2004), the N.C. Court of Appeals limited the impact of *Little* by holding that *Little* refers to the entry of plea before trial, not to the entry of plea at arraignment. "[T]he critical event that forecloses substantive changes in an habitual felon indictment is the plea entered before the actual trial." *Id.* at 373.

Third, the defendant may not be tried on a habitual felon indictment less than twenty days after the return of the indictment. The defendant may waive this requirement by failing to object at trial. *See* G.S. 14-7.3; *State v. Winstead*, 78 N.C. App. 180 (1985) (defendant did not object at trial and waived the 20-day period, but court considered defendant's appeal due to statutory ambiguity; the 20-day period runs from the time the grand jury returns an indictment on the habitual felon charge).

3. *State must properly plead habitual felon charge.* A habitual felon indictment must state: (i) the dates the prior felonies were committed; (ii) the name of the state or sovereign against whom the prior felonies were committed; (iii) the dates of the prior convictions; and (iv) the court where the convictions were obtained. *See* G.S. 14-7.3; *State v. McIlwaine*, 169 N.C. App. 397 (2005) (habitual felon indictment was sufficient even though it did not allege controlled substance involved in defendant's prior drug felony conviction); *State v. Briggs*, 137 N.C. App. 125 (2000) (habitual felon indictment contained adequate description of prior crimes without alleging elements of prior offenses). Some errors may be considered technical and either subject to amendment or not of consequence. *See* paragraph no. 4., below.

   The habitual felon indictment does not need to identify or contain a description of the principal felony to which the habitual felon indictment is ancillary. *See State v. Cheek*, 339 N.C. 725 (1995); *State v. Smith*, 160 N.C. App. 107 (2003). If the habitual felon indictment incorrectly refers to the principal felony, it may be treated as surplusage. *See State v. Bowens*, 140 N.C. App. 217 (2000) (habitual felon indictment referenced one of the three principal felonies charged, felonious possession of marijuana, which was dismissed; court treated the reference as surplusage); *cf. State v. Lee*, 150 N.C. App. 701 (2002) (habitual felon indictment alleged five prior convictions rather than required three convictions; none of convictions used to establish habitual felon status could be used to calculate prior record level under structured sentencing).

   Since the habitual felon charge is ancillary to the principal felony charge, it fails if either the habitual felon indictment *or* the indictment for the principal felony is insufficient and not subject to amendment to cure the defect. *See State v. Winstead*, 78 N.C. App. 180 (1985).

4. *State may not make substantive amendments to habitual felon indictment.* A habitual felon indictment may be amended if the amendment does not make a substantive change. Rather than amending the habitual felon indictment, some prosecutors will seek a superseding indictment to correct a defect. For example, in some cases in which the defendant has raised the defect after trial of the principal felony, the State has asked the court to continue the proceedings while it obtained a superseding indictment. As long as the change, whether by amendment or superseding indictment, does not make a substantive change, either procedure is probably permissible. *See, e.g., State v. Coltrane*, 188 N.C. App. 498 (2008) (permissible for State to amend date and county of prior conviction); *State v. Lewis*, 162 N.C. App. 277 (2004) (amendment to correct dates of prior convictions was permissible; change was not

substantial); *State v. Hargett*, 148 N.C. App. 688 (2002) (same); *State v. Mewborn*, 131 N.C. App. 495 (1998) (permitting superseding indictment after trial of principal felony that made technical changes only, to wit, identifying the state where the prior felonies were committed); *State v. Oakes*, 113 N.C. App. 332 (1994) (permitting superseding indictment after trial of principal felony that made technical changes only).

In contrast, the State may not amend a habitual felon indictment that makes a substantive change. Thus, the State may not amend a habitual felon indictment to allege different prior felonies. The State may obtain a superseding habitual felon indictment alleging different prior felonies; however, under *State v. Little*, 126 N.C. App. 262 (1997) and *State v. Cogdell*, 165 N.C. App. 368 (2004), the State may not obtain a superseding indictment alleging different prior felonies after the defendant has entered a plea (*see* paragraph no. 2., above).

8.5 Common Pleading Defects in Superior Court

The following are common pleading problems that may be evident on the face of the indictment or that may become evident during trial. *See also supra* § 8.2F, Common Pleading Defects in District Court. The timing of challenges to these problems is discussed *infra* § 8.5J, Timing of Motions to Challenge Indictment Defects. *See also infra* § 9.4, Challenges to Grand Jury Procedures.

A. Pleading Does Not State Crime within Superior Court's Jurisdiction

If your client is indicted in superior court, make sure that the pleading charges a felony or a misdemeanor that is within the original jurisdiction of the superior court. *See State v. Bell*, 121 N.C. App. 700 (1996) (indictment dismissed because superior court lacked jurisdiction over case; indictment charged misdemeanor and failed to allege facts that would have elevated offense to felony); *see also State v. Wagner*, 356 N.C. 599 (2002) ("felony" possession of drug paraphernalia does not exist, and trial court never had jurisdiction over offense). In addition to subject matter jurisdiction, check for territorial jurisdiction. North Carolina courts have jurisdiction over a crime only if at least one of the essential acts of the crime took place in North Carolina. *See infra* § 10.2, Territorial Jurisdiction.

B. Pleading Does Not State Any Crime

An indictment or information must state a violation of the current criminal code or a current common law crime. When an indictment alleges a violation of a rescinded or superseded law, or where it does not allege proscribed behavior, the pleading is defective and a motion to dismiss must be granted.

In the following cases, convictions have been vacated because the indictment failed to allege a crime.

State v. McGaha, 306 N.C. 699 (1982) (indictment alleging first-degree rape on theory that victim was under 12 years old was invalid where victim was 12 years, 8 months at time of offense)

State v. Hanson, 57 N.C. App. 595 (1982) (court of appeals finds, sua sponte, that indictment alleging attempt to provide controlled substance to inmate was fatally defective as statute does not proscribe such behavior; conviction vacated)

State v. Wallace, 49 N.C. App. 475 (1980) (citation alleged that "named defendant did unlawfully and willfully operate a (motor) vehicle on a (street or highway) . . . [b]y hunting deer with dogs in violation of Senate Bill #391 which prohibits same"; no crime stated, and trial court properly dismissed on motion made at trial)

State v. Holmon, 36 N.C. App. 569 (1978) (indictment alleged common-law kidnapping, which had been superseded by statutory kidnapping; conviction vacated for failure of indictment to state a crime)

C. Pleading Does Not State Required Elements of Crime

Generally. Except for those crimes where a short-form indictment is statutorily permitted, an indictment must allege every essential element of a crime. *See* G.S. 15A-924(a)(5); *State v. Westbrooks*, 345 N.C. 43 (1996); *State v. Hare*, 243 N.C. 262 (1955) (indictment that fails to allege every element of crime strips superior court of jurisdiction over case). This requirement serves two purposes: first, it ensures that the grand jury considered and found probable cause to believe that the defendant committed every element of the charged offense; second, it puts the defendant on notice of the offense and potential punishment.

Pleading defects often arise in cases involving controlled substances under G.S. 90-95(a); in those cases, the pleading must allege, among other things, the identity of the controlled substance and, in sale and delivery cases, the identity of the buyer or recipient. *See e.g.*, *State v. LePage*, 204 N.C. App. 37 (2010) (indictment identifying controlled substance as "benzodiazepines, which is included in Schedule IV of the North Carolina Controlled Substances Act" was fatally defective; benzodiazepines are not listed in Schedule IV); *State v. Turshizi*, 175 N.C. App. 783 (2006) (indictment fatally flawed where it did not include the full name of controlled substance; substance listed as "methylenedioxymethamphetamine" but did not include "3,4" as listed in statute); Smith, *Criminal Indictment*, at 43–48, *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0803.pdf.

Illustrative cases. In the following cases, our appellate courts vacated convictions where the indictment failed to contain an essential element of the crime.

State v. Galloway, ___ N.C. App. ___, 738 S.E.2d 412 (2013) (trial court erred by instructing jury on offense of discharging a firearm into a vehicle that is in operation under G.S. 14-34.1(b) where indictment failed to allege vehicle was in operation)

State v. Justice, ___ N.C. App. ___, 723 S.E.2d 798 (2012) (indictment charging defendant with larceny from a merchant by removal of anti-theft device fatally defective where term "merchandise" in charging language was too general to identify the property allegedly taken; court also notes that indictment alleges only an attempted rather than completed larceny by stating the defendant "did remove a component of an anti-theft or inventory control device . . . in an effort to steal merchandise")

State v. Barnett, ___ N.C. App. ___, 733 S.E.2d 95 (2012) (indictment charging failing to notify sheriff's office of change of address by a registered sex offender under G.S. 14-208.9 was defective where it failed to allege that defendant was a person required to register)

State v. Harris, ___ N.C. App. ___, 724 S.E.2d 633 (2012) (sex offender unlawfully on premises indictment stated that defendant "did unlawfully, willfully, and feloniously on the premises of Winget Park Elementary School, located at . . . Charlotte North Carolina. A place intended primarily for the use, care, or supervision of minors and defendant is a registered sex offender"; court found grammatical errors did not render indictment insufficient and "willfully" alleged requisite "knowing" conduct; indictment defective, however, because it did not allege a conviction of a required, specific offense with the term "registered sex offender"); *accord State v. Herman*, ___ N.C. App. ___, 726 S.E.2d 863 (2012)

State v. Burge, 212 N.C. App. 220 (2011) (warrant charging defendant with a violation of G.S. 67-4.2, failure to confine a dangerous dog, could not support a conviction for a violation of G.S. 67-4.3, attack by a dangerous dog; though the warrant cited G.S. 67-4.2, it would have supported a conviction under G.S. 67-4.3 had it included the element of medical treatment cost, but it failed to do so)

State v. Brunson, 51 N.C. App. 413 (1981) (motion to dismiss at close of evidence for failure to allege required element of financial transaction card fraud; conviction vacated, although State could refile charge)

State v. Epps, 95 N.C. App. 173 (1989) (conviction for conspiracy to traffic in cocaine vacated for failure to allege amount of cocaine, an essential element of crime)

State v. Coppedge, 244 N.C. 590 (1956) (indictment for refusing to pay child support invalid where indictment left out term "willfully," and willful refusal to support was element of crime)

Where the indictment alleges an element of the crime but the State's proof does not conform to the allegation, fatal variance may result. *See infra* § 8.5I, Variance Between Pleading and Proof.

D. Failure to Identify Defendant

Every indictment must correctly name the defendant or contain a description of the

defendant sufficient to identify him or her. *See* G.S. 15A-924(a)(1); *State v. Simpson*, 302 N.C. 613 (1981) (name of defendant, or sufficient description if his or her name is unknown, must be alleged in body of indictment); *State v. Powell*, 10 N.C. App. 443 (1971) (warrant fatally defective that gave defendant's last name as Smith when it actually was Powell). Misspelling of the defendant's name, or use of a nickname, does not necessarily invalidate an indictment. *See State v. Higgs*, 270 N.C. 111 (1967) (per curiam) (indictment valid where "Burford Murril Higgs" was spelled "Beauford Merrill Higgs"; court found that names were enough alike to come within doctrine of idem sonans, which means sounding the same); *State v. Spooner*, 28 N.C. App. 203 (1975) ("Mike" instead of "Michael" Spooner adequate).

A pleading may identify the defendant by an alias if it is done in good faith. *See State v. Young*, 54 N.C. App. 366 (1981) (nickname alleged was sufficiently similar to actual name; also, defendant waived objection to misnomer by failing to object before entering plea and going to trial), *aff'd*, 305 N.C. 391 (1982); *see also State v. Sisk*, 123 N.C. App. 361 (1996) (no error where defendant's name misstated in one part of indictment but correctly stated in another part), *aff'd in part*, 345 N.C. 749 (1997); *State v. Johnson*, 77 N.C. App. 583 (1985) (no error when defendant's name omitted from body of indictment but included in caption referenced in body of indictment).

E. Lack of Identification, or Misidentification, of Victim

An indictment or information must correctly name the victim against whom the defendant allegedly committed the crime. The omission of the victim's name, or incorrect identification of the victim, is fatal. If the State's proof of the identity of the victim varies from the allegation in the pleading, the variance constitutes grounds to dismiss the charge. A misspelling or incorrect order in the victim's name, if it does not mislead the defendant as to the identity of the victim, will not provide grounds for dismissal.

For a discussion of these principles and applicable cases, see *supra* "Misidentification of victim" in § 8.2F, Common Pleading Defects in District Court.

F. Two Crimes in One Count (Duplicity)

Each count in an indictment may charge only one offense. Where a count charges more than one offense, the defendant may require the State to elect which offense it will pursue at trial; a count may be dismissed if the State fails to make a selection. *See* G.S. 15A-924(b); *see also supra* "Duplicity" in § 8.2F, Common Pleading Defects in District Court.

G. Disjunctive Pleadings

Where a single statute creates more than one offense set forth in the disjunctive, or where a statute states alternative ways of committing an offense, questions may arise regarding both pleadings and jury instructions.

Single statute creates one offense. If a single statute states alternative means of

committing an offense, an indictment should link the alternatives conjunctively by the word "and." *See State v. Swaney*, 277 N.C. 602 (1971) (indictment for robbery with a dangerous weapon properly charged "endangered *and* threatened"; State could prove at trial that defendant either endangered or threatened victim), *overruled on other grounds, State v. Hurst*, 320 N.C. 589 (1987); *State v. Armstead*, 149 N.C. App. 652 (2002) (indictment properly charged that defendant did "obtain *and* attempt to obtain" property by false pretense; State was not required to prove defendant actually obtained the property in addition to attempting to do so); *see also State v. Pigott*, 331 N.C. 199 (1992) (kidnapping indictment proper that listed two different purposes for kidnapping as conjunctive alternatives). The rationale for conjunctive wording is that a disjunctive allegation may "leave it uncertain what is relied on as the accusation" against the defendant. *Swaney*, 277 N.C. at 612. However, use of the disjunctive does not render an indictment defective if the indictment charges only one offense and the allegations represent alternative means of committing that offense. *See State v. Creason*, 313 N.C. 122 (1985) (where defendant is charged with the single offense of possession of LSD with intent to sell or deliver, State must prove only the intent to transfer to another, regardless of the method used).

The State is not bound to prove all of the alternatives it alleges, even though the indictment alleges them in the conjunctive. *See State v. Birdsong*, 325 N.C. 418 (1989) (where indictment sets forth conjunctively two means by which crime charged may have been committed, no fatal variance between indictment and proof when State offers evidence supporting only one of the means charged).

Also, although the indictment alleges the alternatives in the conjunctive, the court may instruct the jury of the alleged alternatives in the disjunctive. The reason given by the courts is that the jury does not need to be unanimous on the method of committing a single crime. *See, e.g., State v. Garnett*, 209 N.C. App. 537 (2011) (not error for trial court to instruct jury that State must prove defendant maintained a dwelling house for "keeping *or* selling marijuana" where indictment charged defendant with maintaining a dwelling house for "keeping *and* selling a controlled substance"); *State v. Petty*, 132 N.C. App. 453 (1999) (in first-degree sex offense case, disjunctive instructions on whether sex act was cunnilingus or penetration not error because offense could be committed in either of two ways). Reversal on appeal may still be required, however, if the judge instructs the jury on alternative ways of committing the offense, there is insufficient evidence to support one of those theories, and the record does not indicate on which theory the jury relied. *See, e.g., State v. Pakulski*, 319 N.C. 562 (1987) (error to instruct jury on felony murder based on felonious breaking or entering and armed robbery where breaking was without a deadly weapon, so that felony would not be a predicate to a felony murder charge; new trial ordered because uncertain whether jury relied on improper theory to support murder verdict); *State v. Moore*, 315 N.C. 738 (1986) (insufficient evidence to support one of three purposes submitted to jury in support of first-degree kidnapping).

If the State alleges only one of the alternative ways of committing an offense, the State may be bound by the theory it has alleged and precluded from obtaining a conviction based on alternative theories. *See, e.g., State v. Yarborough***,** 198 N.C. App. 22 (2009)

(while State is not required to allege the felony that was the purpose of a kidnapping, if it does so, the State must prove the particular felony or fatal variance may result); *see also infra* § 8.5I, Variance between Pleading and Proof (discussing variance issues).

Single statute creates more than one crime. If a single statute creates more than one crime—that is, the statute creates separate offenses for which a defendant could be separately punished—only one of those crimes should be charged in each count. *See State v. Thompson*, 257 N.C. 452, 456 (1962) (stating that pleading "should contain a separate count, complete within itself, as to each criminal offense" but holding that defendant waived right to attack warrant by proceeding to trial without moving to quash); *State v. Albarty*, 238 N.C. 130 (1953) (jury verdict, which was based on misdemeanor pleading charging that defendant sold, bartered, or caused to be sold a lottery ticket, was invalid; each act of selling, bartering, or causing to be sold was separate offense, and verdict was not sufficiently definite to identify crime of which defendant was convicted). Older cases indicate that if the State alleges more than one offense (conjunctively or disjunctively) in a single count, the count is defective and subject to dismissal. However, under G.S. 15A-924(e), the defendant's remedy appears to be a motion to require the State to elect one of the offenses. *See supra* § 8.5F, Two Crimes in One Count (Duplicity).

If the court gives disjunctive jury instructions and the alternatives are separate offenses, not alternative ways of committing a single offense, the instructions violate the defendant's state constitutional right to a unanimous verdict. *See, e.g.*, *State v. Lyons*, 330 N.C. 298 (1991) (disjunctive instructions are fatally ambiguous if the alternatives constitute separate offenses for which the defendant could be separately punished; instruction that permitted jury to find that defendant assaulted Douglas Jones and/or Preston Jones violated jury unanimity requirement); *State v. Diaz*, 317 N.C. 545 (1986) (jury instructions that charged that defendant "knowingly possessed or transported" marijuana invalid because each act of possessing and transporting constituted separate crime for which defendant could be separately punished).

Which is it? Where a statute contains disjunctive clauses, it is not always easy to discern whether the legislature intended to make each disjunctive alternative a separate offense, or intended for the disjunctive clauses to create alternative means of committing one offense. The N.C. Supreme Court has stated that where the disjunctive alternatives go to the "gravamen" of the offense then separate offenses were intended, and otherwise not. *See State v. Creason*, 313 N.C. 122 (1985) (possession with intent to sell or deliver creates one offense with separate means of committing it; possession with intent to transfer is gravamen of offense); *State v. Hartness*, 326 N.C. 561 (1990) (indecent liberties with child by touching child or compelling child to touch defendant creates alternative means of committing same offense; gravamen of offense is taking indecent liberties); *see also Schad v. Arizona*, 501 U.S. 624 (1991) (Due Process requires jury unanimity regarding specific crime; court does not decide extent to which states may define acts as alternative means of committing single crime).

This rule can be hard to apply. In situations where the law is unclear, be careful what you ask for. An objection to a pleading on the ground that it is disjunctive may result in the

State re-indicting the defendant separately for each alternative, and punishing the defendant separately for each.

For more cases on this issue, see Robert L. Farb, *The "Or" Issue in Criminal Pleadings, Jury Instructions, and Verdicts; Unanimity in Jury Verdict*, (UNC School of Government, Feb. 2010), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/verdict.pdf .

H. One Crime in Multiple Counts (Multiplicity)

The Double Jeopardy Clause of the Fifth Amendment regulates multiple punishments for the same offense in the same proceeding. (Double Jeopardy imposes stricter requirements on prosecution of the same offense in successive proceedings. *See infra* § 8.6A, Double Jeopardy.) The State may indict and try a defendant for crimes that are the "same" for Double Jeopardy purposes, but the defendant may only be punished for one of the offenses unless the legislature has made it clear that it intended for there to be multiple punishments. *See Missouri v. Hunter*, 459 U.S. 359 (1983); *State v. Gardner*, 315 N.C. 444 (1986). For example, if two counts of an indictment separately charge your client with larceny and robbery of the same property, the State may proceed to trial on both charges. However, if the defendant is convicted of both, judgment on one of the two must be arrested to avoid multiple punishment. *See State v. Jaynes*, 342 N.C. 249 (1995) (where defendant was separately indicted for and convicted of robbery and larceny of vehicle from same victim in same taking, larceny was lesser included offense of robbery and judgment for larceny had to be arrested).

Even if offenses are not considered the "same" for double jeopardy purposes, multiple punishments may still be barred in light of legislative intent. *See State v. Ezell*, 159 N.C. App. 103 (2003) (legislature did not intend to allow multiple punishments for assault inflicting serious bodily injury and assault with deadly weapon with intent to kill inflicting serious injury in connection with same conduct); *see also State v. Davis*, 364 N.C. 297 (2010) (applying *Ezell*'s analysis to hold that defendant could not be sentenced for second-degree murder and felony death by vehicle; similarly, defendant could not be sentenced for assault with deadly weapon inflicting serious injury and felony serious injury by vehicle). In both *Ezell* and *Davis*, the court relied on the General Assembly's inclusion in the statute that it applied "unless the conduct is covered under some other provision of law providing greater punishment." In light of this language, the court concluded that the General Assembly did not intend to impose multiple punishments.

I. Variance Between Pleading and Proof

General rule. A defendant may be convicted only of the offense alleged in the indictment. *See State v. Faircloth*, 297 N.C. 100 (1979); *State v. Cooper*, 275 N.C. 283 (1969); *State v. Jackson*, 218 N.C. 373 (1940). Not only must the *proof* conform to the indictment, the *instructions* to the jury must also be tailored to the offense alleged in the pleadings. It has been held to be plain error to instruct the jury on an offense not charged in the indictment. *See, e.g., State v. Williams*, 318 N.C. 624 (1986) (where indictment alleged forcible rape and state's proof was of statutory rape because victim was under

twelve years old, indictment would not support conviction); *State v. Rahaman*, 202 N.C. App. 36 (2010) (proper to arrest judgment where jury was instructed on the crime of felony possession of a stolen motor vehicle, but defendant was never indicted on that crime; however, retrial of that charge not barred because dismissal was not based on insufficient evidence and therefore did not amount to acquittal); *State v. Langley*, 173 N.C. App. 194 (2005) (finding fatal variance in possession of firearm by felon case where State alleged in indictment that defendant possessed handgun but evidence at trial showed defendant possessed sawed-off shotgun; "handgun" was a material and essential element of offense); *cf. State v. Rogers*, ___ N.C. App. ___, 742 S.E.2d 622 (2013) (error, but not plain error where first-degree burglary indictment alleged that defendant entered dwelling with intent to commit larceny, but trial court instructed jury it could find defendant guilty if at the time of the breaking and entering he intended to commit robbery with a dangerous weapon; defendant was not prejudiced because instruction benefited defendant by requiring State to prove an additional element).

If the indictment alleges a particular theory of a crime, the State is bound to prove that theory. *See, e.g.*, *State v. Clark*, 208 N.C. App. 388 (2010) (in felonious breaking and entering a motor vehicle, where State alleged the intent to commit a specific felony, the State must prove that allegation); *State v. Loudner*, 77 N.C. App. 453 (1985) (State need not allege particular sex act in indictment for sex offense, but when it does it is bound by those allegations). An exception to this rule exists where the allegations in the pleading are considered "surplusage" or not essential to the crime. *See State v. Pickens*, 346 N.C. 628 (1997) (allegation in indictment for firing into occupied dwelling that shooting was done with shotgun was surplusage; no error where State proved that weapon used was handgun); *State v. Westbrooks*, 345 N.C. 43 (1996) (allegations in indictment for murder that defendant was actor in concert was surplusage; State free to prove that defendant was accessory before fact); *State v. Lark*, 198 N.C. App. 82 (2009) (language in indictment identifying a particular sex act to support felonious child abuse charge was surplusage; trial court instructed jury on the theory alleged in the indictment and on second theory supported by the proof). If you are not sure whether factually specific allegations in an indictment are binding, or will be considered mere surplusage, ask for a bill of particulars. Bills of particular are binding on the State. *See* G.S. 15A-925(e).

Motion to dismiss. A challenge to a variance between pleading and proof should be raised by a motion to dismiss for insufficient evidence *and* for fatal variance at the close of the State's evidence and at the close of all of the evidence. *See State v. Bell*, 270 N.C. 25 (1967) (variance properly raised by motion for nonsuit); *State v. Pulliam*, 78 N.C. App. 129 (1985) (variance properly raised by motion to dismiss for insufficient evidence). Recent cases have required that defendants specifically assert fatal variance to preserve the issue for appeal. *State v. Mason*, ___ N.C. App. ___, 730 S.E.2d 795 (2012) (by failing to assert fatal variance as a basis for his motion to dismiss, defendant did not preserve the argument for appellate review); *accord Hester*, 736 S.E.2d 571 (2012). Counsel may use the following "magic words" to ensure preservation.

> "Your Honor, the defense moves to dismiss each charge on the ground that the evidence is insufficient as a matter of law on every element of

> each charge to support submission of the charge to the jury and that submission to the jury would therefore violate the Fourteenth Amendment.
>
> Further, the defense moves to dismiss each charge on the ground that, as to each charge, there is a variance between the crime alleged in the indictment and any crime for which the State's evidence may have been sufficient to warrant submission to the jury and that submission to the jury would therefore violate the Fifth, Sixth, and Fourteenth Amendments.
>
> [Lay out specific insufficiency arguments and specific variance arguments, if any.]
>
> [If you made specific insufficiency or variance arguments, then repeat motion to dismiss: "Therefore, Your Honor, the defense moves to dismiss each charge on the ground that . . . .]"

Reindictment following dismissal for variance. When charges are dismissed because of variance between the pleading and proof, the defendant is acquitted of the charged offense. The State has failed to offer sufficient evidence to support the charged offense and suffers a nonsuit. Generally, the State is free to reindict on the theory that was proven at trial but not charged. *See State v. Wall*, 96 N.C. App. 45 (1989); *State v. Loudner*, 77 N.C. App. 453 (1985); *State v. Ingram*, 20 N.C. App. 464 (1974).

Reindictment may be barred in some instances, however. *See supra* § 8.2E, Timing and Effect of Motions to Dismiss in District Court (discussing effect of dismissal on subsequent charges) and *infra* § 8.6, Limits on Successive Prosecution.

Cases finding fatal variance. In the following cases, a motion to dismiss at the end of the evidence was granted on the grounds of variance between the pleading and proof.

State v. Christopher, 307 N.C. 645 (1983) (fatal variance where defendant prepared alibi defense based on indictment alleging offense occurred on a specific date, but State offered evidence showing crime might have occurred over a three-month period)

State v. Faircloth, 297 N.C. 100 (1979) (indictment charged kidnapping to facilitate flight following commission of felony of rape, while proof was that victim was kidnapped to facilitate commission of felony of rape)

State v. Best, 292 N.C. 294 (1977) (doctor who prescribed drugs wrongly charged with sale or delivery of drugs)

State v. Bell, 270 N.C. 25 (1967) (indictment charged robbery of Jean Rogers while evidence showed robbery of Susan Rogers)

State v. Sergakis, ___ N.C. App. ___, 735 S.E.2d 224 (2012) (trial court committed plain error by instructing jury it could find defendant guilty of conspiracy if defendant conspired to commit felony breaking and entering or felony larceny where indictment alleged only a conspiracy to commit felony breaking or entering); *see also State v. Pringle*, 204 N.C. App. 562, 566–67 (2010) ("where an indictment charging a defendant with conspiracy names specific individuals with whom the defendant is alleged to have conspired and the evidence at trial shows the defendant may have conspired with persons other than those named in the indictment, it is error for the trial court to instruct the jury that it may find the defendant guilty of conspiracy based upon an agreement with persons not named in the indictment"; no error in this case where indictment alleged that defendant conspired to commit robbery with a dangerous weapon with "Jimon Dollard and another unidentified male," evidence at trial did not vary from allegation in indictment, and trial court instructed jury that it could find defendant guilty if the jury found the defendant conspired with "at least one other person," which court found was in accord with material allegations in indictment and evidence at trial)

State v. Khouri, ___ N.C. App. ___, 716 S.E.2d 1 (2011) (fatal variance existed where indictment stated sexual offense occurred sometime between March 30, 2000 and December 31, 2000, but testimony showed the offense occurred in spring 2001)

State v. Langley, 173 N.C. App. 194 (2005) (finding fatal variance in possession of firearm by felon case where State alleged in indictment that defendant possessed handgun but evidence at trial showed defendant possessed sawed-off shotgun; "handgun" was a material and essential element of offense)

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

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 some time before the date listed in the indictment; and defendant relied on the date alleged in the indictment to prepare alibi defense for the weekend of June 15)

State v. Bruce, 90 N.C. App. 547 (1988) (different sex act with child than that alleged in indictment)

State v. McClain, 86 N.C. App. 219 (1987) (indictment alleged kidnapping to facilitate rape and terrorize victim; court instructed jury it could convict if defendant kidnapped to inflict serious injury)

State v. Washington, 54 N.C. App. 683 (1981) (indictment charged prison escape under

G.S. 148-45(b) while evidence showed failure to return from work release program in violation of G.S. 148-45(g)(1))

State v. Trollinger, 11 N.C. App. 400 (1971) (defendant charged with armed robbery but evidence was that he obtained items from trash can)

Cases where fatal variance not shown. In the following cases, convictions were upheld.

State v. Thompson, 359 N.C. 77 (2004) (no fatal variance where indictment for armed robbery designated a property owner different from the property owner shown at trial; gravamen of offense is endangering or threatening human life by firearms or other dangerous weapons in perpetration of robbery)

State v. Pickens, 346 N.C. 628 (1997) (no fatal variance where indictment alleged firing into occupied dwelling with shotgun and evidence showed firing into occupied dwelling with handgun; "gist of offense" was firing into dwelling with firearm)

State v. Westbrooks, 345 N.C. 43 (1996) (no fatal variance where indictment alleged defendant acted in concert with another to commit murder, and proof showed that defendant was accessory before fact to murder; theory of murder was "surplusage," and State was not bound by it)

State v. Seelig, ___ N.C. App. ___, 738 S.E.2d 427 (2013) (no fatal variance between indictment alleging that defendant obtained value from victim and evidence showed that he obtained value from victim's husband; indictment for obtaining property by false pretenses need not allege ownership of the thing of value obtained; thus allegation was surplusage)

State v. Mason, ___ N.C. App. ___, 730 S.E.2d 795 (2012) (no fatal variance where name of victim was "You Xing Lin" in indictment but Lin You Xing testified at trial; court finds defendant not surprised or disadvantaged by different order of name)

State v. Roman, 203 N.C. App. 730 (2010) (no fatal variance where warrant alleged defendant assaulted officer while he was discharging official duty of arresting defendant for communicating threats, and testimony at trial showed assault occurred when officer arrested defendant for being intoxicated and disruptive in public; reason for arrest was immaterial)

State v. Johnson, 202 N.C. App. 765 (2010) (no fatal variance where indictment alleged "Detective Dunabro" as purchaser of cocaine and evidence at trial identified purchaser as "Agent Amy Gaulden," where they were the same person; she was commonly known by both her maiden and married name)

State v. Williams, 201 N.C. App. 161 (2009) (even if there was variance between the allegation concerning the method of strangulation and the evidence at trial, variance was immaterial; method of strangulation alleged in indictment was surplusage)

Other cases. For additional cases addressing fatal variance, see Smith, *Criminal Indictment*, *available at* www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0803.pdf.

J. Timing of Motions to Challenge Indictment Defects

There are two somewhat inconsistent rules governing the timing of challenges to indictments. G.S. 15A-952 states that challenges to indictments must be made before arraignment or they are waived. On the other hand, if the defect in the indictment is jurisdictional, then the error is unwaivable and may be raised at any time. *See State v. Wallace*, 351 N.C. 481, 503 (2000) ("where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time"); G.S. 15A-952(d) (motion concerning jurisdiction of court or failure of pleading to charge offense may be made at any time).

It is not always easy to determine whether a defect in a pleading is jurisdictional. The first three subsections of this § 8.5, Common Pleading Defects in Superior Court—covering failure to allege a crime within the jurisdiction of the superior court, failure to allege a crime at all, and failure to set forth all essential elements of the crime—describe jurisdictional errors. *See Wallace*, 351 N.C at 503–504 (allegation that indictment failed to include all elements of crime was jurisdictional in nature). Failing to identify the victim, or misidentifying the victim, likely is also fatal. However, if a mistake concerning the identity of the victim appears technical, and did not mislead the defendant, the error may be waivable.

Misnomers regarding the defendant's name usually must be objected to before entry of plea. *See State v. Young*, 54 N.C. App. 366 (1981), *aff'd*, 305 N.C. 391 (1982). Other errors, such as an incorrect date or place, that do not change the nature of the offense charged, are not jurisdictional defects. *See, e.g.*, *State v. Price*, 310 N.C. 596 (1984) (permissible to amend indictment to change date of offense from date victim died to date victim was shot). Duplicity and multiplicity in the pleadings are not jurisdictional defects (although jury instructions that are disjunctive may invalidate a conviction for lack of a unanimous jury verdict, and multiple punishments for overlapping offenses may be barred).

If you are dealing with an indictment that contains a jurisdictional defect, it may be advantageous to wait until during trial (after jeopardy has attached, that is, when the jury is empanelled and sworn) or even after conviction to object to the indictment. There are several potential advantages to such a strategy. First, in certain situations, going to trial may create a double jeopardy bar to a successor prosecution. Second, if there is a mistake in the indictment and the State's proof does not conform to the allegations in the indictment, you may have a good variance claim at the end of trial. Third, if you try the case without raising any objection and the defendant is acquitted, the State is likely barred from retrying the defendant. *See Ball v. United States*, 163 U.S. 662 (1896) (acquittal upon indictment that defendant did not object to as insufficient barred second indictment for same offense).

Sometimes the remedy for a faulty indictment is not dismissal. If the indictment states the essential elements of a crime (for instance, indecent liberties with a child), but fails to allege sufficient details to prepare a defense, you should request a bill of particulars. *See* G.S. 15A-925. If the pleading is duplicitous you should request that the State elect an offense prior to trial. If the State declines to elect, you then have grounds for dismissal. *See* G.S. 15A-924(b). The cure for pleadings where the "same" offense is charged twice or the General Assembly did not intend to impose multiple punishments (multiplicity) is to move to arrest judgment on one offense after conviction.

G.S. 15A-924(f) also provides that the defendant may move to strike allegations that are inflammatory or prejudicial surplusage.

8.6 Limits on Successive Prosecution

This section discusses challenges involving pleadings that may be made when the State seeks to re-prosecute a defendant for criminal conduct that already has been the subject of previous proceedings, either in district or superior court. In such cases, check both sets of pleadings to determine whether there is a double jeopardy, statutory joinder, or due process bar to the successive prosecution (discussed below).

A. Double Jeopardy

Protections. The Double Jeopardy Clause of the Fifth Amendment protects against:

- a second prosecution for the same offense after acquittal;
- a second prosecution for the same offense after conviction (by trial or plea); and
- multiple punishments in a single prosecution for the same offense (*see supra* § 8.5H, One Crime in Multiple Counts (Multiplicity)).

See North Carolina v. Pearce, 395 U.S. 711 (1969); *State v. Brunson*, 327 N.C. 244 (1990) (article 1, section 19 of the N.C. Constitution affords defendants same protections). This section discusses Double Jeopardy restrictions on successive prosecutions. For further discussion of double jeopardy, see *infra* § 13.4B, Motion to Dismiss on Double Jeopardy Grounds.

General test. The test used to determine whether offenses are the "same" for double jeopardy purposes is the same-elements test of *Blockburger v. United States*, 284 U.S. 299 (1932). Under that test, the question is whether each offense requires proof of an element not contained in the other; if not, they are the same offense and double jeopardy bars a successive prosecution.

Lesser offenses. Under the same-elements test of double jeopardy, a lesser offense is considered the "same" as the greater offense. *See Brown v. Ohio*, 432 U.S. 161 (1977). For example, conviction or acquittal of misdemeanor assault with a deadly weapon ordinarily would bar a later prosecution of felony assault with a deadly weapon with

intent to kill based on the same act. The double jeopardy bar does not apply simply because the offenses involve the same act; the offenses must meet the same-elements test (although other doctrines, discussed below, may bar successive prosecutions based on the same incident). Thus, conviction of misdemeanor assault with a deadly weapon would not bar, on double jeopardy grounds, a felony prosecution for shooting into occupied property based on the same act.

Proceedings covered. Double jeopardy protections apply to all prosecutions of a criminal nature. Thus, a finding of responsibility or nonresponsibility for an infraction, although considered a noncriminal violation of law, could bar a later criminal prosecution for the "same" offense. *See State v. Hamrick*, 110 N.C. App. 60 (1993) (stating this general rule, but finding no bar to prosecution of death by vehicle charge where charges for misdemeanor death by vehicle and for driving left of center infraction were filed simultaneously and defendant voluntarily appeared before magistrate and entered plea of responsible for infraction); *State v. Griffin*, 51 N.C. App. 564 (1981) (successive prosecution barred where defendant pled guilty to failing to yield right of way on April 10 and defendant was charged on April 17 with death by vehicle based on same conduct). For a further discussion of *Hamrick* and *Griffin*, see *infra* "Limitations" in this subsection A.

Likewise, acquittal or conviction of criminal contempt will sometimes bar a later criminal prosecution. *See United States v. Dixon*, 509 U.S. 688 (1993) (finding that double jeopardy protections barred later prosecution for assault after defendant had been convicted of criminal contempt for violating domestic violence protective order forbidding same conduct); *State v. Dye*, 139 N.C. App. 148 (2000) (distinguishing *Gilley*, below, court holds that double jeopardy barred later prosecution for domestic criminal trespass after defendant had been adjudicated in criminal contempt for violating domestic violence protective order forbidding similar conduct); *State v. Gilley*, 135 N.C. App. 519 (1999) (criminal contempt proceeding for violation of domestic violence protective order barred later prosecution for assault on female but not prosecution for domestic criminal trespass, misdemeanor breaking and entering, and kidnapping).

Attachment of jeopardy. In district court, jeopardy attaches once the court begins to hear evidence. *See State v. Brunson*, 327 N.C. 244 (1990). In superior court, jeopardy attaches when the jury is empaneled and sworn. *See State v. Bell*, 205 N.C. 225 (1933). For guilty pleas in either level of court, jeopardy generally attaches when the court accepts the plea. *See State v. Wallace*, 345 N.C. 462 (1997) (jeopardy did not attach where judge rejected guilty plea); *State v. Ross*, 173 N.C. App. 569 (2005) (jeopardy did not attach where record insufficient to show whether guilty plea tendered or accepted), *aff'd per curiam*, 360 N.C. 355 (2006); *see also* 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 25.1(d), at 589–99 (3d ed. 2007).

Waiver and guilty pleas. If the defendant pleads guilty in superior court, he or she ordinarily will be unable to raise a double jeopardy claim on appeal. *See State v. Hopkins*, 279 N.C. 473 (1971); *see also State v. McKenzie*, 292 N.C. 170 (1977) (defendant waived

double jeopardy claim by failing to raise claim at trial level). *But see United States v. Broce*, 488 U.S. 563 (1989) (plea of guilty does not waive claim that charge, judged on its face, is one that State may not constitutionally prosecute); *Thomas v. Kerby*, 44 F.3d 884 (10th Cir. 1995) (recognizing exception created by *Broce*).

A guilty plea in district court probably does not constitute a waiver of the defendant's right to argue double jeopardy on appeal for a trial de novo in superior court, but no cases have specifically addressed the issue. *See generally State v. Sparrow*, 276 N.C. 499 (1970) (defendant convicted in district court entitled to appeal to superior court for trial de novo as matter of right, even if defendant entered guilty plea in district court); G.S. 15A-953 (except for motion to dismiss for improper venue, "no motion in superior court is prejudiced by any ruling upon, or a failure to make timely motion on, the subject in district court").

Limitations. The bar on re-prosecution of offenses that are considered the "same" for double jeopardy purposes is not absolute. There are some limitations.

First, if subsequent events provide the basis for new charges (for example, the victim dies after prosecution for assault), the defendant may be charged with those offenses notwithstanding a prior trial or plea to a lesser offense. *See State v. Meadows*, 272 N.C. 327 (1968). *But see State v. Griffin*, 51 N.C. App. 564 (1981) (entry of guilty plea to traffic violation barred later prosecution for death by vehicle even though victim died after plea).

Second, the double jeopardy bar does not necessarily apply if the defendant acts to sever the charges and then pleads guilty to one of them.

- In *Ohio v. Johnson*, 467 U.S. 493 (1984), the defendant pled guilty to one count of a multi-count indictment. The plea did not bar continued prosecution of the other counts. *See also State v. Hamrick*, 110 N.C. App. 60 (1993) (applying *Ohio v. Johnson* and finding no bar to prosecution of death by vehicle charge where charges for misdemeanor death by vehicle and driving left of center infraction were filed simultaneously and defendant voluntarily appeared before magistrate and entered plea of responsible to infraction).
- If the defendant successfully moves to sever offenses or opposes joinder, and then pleads guilty to one of the offenses, double jeopardy would not bar prosecution of the remaining offenses. *See Jeffers v. United States*, 432 U.S. 137 (1977) (defendant was solely responsible for severing offenses and so could not raise double jeopardy as bar).

In contrast, if the State schedules two offenses for different court dates, and the defendant is not responsible for severing the offenses, a defendant's guilty plea to the first-scheduled offense should bar a later prosecution for the same offense. *See* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 17.4(b), at 91–92 (3d ed. 2007).

B. Collateral Estoppel

Double jeopardy includes a collateral estoppel component. A defendant who is *acquitted* in a first trial may be able to rely on the constitutional doctrine of collateral estoppel to bar a second trial on a factually related crime. Collateral estoppel bars the State from relitigating an issue of fact that has previously been determined against it. For example, in *Ashe v. Swenson*, 397 U.S. 436 (1970), the defendant was acquitted of the robbery of "A" in a case in which the only issue of fact was the defendant's presence at the scene. The Court held that the State was collaterally estopped from a subsequent prosecution of the defendant for the robbery of "B" because the issue of his presence had already been decided adversely against the State. *See also State v. McKenzie*, 292 N.C. 170 (1977) (acquittal of DWI precludes State from relitigating issue at defendant's subsequent involuntary manslaughter trial); *State v. Parsons*, 92 N.C. App. 175 (1988) (trial court dismisses indictment for manslaughter of fetus on basis that unborn child is not "person" within meaning of statute and thus indictment did not state crime; State barred by collateral estoppel from bringing second indictment changing term "fetus" to "unborn child" because issue had already been litigated); G.S. 15A-954(a)(7) (codifying constitutional requirement, statute provides that court must dismiss charge if "issue of fact or law essential to a successful prosecution has been previously adjudicated in favor of the defendant in a prior action between the parties").

The term "acquittal" includes a not guilty verdict or dismissal for insufficient evidence. For double jeopardy purposes, an acquittal also includes an implied acquittal of a greater offense. For example, if the defendant is charged with assault with a deadly weapon with intent to kill and is convicted of assault with a deadly weapon, the defendant is deemed to be acquitted of the greater offense. *See Green v. United States*, 355 U.S. 184 (1957); *State v. McKenzie*, 292 N.C. 170 (1977); *State v. Broome*, 269 N.C. 661 (1967).

The application of collateral estoppel is contingent on the previous resolution of the *same* issue. The test is whether a second conviction would *require* the jury to find against the defendant on an issue already decided in his or her favor. *See Dowling v. United States*, 493 U.S. 342 (1990) (acquittal of robbery of victim in her home no bar to showing that defendant was among the group in the house, as the acquittal need not have been based on issue of defendant's presence); *State v. Edwards*, 310 N.C. 142 (1984) (acquittal of larceny charge no bar to prosecution for breaking or entering with intent to commit larceny).

C. Failure to Join

G.S. 15A-926(c) provides that a defendant who has been tried for an offense may move to dismiss a successor charge of any joinable offense, and this motion to dismiss must be granted. *See also* G.S. 15A-926 Official Commentary (statute was intended to bar successive trials of offenses, absent some reason for separate trials); 2 ABA STANDARDS FOR CRIMINAL JUSTICE Standard 13-2.3 & commentary (2d ed. 1980). Our statutory right to dismissal is broader than double jeopardy protections because it bars subsequent prosecutions of related offenses, not merely the same or lesser offenses. For example, if a

defendant is tried for felony breaking and entering, the defendant has a statutory right to dismissal of a later larceny charge that the prosecution could have joined with the earlier offense.

There are a number of limits to this right, however. First, the statute applies only to charges brought after the first trial. It creates no right to dismissal with respect to joinable charges that were pending at the time of the first trial and that the defendant could have moved to join. *See* G.S. 15A-926(c)(2) (no right to dismissal if defendant fails to move to join charges, thus waiving right to joinder, or if defendant makes such a motion and motion is denied). Second, the right to dismissal of a successor charge does not apply if the defendant pled guilty or no contest to the previous charge. *See* G.S. 15A-926(c)(3). If defense counsel has concerns about this possibility, counsel may want to make an explicit part of any plea agreement that the State will not prosecute any other charges related to the transaction or occurrence. Third, the court may deny a motion to dismiss if the court finds that the prosecution did not have sufficient evidence to try the successor charge at the time of trial or the ends of justice would be defeated by granting the motion. *See* G.S. 15A-926(c)(2); *State v. Warren*, 313 N.C. 254 (1985) (no error in denial of motion to dismiss burglary and larceny charges brought after trial of related murder when insufficient evidence of those offenses existed at time of murder trial; delay in charging additional offenses was not for purpose of circumventing statutory joinder requirements).

Case law has further limited the right. In *State. v. Furr*, 292 N.C. 711 (1977), the N.C. Supreme Court held that the right to dismissal applies only where the defendant has been indicted for the joinable offenses at the time of the first trial. This holding effectively eviscerated the statutory right to dismissal because G.S. 15A-926(c)(2), discussed above, provides for no right to dismissal of a pending charge that the defendant failed to move to join or unsuccessfully moved to join. In a later case, *State v. Warren*, 313 N.C. 254 (1985), the N.C. Supreme Court rolled back *Furr*, recognizing that the joinder statute applies to successor charges that were not pending at the time of trial and that would have been joinable had the State filed them. The Court added, however, that a defendant who has been tried for an offense is entitled to dismissal of joinable offenses only if the sole reason that the State withheld indictment on the offenses was to circumvent the statutory joinder requirements. The Court ameliorated the potential strictness of this requirement by stating that the defendant may meet this burden by showing that the State had substantial evidence of the successor charge at the time of the first trial or that the State's evidence at a second trial would be the same as at the first trial. In *Warren*, the Court found that the defendant failed to make such a showing and that there were valid reasons for the State's failure to seek an indictment charging larceny and burglary before the defendant was tried on a related murder charge. *See also State v. Tew*, 149 N.C. App. 456 (2002) (relying on *Warren*, court found that State did not circumvent statutory joinder requirements and trial court did not err in denying defendant's motion to dismiss successor felony assault charge; defendant had originally been convicted of attempted second-degree murder, and N.C. Supreme Court vacated the conviction on the rationale, not established at the time of the charge, that the offense of attempted second-degree murder did not exist).

D. Due Process

If a defendant is convicted of a misdemeanor (for example, misdemeanor assault) in district court and appeals for a trial de novo in superior court, a subsequent indictment of the defendant for a felony assault arising out of the same incident is presumed to be vindictive and therefore in violation of Due Process. This rule bars prosecution of the more serious offense regardless of whether it meets the same-elements test for double jeopardy purposes. *See Blackledge v. Perry*, 417 U.S. 21 (1974) (Due Process bars indictment for more serious offense regardless of whether prosecutor acted in good or bad faith); *see also Thigpen v. Roberts*, 468 U.S. 27 (1984) (following *Blackledge*); *State v. Bissette*, 142 N.C. App. 669 (2001) (*Blackledge* barred filing of felony charge after appeal of misdemeanor conviction for trial de novo; State also was barred from refiling misdemeanor charge because State elected at commencement of trial on felony charge to dismiss misdemeanor charge); *State v. Mayes*, 31 N.C. App. 694 (1976) (recognizing that showing of actual vindictiveness not required).

Can the State rebut this presumption of vindictiveness? The only situation in which the U.S. Supreme Court has found that the presumption may be rebutted is when subsequent events form the basis for new charges (for example, the victim dies after appeal). *See Blackledge*, 417 U.S. at 29 n.7; *Thigpen*, 468 U.S. at 32 n.6. What other circumstances, if any, would be sufficient to rebut the presumption is unclear.

If the defendant appeals from a plea of guilty in district court, offenses that were dismissed as part of any plea agreement, including felonies, may be charged in superior court. *See State v. Fox*, 34 N.C. App. 576 (1977) (State may indict defendant on felony breaking and entering and felony larceny where defendant was initially charged with those offenses but pled guilty to misdemeanor breaking and entering pursuant to a plea agreement in district court and then appealed to superior court for trial de novo). If, however, the defendant is charged with a misdemeanor, pleads guilty in district court without any plea agreement, and then appeals, *Blackledge* bars the State from initiating felony charges based on the same conduct.

The State is not barred on appeal of a misdemeanor for a trial de novo from seeking a greater sentence for that misdemeanor than the district court imposed. *See Colten v. Kentucky*, 407 U.S. 104 (1972); *State v. Burbank*, 59 N.C. App. 543 (1982); *cf.* G.S. 15A-1335 (when conviction or sentence in superior court is set aside on direct review or collateral attack, court may not impose more severe sentence for same offense or for different offense based on same conduct); Jessica Smith, *Limitations on a Judge's Authority to Impose a More Severe Sentence After a Defendant's Successful Appeal or Collateral Attack*, ADMINISTRATION OF JUSTICE BULLETIN No. 2003/03 (UNC School of Government, July 2003), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/aoj200303.pdf. [*Legislative note:* Effective for resentencing hearings held on or after December 1, 2013, S.L. 2013-385 (H 182) amends G,S. 15A-1335 (resentencing after appellate review) to provide that the statute does not apply when a defendant on direct review or collateral attack succeeds in having a guilty plea vacated.]

E. Timing of Challenge

When the prosecution has failed to allege an offense properly as described in previous sections, the defendant may wish to wait until trial to move to dismiss the charges. *See supra* § 8.2, Misdemeanors Tried in District Court; § 8.4, Felonies and Misdemeanors Initiated in Superior Court; § 8.5, Common Pleading Defects in Superior Court.

In the situations described in this section § 8.6, there is less reason to wait to file a motion to dismiss. In all of the situations described here, the defendant has already been tried for one offense and the prosecution is seeking to try the defendant for another, related offense. If the defendant's motion to dismiss is successful, the prosecution should be barred from pursuing the charge.

If the case is in superior court, the following time limits apply: (1) the motions do not appear to be subject to G.S. 15A-952(b), which requires that certain motions be filed before arraignment; (2) if the motion to dismiss is for lack of joinder, G.S. 15A-926(c)(2) requires that it be filed before trial; (3) if the motion to dismiss is based on constitutional grounds, G.S. 15A-954(c) provides that it may be raised at any time; however, such motions may be waived by the failure to raise them at the trial level. *See State v. Frogge*, 351 N.C. 576 (2000) (defendant argued that prosecution was vindictive and moved to dismiss indictment; court finds that defendant waived motion by failing to make motion in trial court). For more on timing of motions, see *infra* Chapter 13, Motions Practice.

8.7 *Apprendi* and *Blakely* Issues

A. The Decisions

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court held that any fact (other than a prior conviction) that increases the punishment for a crime beyond the statutory maximum must be included in the charging instrument, submitted to the jury, and proven beyond a reasonable doubt. *Id.* at 476.[1] In *Blakely v. Washington*, 542 U.S. 296 (2004), the Court elaborated on the meaning of statutory maximum, holding "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Id.* at 303 (emphasis in original). In *State v. Allen*, 359 N.C. 425 (2005), *opinion withdrawn on other grounds*, 360 N.C. 569 (2006), the N.C. Supreme Court recognized that North Carolina's structured sentencing scheme violated the Sixth Amendment requirement that any factor, other than a prior conviction, that increases the

1. In a footnote in *Apprendi*, the Court stated that it was not reaching the question of whether the states are bound by the Fifth Amendment requirement that crimes be charged in a grand jury indictment. 530 U.S. at 477 n.3. However, the defendant has a Sixth and Fourteenth Amendment right to notice of the charges against him or her, and pleadings ordinarily must allege all the elements of the offense. *See generally State v. Hunt*, 357 N.C. 257 (2003) (recognizing these principles, but finding that North Carolina statutes authorize short-form indictments for murder and such indictments are sufficient to put defendants on notice of statutory capital aggravating factors).

defendant's maximum sentence be alleged in the pleading, submitted to the jury, and proven beyond a reasonable doubt.

In response to these decisions, the General Assembly revised the procedures for determining aggravating factors in the "Blakely Bill" (2005 N.C. Sess. Laws Ch. 145 (H 822)), effective for offenses committed on or after June 30, 2005. The Blakely Bill applies to structured sentencing for felonies in both district and superior court and requires that the finder of fact determine aggravating factors beyond a reasonable doubt unless admitted by the defendant. Additionally, the Blakely Bill changed the procedures for pleading or providing notice of aggravating factors and certain prior record points, as discussed below.

For a further analysis of the impact of *Blakely* on determining and weighing aggravating factors and prior record points, see 2 NORTH CAROLINA DEFENDER MANUAL § 24.1E (Right to Jury Verdict on Every Element of Offense, Including "Sentencing" Factors) (UNC School of Government, 2d ed. 2012); JOHN RUBIN & SHEA RIGGSBEE DENNING, PUNISHMENTS FOR NORTH CAROLINA CRIMES AND MOTOR VEHICLE OFFENSES 1-3 (UNC School of Government, Supp. 2008), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/punchtsuppl08.pdf; Jessica Smith, *North Carolina Sentencing after* Blakely v. Washington *and the* Blakely *Bill* (UNC School of Government, Sept. 2005), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/Blakely%20Update.pdf.

B. Notice and Pleading Requirements after *Blakely*

Aggravating factors and prior record points for structured sentencing felonies. In addition to the other pleading requirements, the Blakely Bill requires that every indictment (or information if an indictment is waived) allege any "catch all" aggravating factors under G.S. 15A-1340.16(d)(20) that it intends to use. The State does not need to allege in the indictment the aggravating factors specifically enumerated in G.S. 15A-1340.16(d)(1) through (19) except the aggravating factor in G.S. 15A-1340.16(d)(9) (offense directly related to public office or employment held by defendant). *See* G.S. 15A-1340.16(f) (requiring that indictment allege this aggravating factor); *see also* 2012 N.C. Sess. Laws Ch. 193 (H 153) (amending several statutes to require forfeiture of retirement benefits on conviction with this aggravating factor).

The State still must give written notice of aggravating factors it intends to use at least 30 days before trial or plea of guilty or no contest unless the defendant waives notice. *See* G.S. 15A-1340.16(a4), (a6); *see also State v. Mackey*, 209 N.C. App. 116 (2011) (State did not provide proper notice of intent to pursue aggravating factors by giving defendant plea offer letter stating that defendant "qualified for aggravated sentencing" under two enumerated aggravating factors; letter did not indicate that State intended to proffer these factors in court proceedings).

Similarly, the State need not allege in the indictment, but must provide 30-days' notice in writing of its intent to prove, the prior record level point in G.S. 15A-1340.14(b)(7)

(defendant committed the offense while on probation, parole, or post-release supervision, while serving a sentence of imprisonment, or while on escape from a correctional facility during a sentence of imprisonment). The applicable statutes do not require the State to provide written notice (or allege in the indictment) either prior convictions or the prior record point in G.S. 15A-1340.14(b)(6) (all elements of present offense are included in a prior offense for which defendant convicted).

Firearm and Other Enhancements. North Carolina's firearms enhancement statute increases the defendant's sentence beyond the statutory maximum, and the facts supporting the enhancement must be alleged in the indictment or information. *See* G.S. 15A-1340.16A(d) (requiring that indictment include this allegation); *see also State v. Lucas*, 353 N.C. 568 (2001), *overruled on other grounds, State v. Allen*, 359 N.C. 425 (2005), *opinion withdrawn on other grounds*, 360 N.C. 569 (2006). This procedure also applies to the sex offender enhancement in G.S. 15A-1340.16B, the bullet-proof vest enhancement in G.S. 15A-1340.16C, and the enhancements for certain methamphetamine offenses in G.S. 15A-1340.16D (expanded by S.L. 2013-124 (H 29) to include additional circumstances, effective for offenses committed on or after Dec. 1, 2013). *See generally* JOHN RUBIN, BEN F. LOEB, JR., & JAMES C. DRENNAN, PUNISHMENTS FOR NORTH CAROLINA CRIMES AND MOTOR VEHICLE OFFENSES 8–9 & n.11 (UNC School of Government, 3d ed. 2005).

In 2008, the General Assembly added the offenses of rape and sexual offense by an adult involving a child under age 13. *See* G.S. 14-27.2A, 14-27.4A. These statutes establish a mandatory sentence of 300 months but allow a judge, on determining "egregious aggravation," to impose a sentence of up to life without parole. This procedure likely violates *Blakely*. *See* John Rubin, *2008 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/06, at 2–4 (UNC School of Government, Nov. 2008), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0806.pdf.

Legislative note: Effective for offenses committed on or after October 1, 2013, S.L. 2013-369 (H 937) amends G.S. 15A-1340.16A to apply a firearm sentence enhancement to all felonies instead of Class A through E felonies only. The length of the enhancement depends on the class of felony (72 months for Class A through E felonies instead of the current 60 months; 36 months for Class F and G felonies; and 18 months for Class H and I felonies). G.S. 15A-1340.16A(d) continues to require that the facts supporting the enhancement be alleged in the indictment or information.

Misdemeanors, including impaired driving offenses. The Blakely Bill applies to structured sentencing for felonies in both district and superior court. It does not apply to structured sentencing for misdemeanors, which was not affected by the *Apprendi* and *Blakely* decisions. The Blakely Bill also does not apply to offenses not subject to structured sentencing, such as impaired driving. However, in *State v. Speight*, 359 N.C. 602 (2005), *vacated on other grounds*, 548 U.S. 923 (2006), the court addressed the application of *Blakely* to misdemeanor impaired driving and held that for impaired driving offenses tried in superior court (either when the offense is the subject of a misdemeanor appeal or is joined with a felony for trial initially in superior court),

aggravating factors other than prior convictions must be found by a jury beyond a reasonable doubt or admitted by the defendant.

The General Assembly thereafter amended G.S. 20-179 to require that aggravating factors in impaired driving cases be proved beyond a reasonable doubt. As revised, the statute also requires in superior court that the State provide notice of its intent to prove aggravating factors at least 10 days before trial. *See* G.S 20-179(a1); *see also* Shea Denning, *What's* Blakely *got to do with it? Sentencing in Impaired Driving Cases after Melendez-Diaz*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 24, 2009) (discussing applicability of Confrontation Clause to evidence of aggravating factors in impaired driving cases), http://nccriminallaw.sog.unc.edu/?p=567. The provisions of G.S. 20-179 also apply to other implied consent offenses. *See* G.S. 20-179(a) (statute applicable to impaired driving in a commercial vehicle; second or subsequent violations for operating a commercial vehicle after consuming alcohol; or second or subsequent violations for operating a school bus, school activity bus, or child care vehicle after consuming alcohol).

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

CRIMINAL PLEADINGS IN DISTRICT COURT

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

EXAMPLES:

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

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

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

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

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

PROBLEMS WITH PLEADING:

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

WHEN TO MOVE TO DISMISS:

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

SPECIFIC OFFENSES:

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

AMENDMENT:

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

PRACTICE TIPS:

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

INTERVIEWING

There are three components of a good client interview.

Be **Positive** –in your attitude/approach

Being positive does not mean being overly optimistic and misleading your client about the possible outcome. It does mean putting the best spin on the information provided and facts that you have.

Be **Productive**—in what you get from your client

Includes getting information from your client
Making sure you get the right information
Making sure your client understands your function
    Confidentiality
    Role of attorney

Be **Proactive** by getting down to business/ being practical

Acting in advance to deal with the situation; taking the steps to avoid a difficult situation.
Making sure that you speak to your client in a way they understand (saves you and them headaches in the future)
Taking good notes

Before you can put these abstract concepts into practical use, you have to start the with the client interview

A. Information Gathering

Information gathering is the most important aspect of the client interview, but it's the **type** of information you get and **how** you go about gathering it that counts. This includes more than work information and family support.

1. The information you get could be the difference between your client being found guilty and not guilty. If you don't get the right information, you may miss a crucial defense.

    a. Ask open-ended questions. Instead of asking: **do you have children?** Say: **tell me about your family.**

    b. Ask the same questions in different ways (and more than once)

    c. Give your client the opportunity to tell you his/her story in their own way.

2. Go into each interview knowing the basic information you have to get from your client

    a. have in interview sheet or checklist (see attachment A)

    b. don't be afraid to deviate from the "script."

3. Present the information in a way that is helpful to your client.

Positive/Productive/Proactive:

looking your client in eye and making sure they know you are listening to them and what they have to say <u>is important</u>. Keeping your head down and taking notes is not appropriate the whole time they are talking

Keep good notes in your file. This will save you from having to ask you client for information they've already given (which affects trust)

Go over the elements of the crime in a way to bring out possible defenses or legal issues. Unfortunately your clients aren't going to hand you the information on a silver platter. You may have to do a little digging.

Get witness or alibi information. The last thing you want to happen is for your client to say during trial: Well my boss was there and he saw the whole thing. Always ask.

This way you know what's happening with your clients <u>and</u> they know you know

B. Forming relationship with client

Whether it's for fifteen minutes or over several months, at soon as that case is assigned to you a relationship has begun. How successful that relationship is will largely be up to you.

1. Talk to your client not at him/her

2. Establishing trust

    a. know the law –that includes affirmative defenses. **Your client needs to trust you as an attorney. Be prepared with your elements of the crime and their defenses.**

    b. let the client know that you are comfortable in the courtroom and with the way things work.

    c. Keep them informed.

3. Treating client with respect

    a. your job while interviewing your client is to let them know that the opinion of the cops, DA, judge and general public is not your opinion

    b. how you speak to your client is there indication of how you will represent them

Positive/Proactive/Productive:

It's important that your client knows that while you are handling their case it is the most important one you have. Reinforce that idea.

Reassure them that you are on their side while remaining objective about the law and the facts.

Let them know that you're going to put up the best defense possible and that you're going to argue to the judge that they get the outcome of that they want (even if you don't agree with it. And then do just that.

Develop a rapport. We represent people we don't like all the time. However, you can't effectively represent someone that you can even tolerate speaking to and who refuses to speak with you. So utilize all the points to make sure that you have a working rapport with your client.

C. Making sure your client understands you

1. Don't speak over the client's head

    a. Legal jargon is not necessary to explain most charges or defenses

    b. Just because your client has a long record, doesn't mean s/he understands what's happening. Maybe no one else ever took the time to explain it. 2.

2. No two are alike

    a. Some clients will have had little or no experience with the system and quickly become intimidated, let them know that you can address them on their level

    b. Talk to them about what they are going to hear in court and assure them it will be explained afterwards if they don't understand.

Positive/Productive/Proactive:

Take the time to explain the legal language they will hear in court. Don't just leave the conditions of probation to the PO. Don't let the first time they hear the language of the transcript be from the judge. Don't let the first time they know jail is possible is when the deputy puts the handcuffs on them.

A client always wants to know the worse case scenario and it important that you tell them all the things that could happen **and** based on your experiences what probably will happen.

D. Making sure you understand your client

1. What are his/her issues?
    a. Mental Illness
    b. Retardation
    c. Youth
    d. Stubbornness
    e. Fear

Each of these will warrant that you approach your client in a different way. Sometimes there will be a combination and only through talking with (**not at**) your client, will you figure out how to best deal with him/her.

2. What is his/her motivation for the crime?
    a. Drug use
    b. Peer Pressure
    c. Retaliation
    d. Fear

Knowing underlying issues will go along way in negotiation and sentencing

Epilogue:

Be Positive: This doesn't stop after the interview. Put the best possible spin on the information your client give you. Know what to say and what to leave out. **Even you if you can sum up your client's life in thirty seconds, doesn't mean you should.**

Be Productive: Keep up with the law on the most common cases you handle. Revise your interview sheets when necessary.

Be proactive: Know your judges and DA's. Use this information to benefit your clients.

CLIENT INTERVIEWING
2015 New Misdemeanor Defender Training

ROADMAP

I. What type of lawyer are you?
II. Three Techniques to use during every client interview.
III. The Furious Five – type of clients.

1. WHAT TYPE OF LAWYER ARE YOU?

I. **Three Types of Public Defenders.**

a. The Die Hard.
   i. All about the client.
   ii. A feeling of doing for others . . . "Client-Driven"

b. The Runway Model.
   i. All about the lawyer.
   ii. A feeling of doing for self . . . "Self-Driven"

c. The Waiter
   i. All about waiting for the "real" job.
   ii. A feeling of just-do-it . . . "Opportunity-Driven"

II. **No Matter What Type of Lawyer You Are – We All Need the Same Thing.**

a. To zealously represent a client to the fullest – need client interviewing skills.

b. To be as effective in the courtroom as possible – need client interviewing skills.

c. To get the next job – need the marketable skill of client interviewing.

III. **If You Don't Maximize This Skill:**

a. Miserable . . . despise your clients.

b. Miss crucial information needed for your defense.

c. Client interaction – become ineffective and burdensome.

IV. **Generally, Client Interviewing is**

a. Time consuming in the short term.

b. But, if done properly, it can be very useful in the long term.

Trust is not built, trust is the result of what you've built.

2. THREE TECHINIQUES

I. **Set the Stage.**

a. Set the boundaries for the interview.
   i. Explain the process and expectations.
      1. Keep it brief . . . 60 seconds or less
   ii. Imagine: A chess board or an empty canvass (Four Corners).

b. Introduce the Four Corners.
   i. Yourself . . . "I am your attorney" then your name.
   ii. Trial and Guilty Plea options.
   iii. Charges.
      1. There is no discovery in District Court.
      2. But get what you can – copy of the Pink Sheet or Affidavit.
   iv. Sentencing options. (+ worst case scenario).
      1. Maximum sentence length.
      2. Probation length and conditions.
      3. Range of court costs and fees.
      4. Alternatives to convictions.

II. **Listen! (Silent)**

a. Purpose of the interview.
   i. The Case?
   ii. The Client?

b. To get started – ask open-ended questions.
   i. "What can you tell me about this case?"
   ii. A quick note about note-taking. . .
      1. Keeping notes will be important down the road – it will prevent you from having to ask your client to repeat important details all over again.
      2. But don't write verbatim . . . jot down a word or two.

c. Be Mindful of Distractors.
   i. Stanford game – rename that object
   ii. Race & the interview.
      1. Implicit Bias plays a role in how we interpret everything.
      2. Be mindful of your implicit bias towards the client.
      3. Be mindful of the client's implicit bias towards you the Public Defender.
      4. But don't let it create a barrier between you and the client.

Trust is not built, trust is the result of what you've built.

2. THREE TECHINIQUES (cont'd.)

III. **The Interview.**

a. You don't have to prove yourself.
   i. Not an interrogation.
   ii. Not an investigation.
   iii. Not an intramural competition.

b. Information gathering.
   i. Inter…inside.
   ii. View…to look.
   iii. Client inter-views allow you "to look inside" the facts of the case or the life experiences of your client.

c. Keep it Simple.
   i. No legal jargon.
   ii. Don't believe the tone or facts in the police report . . . Always BIASED.

d. Stay within the Four Corners.
   i. Gently guide the interview and keep on task.

3. THE FURIOUS FIVE

I. Every Client is Different.

a. Different clients require different approaches.

II. The 5 Common Types of Client (Courtesy of Kung Fu Panda).

a. The Emotionally Aggressive (Tigress).
   i. *Client Personality* – These type of clients normally:
      1. Lack control over their emotions.
      2. Are self-destructive.
      3. Believe the world is out to get them, a feeling of being abandoned.
   ii. *Lawyer Approach* - As the lawyer, you must:
      1. Acknowledge their emotions.
         a. "I can see that this really bothers you."
         b. "I hate that the cop did that to you."
         c. "I see that you are trying to do right."
      2. But do not get drawn into those emotions.
      3. Be disciplined.
         a. You cannot change their world, so stick to the case before you.

Trust is not built, trust is the result of what you've built.

THE FURIOUS FIVE (cont'd.)

b. The Intelligibly Challenged (Crane).
   i. *Client Personality* – These type of clients normally:
      1. Lack confidence.
      2. Act like it's not their fault
      3. Are immature or mentally disabled.
   ii. *Lawyer Approach* - As the lawyer you must:
      1. Be confident – show that you know what you are talking about.
      2. Do not ask or make insulting statements.
      3. Ask about mental health treatment, level of schooling, etc.

c. The Liars & Deceivers (Snake).
   i. *Client Personality* – These type of clients normally:
      1. Seem sneaky.
      2. Act timid but are not.
      3. Are elusive with the facts and the truth.
   ii. *Lawyer Approach* - As the lawyer you must:
      1. Be observant.
      2. Handle the facts with care.
      3. Don't argue with them – always say "it is up to the judge or jury."

d. The Cynic (Monkey).
   i. *Client Personality* – These type of clients normally:
      1. Make empty-threats.
      2. Act cynically.
      3. Are troublemakers.
   ii. *Lawyer Approach* - As the lawyer you must:
      1. Be compassionate.
      2. Be optimistic.
      3. Don't take it personal / laugh along when appropriate.

e. The Know-it-All (Mantis).
   i. *Client Personality* – These type of clients normally are:
      1. Jump to conclusions.
      2. Act impatiently.
      3. Are impulsive decision-makers.
   ii. *Lawyer Approach* - As the lawyer you must:
      1. Be patient.
      2. See the big picture and don't get caught up in the heat of the moment.
      3. Realize the more you say, the more you give them to argue about.

Know your lawyer-type; Use the three techniques (set the stage, listen, and inter-view); ID the client.

STRUCTURED SENTENCING

STATE OF NORTH CAROLINA

_____County _____ Seat of Court

File No.

NOTE: *[This form is to be used for misdemeanor offense(s). Use AOC-CR-342 or AOC-CR-310 for DWI offense(s).]*

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

STATE VERSUS

Name Of Defendant

Race | *Sex* | *Date Of Birth*

JUDGMENT SUSPENDING SENTENCE - MISDEMEANOR PUNISHMENT: ☐ COMMUNITY ☐ INTERMEDIATE (STRUCTURED SENTENCING)

(For Offenses Committed On Or After Dec. 1, 2011)

G.S. 15A-1341, -1342, - 1343, -1343.2, -1346

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

The defendant ☐ pled guilty (☐ pursuant to *Alford*) to ☐ was found guilty by the Court of ☐ was found guilty by a jury of ☐ pled no contest to

File No.(s)	Off.	Offense Description	Offense Date	G.S. No.	CL.	*Pun. CL.

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

The Court has determined, pursuant to G.S. 15A-1340.20, the number of prior convictions to be _____. **Level:** ☐ **I (0)** ☐ **II (1-4)** ☐ **III (5+)**

☐ 1. The Court finds: ☐ (a) enhancement for ☐ G.S. 90-95(e)(4) (drugs). ☐ G.S. 14-3(c) (hate crime). ☐ G.S. 14-50.22 (gang).
☐ (b) enhancement from required suspended sentence to Class 2 misdemeanor. G.S. 90-95(e)(7).
This finding is based on a determination of this issue by the trier of fact beyond a reasonable doubt or on the defendant's admission.

☐ 2. The Court imposes mandatory punishment pursuant to G.S. 14-33(d) (assault in the presence of a minor).

☐ 3. The Court finds the above-designated offense(s) is a reportable conviction under G.S. 14-208.6 and therefore imposes the special conditions of probation set forth on the attached AOC-603C, Page Two, Side Two, and makes the additional findings and orders on the attached AOC-CR-615, Side Two.

☐ 4. The Court finds the above-captioned offense(s) involved the *(check all that apply)* ☐ physical or mental ☐ sexual abuse of a minor ☐ *(If No. 3 not found)* and therefore imposes the special conditions of probation set forth on the attached AOC-CR-603C, Page Two, Side Two.

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

☐ 6. The Court finds that the above-designated offense(s) involved criminal street gang activity. G.S. 14-50.25.

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

☐ 8. *(for judgments entered on or after Dec. 1, 2013, only)* The Court finds that this was an offense involving child abuse or an offense involving assault or any of the acts as defined in G.S. 50B-1(a) committed against a minor. G.S. 15A-1382.1(a1).

☐ 9. The Court finds that the defendant refused to consent to conditional discharge under G.S. 14-204.

The Court, having considered evidence, arguments of counsel and statement of defendant, Orders that the above offenses, if more than one, be consolidated for judgment and the defendant be imprisoned for a term of _____ days in the custody of the: *(check only one)*
☐ Sheriff of _____ County. ☐ Other: _____.
☐ Misdemeanant Confinement Program *(sentences greater than 90 days for which a facility is not otherwise specified above).*

☐ This sentence shall run at the expiration of the sentence imposed in file number _____.

The defendant shall be given credit for _____ days spent in confinement prior to the date of this Judgment as a result of this/these charge(s), to be applied toward the ☐ sentence imposed above. ☐ imprisonment required for special probation set forth on AOC-CR-603C, Page Two.

SUSPENSION OF SENTENCE

Subject to the conditions set out below, the execution of this sentence is suspended and the defendant is placed on ☐ supervised ☐ unsupervised probation for _____ months.

☐ 1. The Court finds that a ☐ longer ☐ shorter period of probation is necessary than that which is specified in G.S. 15A-1343.2(d).

☐ 2. The Court finds that it is NOT appropriate to delegate to the Section of Community Corrections the authority to impose any of the requirements in G.S. 15A-1343.2(e) for community punishment or G.S. 15A-1343.2(f) for intermediate punishment.

☐ 3. This period of probation shall begin ☐ when the defendant is released from incarceration ☐ at the expiration of the sentence in the case below.

File No.	*Offense*	*County*	*Court*	*Date*

☐ 4. The defendant shall comply with the conditions set forth in file number _____.

☐ 5. The defendant shall provide a DNA sample pursuant to G.S. 15A-266.4. (AOC-CR-319 required)

MONETARY CONDITIONS

The defendant shall pay to the Clerk of Superior Court the "Total Amount Due" shown below, plus the probation supervision fee, pursuant to a schedule ☐ determined by the probation officer. ☐ set out by the court as follows: _____

Costs	*Fine*	*Restitution**	*Attorney's Fees*	*Comm Serv Fee*	*EHA Fee*	*SBM Fee*	*Appt Fee/Misc*	*Total Amount Due*
$	$	$	$	$	$	$	$	$

*See attached "Restitution Worksheet, Notice And Order (Initial Sentencing)" AOC-CR-611, which is incorporated by reference.

☐ The Court finds just cause to waive costs, as ordered on the attached ☐ AOC-CR-618. ☐ Other: _____.

☐ Upon payment of the "Total Amount Due," the probation officer may transfer the defendant to unsupervised probation.

Material opposite unmarked squares is to be disregarded as surplusage.
(Over)

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

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

☐ 13. The Court finds that the defendant is responsible for acts of domestic violence and therefore makes the additional findings and orders on the attached AOC-CR-603C, Page Two, Side Two.

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

The defendant shall also comply with the following special conditions which the Court finds are reasonably related to the defendant's rehabilitation:

☐ 14. Surrender the defendant's drivers license to the Clerk of Superior Court for transmittal/notification to the Division of Motor Vehicles and not operate a motor vehicle for a period of _____ or until relicensed by the Division of Motor Vehicles, whichever is later.

☐ 15. Successfully pass the General Education Development Test (G.E.D.) during the first _____ months of the period of probation.

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

☐ 17. Report for initial evaluation by _____, participate in all further evaluation, counseling, treatment, or education programs recommended as a result of that evaluation, and comply with all other therapeutic requirements of those programs until discharged.

☐ 18. Not assault, threaten, harass, be found in or on the premises or workplace of, or have any contact with _____. "Contact" includes any defendant-initiated contact, direct or indirect, by any means, including, but not limited to, telephone, personal contact, e-mail, pager, gift-giving, telefacsimile machine or through any other person, except _____.

☐ 19. *(for offenses committed on or after December 1, 2012)* Abstain from alcohol consumption and submit to continuous alcohol monitoring for a period of _____ ☐ days, ☐ months, the Court having found that a substance abuse assessment has identified defendant's alcohol dependency or chronic abuse.

☐ 20. Other:

☐ 21. Comply with the Special Conditions Of Probation which are set forth on AOC-CR-603C, Page Two.

ORDER OF COMMITMENT/APPEAL ENTRIES

☐ 1. It is ORDERED that the Clerk deliver **two** certified copies of this Judgment and Commitment to the sheriff or other qualified officer and that the officer cause the defendant to be delivered with these copies to the custody of the agency named on the reverse to serve the sentence imposed or until the defendant shall have complied with the conditions of release pending appeal.

☐ 2. The defendant gives notice of appeal from the judgment of the District Court to the Superior Court.

☐ 3. The current pretrial release order is modified as follows: _____.

☐ 4. The defendant gives notice of appeal from the judgment of the trial court to the Appellate Division. Appeal entries and any conditions of post conviction release are set forth on form AOC-CR-350.

SIGNATURE OF JUDGE

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

CERTIFICATION

I certify that this Judgment and attachment(s) marked below is a true and complete copy of the original which is on file in this case.

☐ 1. Appellate Entries (AOC-CR-350)
☐ 2. Judgment Suspending Sentence (AOC-CR-603C, Page Two) (additional conditions of probation)
☐ 3. Restitution Worksheet, Notice And Order (Initial Sentencing) (AOC-CR-611)
☐ 4. Judicial Findings As To Required DNA Sample (AOC-CR-319)
☐ 5. Judicial Findings And Order For Sex Offenders - Suspended Sentence (AOC-CR-615, Side Two)
☐ 6. Convicted Sex Offender Permanent No Contact Order (AOC-CR-620)
☐ 7. Additional File No.(s) And Offense(s) (AOC-CR-626)
☐ 8. Other: _____.

Date	*Date Certified Copies Delivered To Sheriff*	*Signature Of Clerk*	☐ *Deputy CSC* ☐ *Asst. CSC* ☐ *Clerk Of Superior Court*	**SEAL**

Material opposite unmarked squares is to be disregarded as surplusage.

STATE VERSUS | *File No.*

Name Of Defendant

NOTE: Use this page with **AOC-CR-310C**, "Impaired Driving - Judgment Suspending Sentence"; **AOC-CR-603C**, "Judgment Suspending Sentence - Felony"; **AOC-CR-604C**, "Judgment Suspending Sentence - Misdemeanor"; **AOC-CR-619C**, "Conditional Discharge Under G.S. 90-96(a)", **AOC-CR-621C**, "Conditional Discharge Under G.S. 14-50.29"; **AOC-CR-627C**, "Conditional Discharge Under G.S. 90-96(a1)"; **AOC-CR-628**, "Conditional Discharge Under G.S. 14-204(b)"; **AOC-CR-632C**, "Conditional Discharge Under G.S. 15A-1341(a4)"; or **AOC-CR-633C**, "Conditional Discharge Under G.S. 15A-1341(a5)"; **for offenses committed on or after Dec. 1, 2011.**

COMMUNITY AND INTERMEDIATE PROBATION CONDITIONS - G.S. 15A-1343(a1)

NOTE: *The conditions in this section may not be imposed for defendants placed on probation for a sentence under G.S. 20-179.*
In addition to complying with the regular and any special conditions of probation set forth in the "Judgment Suspending Sentence" entered in the above case(s), the defendant shall also comply with the following conditions of probation, which may be imposed for any community or intermediate punishment.

☐ 1. Submit to house arrest with electronic monitoring, remain at the defendant's residence for a period of _____ ☐ days, ☐ months, abide by all rules, regulations, and directions of the probation officer regarding such monitoring, and pay the fees prescribed in G.S. 15A-1343(c) as provided under Monetary Conditions. The defendant may leave the residence for the following purpose(s) and as otherwise permitted by the probation officer:
☐ employment ☐ counseling ☐ a course of study ☐ vocational training.
Other:

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

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

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

☐ 4. Obtain a substance abuse assessment, monitoring, or treatment as follows:
_____.

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

☐ 6. Participate in an educational or vocational skills development program as follows:
_____.

☐ 7. Submit to satellite-based monitoring, if required on the attached AOC-CR-615, Side Two.

INTERMEDIATE PUNISHMENTS

In addition to complying with the regular and any special, community, or intermediate conditions of probation set forth in the "Judgment Suspending Sentence" or herein for the above case(s), the defendant shall also comply with the following intermediate punishment(s) under G.S. 15A-1340.11(6).

☐ **1. Special Probation - G.S. 15A-1351**
For the defendant's active sentence as a condition of special probation, the defendant shall comply with these additional regular conditions of probation: (1) Obey the rules and regulations of the Division of Adult Correction governing the conduct of inmates while imprisoned. (2) Report to a probation officer in the State of North Carolina within seventy-two (72) hours of the defendant's discharge from the active term of imprisonment.
☐ A. Serve an active term of _____ ☐ days ☐ months ☐ hours in the custody of the
☐ N.C. DAC. ☐ Sheriff of this County. ☐ Other: _____.
(**NOTE:** *Noncontinuous periods of special probation may not be served in DAC. Also, special probation imposed in misdemeanor sentences on or after Oct. 1, 2014, and in sentences under G.S. 20-179 on or after Jan. 1, 2015, may not be served in DAC.*)
☐ B. The defendant shall report in a sober condition to begin serving his/her term on:

Day	*Date*	*Hour* ☐AM ☐PM

and shall remain in custody until:

Day	*Date*	*Hour* ☐AM ☐PM

☐ C. The defendant shall again report in a sober condition to continue serving this term on the same day of the week for the next _____ consecutive weeks, and shall remain in custody during the same hours each week until completion of the active sentence ordered.
☐ D. This sentence shall be served at the direction of the probation officer within _____ ☐ days ☐ months of this judgment.
☐ E. Pay jail fees. ☐ F. Work release is recommended. ☐ G. Substance abuse treatment is recommended.
☐ H. Other:

☐ **2. Drug Treatment Court - G.S. 15A-1340.11(3a); 15A-1340.11(6)**
Comply with the rules adopted for the program as provided for in Article 62 of Chapter 7A of the General Statutes and report on a regular basis for a specified time to participate in court supervision, drug screening or testing, and drug or alcohol treatment programs.
Other:

INTERMEDIATE CONDITIONS OF PROBATIONS - G.S. 15A-1343(b4)

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

Material opposite unmarked squares is to be disregarded as surplusage.

(Over)

MANDATORY SPECIAL CONDITIONS FOR SEX OFFENDERS AND PERSONS CONVICTED OF OFFENSES INVOLVING PHYSICAL, MENTAL, OR SEXUAL ABUSE OF A MINOR - G.S. 15A-1343(b2)

NOTE: *The following are not defined as intermediate punishments under G.S. 15A-1340.11(6).*
NOTE: *Select **only one** of the three sets of conditions below.*

☐ **1. Special Conditions For Reportable Convictions - G.S. 15A-1343(b2)**

NOTE: *Impose only for a reportable conviction under G.S. 14-208.6.*

The defendant has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4) and must

a. Register as a sex offender and enroll in satellite-based monitoring if required on the attached AOC-CR-615, Side Two.
b. Participate in such evaluation and treatment as is necessary to complete a prescribed course of psychiatric, psychological, or other rehabilitative treatment as ordered by the court.
c. Not communicate with, be in the presence of, or found in or on the premises of the victim of the offense.
☐ d. *(if the Court finds physical, mental, or sexual abuse of a minor)* Not reside in a household with
   ☐ (1) *(for sexual abuse)* any minor child.
   ☐ (2) *(for physical or mental abuse)* any minor child ☐ other than the child(ren) named below, for whom the court expressly finds that it is unlikely that the defendant's harmful or abusive conduct will recur and that it would be in the best interest of the child(ren) named below to reside in the same household with the probationer. *(Name minor child(ren) with whom the probationer may reside in the same household)*: _____.
e. Submit at reasonable times to warrantless searches by a probation officer of the defendant's person, of the defendant's vehicle and premises, and of the defendant's computer or other electronic mechanism which may contain electronic data, while the defendant is present, for the following purposes which are reasonably related to the defendant's probation supervision: ☐ child pornography
   ☐ _____.
f. Other:

☐ **2. Special Conditions For Offenses Involving The Sexual Abuse Of A Minor - G.S. 15A-1343(b2)**

NOTE: *Impose if offense involved sexual abuse of a minor but is **not** a reportable conviction.*

The defendant has been convicted of an offense involving the sexual abuse of a minor and must

a. Participate in such evaluation and treatment as is necessary to complete a prescribed course of psychiatric, psychological, or other rehabilitative treatment as ordered by the court.
b. Not communicate with, be in the presence of, or found in or on the premises of the victim of the offense.
c. Not reside in a household with any minor child. (G.S. 15A-1343(b2)(4))
d. Submit at reasonable times to warrantless searches by a probation officer of the defendant's person, of the defendant's vehicle and premises, and of the defendant's computer or other electronic mechanism which may contain electronic data, while the defendant is present, for the following purposes which are reasonably related to the defendant's probation supervision: ☐ child pornography
   ☐ _____.
e. Other:

☐ **3. Special Conditions For Offenses Involving The Physical Or Mental Abuse Of A Minor - G.S. 15A-1343(b2)**

NOTE: *Impose if offense involved physical or mental abuse of a minor but is **not** a reportable conviction and did **not** involve sexual abuse.*

The defendant has been convicted of an offense involving the physical or mental abuse of a minor and must

a. Participate in such evaluation and treatment as is necessary to complete a prescribed course of psychiatric, psychological, or other rehabilitative treatment as ordered by the court.
b. Not communicate with, be in the presence of, or found in or on the premises of the victim of the offense.
c. Not reside in a household with
   ☐ (1) any minor child.
   ☐ (2) any minor child other than the child(ren) named below, for whom the court expressly finds that it is unlikely that the defendant's harmful or abusive conduct will recur and that it would be in the best interest of the child(ren) named below to reside in the same household with the probationer. *(Name minor child(ren) with whom the probationer may reside in the same household)*:
   _____.
d. Submit at reasonable times to warrantless searches by a probation officer of the defendant's person, of the defendant's vehicle and premises, and of the defendant's computer or other electronic mechanism which may contain electronic data, while the defendant is present, for the following purposes which are reasonably related to the defendant's probation supervision: ☐ child pornography
   ☐ _____.
e. Other:

ADDITIONAL CONDITIONS FOR DOMESTIC VIOLENCE

☐ 1. Pursuant to its finding that the defendant is responsible for acts of domestic violence, the Court further finds that:
   ☐ a. there is an abuser treatment program, approved by the Domestic Violence Commission, reasonably available to the defendant, who shall:
      ☐ (1) *(for supervised probation)* attend and complete *(check one)* ☐ *(program name)* _____
         ☐ a program to be identified by the probation officer, and abide by the program's rules. The probation officer shall send a copy of this judgment to the program, which shall notify the officer if the defendant fails to participate or is discharged for violating any of its rules.
      ☐ (2) *(for unsupervised probation)* attend and complete *(check one)* ☐ *(program name)* _____
         ☐ a program chosen by the defendant, who shall notify the program and the district attorney of that choice within ten (10) days of the entry of this judgment, and abide by the program's rules. The district attorney shall send a copy of this judgment to the program, which shall notify the district attorney if the defendant fails to participate or is discharged for failure to comply with the program or its rules.
   ☐ b. there is no approved abuser treatment program reasonably available. ☐ c. it would not be in the best interests of justice to order the defendant to complete an abuser treatment program because _____.
☐ 2. As additional Special Conditions of Probation, the defendant shall:
   ☐ a. not come within _____ feet of _____ at any time.
   ☐ b. comply fully with any G.S. Chapter 50B Domestic Violence Protective Order in effect.

The above conditions are incorporated in the "Judgment Suspending Sentence" in the above case(s) and made a part thereof.

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

Material opposite unmarked squares is to be disregarded as surplusage.

STATE OF NORTH CAROLINA

_____ County

File No.

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

STATE VERSUS

Name Of Defendant

ADDITIONAL FILE NO.(S) AND OFFENSE(S)

NOTE: *Use this page in conjunction with all NCAOC judgment or probationary forms, to list additional offenses of conviction, deferred prosecution, or conditional discharge addressed in the court's order. There are no A, B, C, or other variations of this form, so this page can be used to continue an offense list from any of the related forms, for any date(s) of offense or conviction.*

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

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

(Over)

ADDITIONAL FILE NO.(S) AND OFFENSE(S)

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

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

PROBATION VIOLATIONS

PROBATION VIOLATIONS

Jamie Markham
UNC School of Government

September 2015

- **Notice**
  - A probationer is entitled to at least 24 hours' notice of any alleged violation of probation. G.S. 15A-1345(e). The court may act on a violation only when the probationer has received proper notice or waived notice, and probation may be **revoked** only when the probationer has been given notice of a **revocation-eligible** violation (new criminal offense, absconding, or technical violation after two prior CRV or, for certain misdemeanants, two "quick dips"). State v. Tindall, __ N.C. App. __, 742 S.E.2d 272 (2013).
  - Supervised probation: Notice comes via violation report (DCC-10) filed by probation officer.
  - Unsupervised: AOC-CR-220, Notice of Hearing on Violation of Unsupervised Probation.
- **Bail**
  - Prehearing release for a probationer arrested for an alleged violation is generally the same as pretrial release for a criminal charge.
  - If a probationer has a pending felony charge or has ever been convicted of a reportable sex crime and a judicial official determines that he or she poses a danger to the public, release shall be denied under the procedure described in G.S. 15A-1345(b1). Use AOC-CR-272.
- **Jurisdiction**
  - In general, a judge has power to act on a probation matter at any time before probation expires. The court may act after expiration if a violation report was filed (and file stamped) before the case expired. G.S. 15A-1344(f).
- **Preliminary Hearing**
  - A probationer detained for a probation violation is entitled to a preliminary hearing on the violation within seven working days of his or her arrest, unless the probationer waives it or the final violation hearing is held first. G.S. 15A-1345(c)–(d).
- **Final Hearing**
  - Venue: Probation violations may be heard in the district where (a) probation was imposed, (b) the alleged violation took place, or (c) the probationer currently resides. G.S. 15A-1344(a).
  - Confrontation: A probationer may confront and cross-examine witnesses, unless the court finds good cause for not allowing confrontation.
  - Counsel: A probationer has a right to counsel for a violation hearing. The court must comply with G.S. 15A-1242 when accepting a waiver of the right to counsel for a violation hearing.
  - Evidence: The rules of evidence do not apply at a violation hearing. Hearsay is admissible. State v. Murchison, 367 N.C. 461 (2014). The exclusionary rule does not apply. State v. Lombardo, 74 N.C. App. 460 (1985).
  - Standard of proof: The State must present evidence proving to the judge's *reasonable satisfaction* that the probationer willfully violated a valid condition of probation.
  - Willfulness: Only willful acts may be a violation of probation. The probationer may offer evidence that a violation was not willful. If the probationer offers such evidence, the court must consider it

and make written findings of fact clearly showing that it was considered. State v. Floyd, 213 N.C. App. 611 (2011) (reversing a revocation when the court failed to make such written findings). If the alleged violation concerned the nonpayment of a monetary obligation, the defendant must be given an opportunity to show that the nonpayment was attributable to a good faith inability to pay. G.S. 15A-1345(e); -1364.

- Class H and I felonies pled in district court: By default, probation violation hearings for felony defendants who pled guilty in district court are held in superior court. Hearings may be held in district court with the consent of the State and the defendant. G.S. 7A-271(e).

- **Appeals**
  - A probationer may appeal to superior court for a de novo violation hearing if a district court judge revokes probation or imposes special probation. **There is no right of appeal if the defendant waived his or her right to a hearing in district court. G.S. 15A-1347.**
  - There is no right to appeal a period of confinement in response to violation (CRV). State v. Romero, __ N.C. App. __, 745 S.E.2d 364 (2013).
  - Appeal of a violation hearing held in district court for a Class H or I felony pled in district court is to superior court for a de novo hearing. State v. Hooper, 358 N.C. 122 (2004).

SUMMARY OF PROBATION RESPONSE OPTIONS

- **Terminate probation**
  - Ends probation; permissible at any time. G.S. 15A-1343(b).
  - "Unsuccessful" or "unsatisfactory" termination is not a statutory concept.
- **Transfer to unsupervised probation**
  - Permissible at any time.
  - Court may authorize probation officer to transfer upon payment of moneys. G.S. 15A-1343(g).
- **Modify probation**
  - Add/remove/change conditions; permissible at any time for good cause shown. G.S. 15A-1344(d).
  - Intermediate conditions may be added to a community case upon violation. G.S. 15A-1344(a).
- **Extend probation**
  - Ordinary extension to 5 years, permissible at any time for good cause. G.S. 15A-1344(d).
  - Special purpose extension for up to 3 years beyond original period if:
    - Probationer consents,
    - In last 6 months of original period, and
    - For restitution or medical/psychiatric treatment. G.S. 15A-1343.2; -1342(a).
- **Short-term (2–3 day) jail confinement ("quick dip")**
  - 2–3 day increments; no more than 6 days/month; in 3 separate months. G.S. 15A-1343(a1)(3).
  - Only for non-DWI offenses committed on/after 12/1/11.
- **Contempt**
  - Up to 30 days confinement; violation proved beyond a reasonable doubt. G.S. 15A-1344(e1).
  - Contempt confinement counts for credit toward the defendant's suspended term of imprisonment upon activation. State v. Belcher, 173 N.C. App. 620 (2005).
- **Special probation ("split sentence")**

- Confinement up to ¼ maximum imposed sentence (DWI: ¼ maximum *authorized* sentence). G.S. 15A-1344(e).

- **Confinement in Response to Violation (CRV, or "dunk")**
  - In response to a "technical violation" (not a new crime or absconding), confinement of up to 90 days for a misdemeanor or 90 days exactly for a felony (although in no case longer than the defendant's suspended term of imprisonment). G.S. 15A-1344(d2).
  - CRV may not be served in noncontinuous intervals (e.g., weekends). When a defendant is on probation for multiple offenses, any CRV periods imposed must run concurrently on all cases related to the violation.
  - For probation violations on or after October 1, 2014, when CRV is ordered for a felony, no jail credit may be awarded to the 90-day term of incarceration. Credit is instead applied to the suspended term of imprisonment and deducted if probation is revoked. No similar rule applies to misdemeanor CRV. For violations before October 1, 2014, the court is required to apply credit for confinement awaiting a violation hearing to any CRV period ordered.
  - After two CRV periods, the court may revoke probation for any violation.

  Non-DWI misdemeanor defendants placed on probation on or after December 1, 2015
  - **CRV eliminated for Structured Sentencing (non-DWI) misdemeanants. For these defendants, court may instead impose 2–3 day "quick dips" in response to technical violations. The defendant is eligible for revocation for any violation committed after he or she has received two quick dips (imposed either by a judge or by a probation officer through delegated authority)**
- **Revocation**
  - Activation of a defendant's suspended sentence, permissible only in response to:
    - Violations of "commit no criminal offense" condition under G.S. 15A-1343(b)(1).
      - A pending charge or uncharged conduct may support a violation of this condition if the probation court makes an independent finding that the criminal activity occurred. State v. Monroe, 83 N.C. App. 143 (1986).
      - No revocation solely for conviction of a Class 3 misdemeanor. G.S. 15A-1344(d).
    - Violations of "absconding" condition under G.S. 15A-1343(b)(3a).
      - Only defendants on probation for offenses committed on or after December 1, 2011 are subject to the revocation-eligible absconding condition. State v. Nolen, __ N.C. App. __, 743 S.E.2d 729 (2013).
    - Any violation by a defendant who has received two CRV periods. G.S. 15A-1344(d2).
    - For non-DWI misdemeanor defendants placed on probation on or after December 1, 2015, any violation after the defendant has received two periods of "quick dip" confinement
  - Upon revocation court may:
    - Reduce the suspended sentence within the same grid cell. G.S. 15A-1344(d1).
    - Run the activated sentence concurrently with or consecutively to other sentences. By default, an activated sentence runs concurrently with other sentences to which the defendant is subject. G.S. 15A-1344(d).
  - Jail credit: Upon revocation, the defendant must receive credit for:
    - Pretrial confinement
    - The active portion of any split sentence served. State v. Farris, 336 N.C. 553 (1994).
    - Time spent at DART-Cherry. State v. Lutz, 177 N.C. App. 140 (2006).

        - Time spent imprisoned for contempt. State v. Belcher, 173 N.C. App. 620 (2005).
        - Prior CRV confinement. G.S. 15A-1344(d2).
        - Prior "quick dip" confinement imposed by a probation officer or judge.
    - There is no law allowing a person to "elect to serve" or "invoke" a suspended sentence.
- **Civil judgments for money**
    - Restitution: Docketing permissible only for CVRA cases > $250. G.S. 15A-1340.38.
    - Costs/fines: Docketing permissible upon default under G.S. 15A-1365.
    - Attorney fees: Docketing as provided in G.S. 7A-455.
- **Delegated authority (G.S. 15A-1343.2)**
    - For cases sentenced under Structured Sentencing, a probation officer may impose certain additional conditions of probation on a defendant without prior approval from the court. Those conditions include:
        - Community service
        - A curfew, with electronic monitoring
        - Participation in educational or skills development programming
        - Electronic house arrest
        - With the consent of the defendant, 2–3 days of jail confinement ("quick dip")

EVIDENCE

Medical Records:

If the custodian of records delivers them by subpoena, pursuant to N.C. Gen. Stat. § 1A-1, Rule 45(c)(2), for the sole purpose of delivering the medial records, the custodian need not appear so long as the custodian delivered certified copies of the records requested together with a copy of the subpoena and an affidavit by the custodian testifying that the copies are true and correct copies and that the records were made and kept in the regular course of business. These materials can come in without authentication.

Assume that you have the records and have subpoenaed your client's doctor (who is not the custodian of records) to testify in court. You are seeking admission of the medical records into evidence on direct examination. You need to ask regarding the following issues:

1) Mark exhibit

2) Show exhibit to opposing counsel

3) Approach witness

4) Show exhibit to witness

5) Familiarity of witness with exhibit for identification

6) Whether witness can identify the documents

7) How the documents were prepared, i.e. in the ordinary scope of the business of the company

8) Storage of the documents, where the documents are retrieved from

9) Whether it is a regular part of business to keep and maintain this type of record

10) Whether documents of this type would be kept under the witness's custody or control

11) Move for admission of the documents

Intoximeter Results:

Your client has been charged for DWI and blew a .04 on the Intoximeter. The DA is proceeding to trial under appreciable impairment and refuses to stipulate to the admission of the test results, so you are cross examining the chemical analyst to admit the test. You need to ask regarding the following issues:

1) Whether arresting officer requested that Client take the Intoximeter

2) Whether officer took Client before a licensed chemical Analyst

3) Whether the Analyst advised Client of rights orally and in writing pursuant to N.C. Gen. Stat. § 20-16.2(a) (i.e. rights to a witness, rights to an alternative test, right of refusal, general revocations for implied consent offenses)

4) Whether client acknowledged or signed the rights form

5) Whether the Analyst's affidavit was signed, sworn to and executed by analyst, in the presence of notary public. N.C. Gen. Stat. § 20-139.1 (e1)

6) Whether the Client's name is on Analyst affidavit.

7) Whether what is commonly referred to as the Skinny Sheet (DHHS 3908/DHHS 4082, which details the results of the test) attached to Analyst affidavit.

8) Whether affidavit reflect that Intoximeter was performed by person with current and valid permit for that Intoximeter instrument by DEHNR & **Department of Health & Human Services.** N.C. Gen. Stat. § 20-139.1(b)(1)

9) Whether the Intoximeter EC/IR-II is an automated instrument that prints results of the analysis. N.C. Gen. Stat. § 20-139.1(b1)(2)

10) Whether the affidavit reflects that a 15 minute observation period was observed. N.C. Gen. Stat. § 20-139.1(b)

11) Whether affidavit and Skinny Sheet reflect that preventative maintenance was performed within 125 test or 4 months, whichever comes first. N.C. Gen. Stat. § 20-139.1(b)(2)

12) Whether the affidavit and Skinny Sheet reflect two consecutive tests within .02 of each other. N.C. Gen. Stat. § 20-139.1(b)(3)

13) Whether the Client was given copy of the results. N.C. Gen. Stat. § 20-139.1

14) What was lower of 2 readings recorded on the test.

MVR or Police Videos:

You represent a client charged with DWI, and you are seeking to have the video of the dashboard mounted camera admitted into evidence. You are cross examining the arresting officer. You need to ask regarding the following issues.

1) Mark exhibit
2) Show exhibit to opposing counsel
3) Approach witness
4) Show exhibit to witness
5) Familiarity of witness with MVR or vehicle recording devices
6) Definition of the recording device
7) How the device works and records
8) How the device is activated and deactivated
9) The procedure for when a recording is initiated and how it is stored
10) Whether there is audio and how that is controlled
11) Whether the equipment was functional during that day/time
12) Whether the taped material is a fair and accurate depiction of the events of the stop
13) Whether the label on the disc containing the video matches the details (complaint number, defendant's name) of the present case
14) Ask to play video
15) Once video is functional, determine if date and time on video match the incident
16) Determine if officer and defendant, as well as defendant's vehicle appear in the tape.
17) Determine if the video fairly and accurately depicts the stop in question
18) Move for admission of video disc

Phone Records:

You represent a client charged with assault on a female in domestic violence court. He wants to testify regarding harassing phone calls made to him by the victim. During direct examination, you are seeking to admit his phone records into evidence or in the alternative, refresh his recollection. You need to ask regarding the following issues:

1) Mark exhibit
2) Show exhibit to opposing counsel
3) Approach witness
4) Show exhibit to witness
5) Whether the defendant owns a phone
6) What the phone number is for the phone
7) Who the defendant's phone carrier is
8) What the defendant's account number is for his phone carrier
9) What is the defendant's billing address
10) Whether they recognize the phone records
11) Whether the information contained on the records matches their personal information
12) Whether the records is an accurate account of the calls the defendant made/received on the date in question
13) Whether the defendant recognizes the victim's number
14) How they recognize the victim's number
15) Whether they received or made any calls from or to the victim during the time in question
16) Move to admit into evidence

Business Records:

You are seeking to introduce financial records and receipts from a local business owner into evidence during direct examination. You need to ask regarding the following issues:

1) Mark exhibit

2) Show exhibit to opposing counsel

3) Approach witness

4) Show exhibit to witness

5) Familiarity of witness with exhibit for identification

6) Whether witness can identify the documents

7) How the documents were prepared, i.e. in the ordinary scope of the business of the company

8) Storage of the documents, where the documents are retrieved from

9) Whether it is a regular part of business to keep and maintain this type of record

10) Whether documents of this type would be kept under the witness's custody or control

11) Move for admission of the documents

Photographs:

You represent a defendant and wish to admit a photograph into evidence showing the condition of his vehicle after an accident during direct examination. You need to ask regarding the following issues:

1) Mark exhibit

2) Show exhibit to opposing counsel

3) Approach witness

4) Show exhibit to witness

5) Whether witness recognizes what is shown in this photograph

6) Whether the witness is familiar with the scene (person, product, etc.) portrayed in this photograph

7) How the witness recognizes what is shown in this photograph

8) Whether the scene portrayed in the photograph fairly and accurately represents the scene as the witness remembers it on the date in question

9) Move for admission of the exhibit

Diagrams:

You represent a defendant and are seeking to admit a diagram into evidence that contains a map of the area, including the defendant's home and the location of the arrest during direct examination. You need to ask regarding the following issues:

1) Mark exhibit

2) Show exhibit to opposing counsel

3) Approach witness

4) Show exhibit to witness

5) Whether witness is familiar with the area that this diagram depicts

6) How they are familiar with this area

7) Whether this diagram/map appears to be an accurate depiction of the areas

8) Whether this diagram/map fairly depicts the area as the witness recalls it on the date in question

9) Whether the diagram/map would be valuable in helping the defendant describe the area included in the diagram or the series of events that occurred during that day

10) Move to admit the diagram into evidence

Facebook or Electronic Media:

You represent a defendant and you are seeking to introduce into evidence a print out of threatening messages that an alleged victim made on the wall of his Facebook page during direct examination. You need to ask regarding the following issues:

1) Whether the witness is familiar with Facebook
2) Whether the witness can explain what Facebook is
3) How the witness got a Facebook account
4) How the witness is identified as a Facebook user
5) How do users gain access to each other's pages
6) Once a user gains access to a page, how users can communicate between pages
7) What the term "wall" means and how it functions
8) The procedures for who can leave messages on witness's wall
9) Whether the witness can identify who writes on their wall
10) Mark exhibit
11) Show exhibit to opposing counsel
12) Approach witness
13) Show exhibit to witness
14) Whether defendant recognizes the exhibit
15) How they recognize the exhibit
16) Whether the information included on the exhibit (account user name, victim's identification) matches information in case
17) Whether this print out is a fair and accurate depiction of the message left on the Facebook page on that specific date and time
18) Whether the victim wrote on the witness's wall and the contents of the writing
19) Move to admit item into evidence

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PRESERVING THE RECORD AND MAKING OBJECTIONS AT TRIAL:

A Win-Win Proposition for Client and Lawyer

Ira Mickenberg
Public Defender Trainer and Consultant
6 Saratoga Circle
Saratoga Springs, NY 12866
(518) 583-6730
imickenberg@nycap.rr.com

I. The Prime Directive For Preserving the Record and Making Objections at Trial

WHEN IN DOUBT -- OBJECT

A. This cannot be overstated. If you do not object, you have lost -- regardless of whether you are right or wrong about the issue. If you do object, two things can happen, and both of them leave your client in a better position than if you were silent:

1. The objection will be sustained. Whatever you were objecting to has been excluded, and some prejudice has been kept out of the trial. You have also seized the moral high ground for future objections, if the prosecutor violates the judge's ruling.

2. The objection will be overruled. This is not great, but at least you have preserved the issue so that on appeal or habeas, your client will have a chance for reversal. Almost as important, you have begun to educate the judge on the issue, which maximizes your chances of limiting the prosecution's ability to expand the prejudice later in the trial.

B. Many lawyers are afraid to make objections because they think the court may get angry at them for daring to object. There are two answers to this:

1. It is more important to preserve your client's right to appellate and habeas review than it is to have the court happy with you.

2. If a judge is going to get upset with you for objecting, he or she is probably the kind of judge who is already upset with your very existence as a defense lawyer. It's part of our job, so we have to learn to live with it.

MYTH ALERT #1 Objecting too much will make the jurors angry:

When I took trial advocacy courses in law school, I was advised not to object too much, because it will make the jury angry. This is nonsense for two reasons:

1. Jurors don't get angry because you are objecting. They get angry if you are behaving like a jerk when you object. Whining, eye-rolling and other stereotypical lawyer histrionics might offend a jury. Making your objection in an intelligent, calm, sincere and respectful-sounding way lets the jury know you are doing your job and care about your case.

2. The law professors who keep advising you not to object have never gone to jail because they were procedurally barred from raising a winning issue on habeas. Your client will.

II. How to Prepare For Objections and Record Preservation

MYTH ALERT #2: You can't prepare for trial objections. You just have to be very smart and very fast on your feet.

This is also nonsense. It was probably made up by a trial attorney who was invited to teach at an advocacy seminar, and wanted to convince the audience that he was smarter and faster than they were. Like every aspect of a trial, knowing your theory of defense, thinking about your case critically and doing your homework in advance will allow you to make effective objections even if you are really slow on your feet.

A. Know your theory of defense inside out. Go through the exercise of writing out your theory of defense paragraph. Know what story you are going to tell the jury that will convince them to return the verdict you want.

B. Then ask yourself four questions:

1. What evidence, arguments and general prejudice might the prosecutor come up with that will hurt my theory of defense?

2. What legal objections can I make to those tactics?

3. What evidence and arguments will the prosecutor offer in support of his or her theory of the case?

4. What legal objections can I make to the prosecutor's evidence and arguments?

C. Once you have answered these four questions, take the following steps:

1. Go to the law library and research the law on those objections.

2. If you find supportive law, make copies of the relevant cases or statutes. Bring them to court with you, and cite them if you make a motion in limine.

D. If appropriate, make a motion in limine, in writing and on the record, to obtain the evidentiary ruling you want before trial.

E. If a motion in limine is not appropriate, bring the copies of the law you have found with you to trial. This will guarantee that when you make the objection, you will be the only one in the courtroom who is able to cite directly relevant law.

MYTH ALERT #3: You have to choose between preserving the record, and following a good trial strategy.

Baloney. If you know your theory of defense, you will know whether an objection advances the theory or conflicts with it. Object when it advances your theory. Don't object if it conflicts with your theory. Just make sure you know the difference.

III. How to Make Objections

A. Whenever you anticipate a problem, consider making a motion in limine to head off the difficulty and get an advance ruling.

B. When you are unsure whether to object, DO IT. You have far less to lose if you have an objection overruled than if you allow the damaging evidence in without a fight.

C. Be unequivocal when you object, don't waffle.

1. RIGHT: I object.
   WRONG: Excuse, me you honor, but I think that may possibly be objectionable.

2. Don't ever let the judge bully you into withdrawing an objection. If the judge goes ballistic because you have made an objection, just make sure you get it all on the record -- including his ruling.

D. If the objection is sustained, ask for a remedy.

1. Mistrial.

2. Strike testimony.

3. Curative instruction.

E. If you realize that you have neglected to make an objection which you should have made:

1. DON'T PANIC -- but don't just forget about it.

2. Make a late objection on the record.

3. Ask for a remedy which the court can grant now.

   a. Curative instruction/strike testimony.

   b. Mistrial.

IV. If You Happen To Have A Capital Case, Remember To Make Objections On Non-Capital Issues

NOTE: This particularly important because in many jurisdictions death penalty law is so bad that if a reviewing court feels that an injustice is being done, you have to give the court a non-death penalty issue on which to peg its reversal.

A. If you are objecting to the admission of evidence, raise every possible ground:

EX: If you are objecting to admission of a photo array, don't just cite your state's equivalent of Wade. You may also wish to raise:

1. Suggestive behavior by police
2. Photo array unreliable based on nature of the witness
3. Right to counsel.
4. Fruit of an illegal arrest or other police misconduct.
5. Fruit of an illegally obtained statement
    a. Coerced statement
    b. Miranda
    c. Right to counsel
6. The photo array is biased, based on the latest scientific research on photo arrays.

B. If you are relying on scientific or technical information as the basis for your objection, give the court a copy of the relevant articles in advance of the court proceeding. This not only helps your chances of winning the objection, but it educates the judge about the issue.

C. Prosecutorial Misconduct in Summation

1. In General

a. ***It is not impolite to interrupt opposing counsel's summation -- it is mandatory to preserve error and stop the prejudice.***

b. Be sure to ask for some remedy any time an objection is sustained to remarks in a prosecutor's closing argument.

1. Admonish the jury to ignore the statements.
2. Admonish the prosecutor not to do it again.
3. Mistrial.

2. Some common objections to prosecutorial summations.

a. Distorting or lessening the burden of proof.

b. Negative references to the defendant's exercise of a constitutional or statutory right.

1. Pre- and post- arrest silence.
2. Requests for counsel.
3. Not testifying at trial.

c. Religious or patriotic appeals -- particularly now that the government is asserting that everything it doesn't like (including your client) is tied to terrorism.

d. Appeals to sympathy, passion or sentiment.

e. Name-calling or other invective directed at either the defendant, defense counsel or the defense theory.

f. References to evidence that has been suppressed or not introduced.

g. Attacks on the defendant's character, when character has not been made an issue in the case.

D. Some Common Objections in the Evidentiary Portion of the Trial

1. Improper introduction of uncharged crimes or bad acts attributed to the defendant

2. The court improperly limited the defense right to cross-examine witnesses.

3. The court wrongfully permitted the prosecutor to cross-examine the defendant in a prejudicial manner or about improper subjects.

a. The defendant's pre- and post-arrest silence.

b. The defendant's request for a lawyer and consultation with counsel.

4. The prosecutor tried to have a police officer testify about the defendant's invocation of his right to silence or his request for a lawyer.

5. Improper use of expert testimony.

a. There was no need for an expert because a lay jury could understand the subject on its own.

b. The opinion evidence was given outside the area of the expert's expertise.

c. The expert is unqualified.

d. The expert's opinion is so far outside the mainstream of current thought as to be junk science. Make a Daubert challenge.

BASIC EVIDENCE PROCEDURES

Thomas K Maher
Rudolf Maher Widenhouse & Fialko
312 West Franklin Street
Chapel Hill, N.C.

A. He Who Hesitates Is Lost, or at Least Overruled.

Judges are required to make rulings on the admissibility of scores of items of evidence during the course of every trial. They are making these rulings without the factual knowledge of the case that the trial lawyers possess, and not every judge was elevated to the bench based upon their knowledge of the rules of evidence. As a result, some judges look to the lawyers for input on evidentiary rulings. Lawyers who can quickly, and confidently, state the basis for the admissibility of a piece of evidence are more likely to prevail on a contested point than a lawyer who seems hesitant or unsure about the admissibility of their evidence. A lawyer who has demonstrated that they are prepared on both the law and the facts will be more likely to prevail than a lawyer who is not, and this is true regardless of the actual merits of the contested evidence.

This boils down to two simple, but important, points. Be prepared and act as if you know what you are doing. The second is easier to accomplish if you have done the first. Doing the first requires knowing the facts of your case before trial starts, and giving some serious thought to the evidentiary issues that may arise. You need to anticipate the evidence that will be offered by the other side, and determine what legitimate evidentiary

objections you want to make. The harder part is analyzing your own evidence and determining what objections will be made by the prosecution, and being prepared to defend the introduction of your evidence. When you have the luxury of properly preparing your case, you should have a written outline of every witness you expect to testify, and in the margins you should cite the Rule of Evidence that supports your position, or case, for every issue in which there is likely to be a contest of admissibility. You should also make sure you have written down the foundation questions for areas - such as character evidence or contested hearsay - that you intend to introduce. Do not rely solely on your memory. Finally, if you have a case that actually supports your position, make copies and be prepared to hand them up to the judge. State trial judges do not have law clerks, and most truly appreciate getting the legal basis for your position.

Acting as if you know what you are doing is important. Many judges gauge the merits of your argument in part by how strongly you appear to believe what you are saying. An objection that begins :"For the record, I would like to object....." might as well be phrased "I know I am wrong, but to preserve every possible appellate issue I am moving my lips..." A firm objection, followed by a citation to a rule, is much more likely to be taken seriously. Finally, do not talk yourself into having strategic reasons for not arguing evidentiary points; if you do not object, you will never hear the lovely word "sustained," and if you do not offer your evidence, you will never experience the joy of getting in evidence over objection.

B. The Often Overlooked Rule 1101(b)(1)

One of the Rules of Evidence that is often overlooked is Rule 1101(b)(1), which provides that the Rules of Evidence do not apply to: "The determination of questions of fact preliminary to the admissibility of evidence when the issue is to be determined by the court under Rule 104(a)." Rule 104(a) repeats the admonition that the Rules of Evidence do not apply to the court's consideration of facts relied upon in determining the admissibility of evidence, with the exception of rules relating to privilege. So, in offering evidence, or contesting evidence, the preliminary facts that you are relying upon to make your point need not be proved by admissible evidence. Obviously, the more reliable your facts, the more persuasive they will be, but you are not constrained by the Rules of Evidence.

C. Getting to "Sustained"; objecting to the State's Evidence.

Let's face facts, we are not Perry Mason and we seldom win cases through our presentation of irrefutable evidence of our client's innocence. We win cases by raising a reasonable doubt about the State's case, and by ensuring that the State's case does not contain unreliable or unfairly inflammatory evidence. Evidence that may lead an officer to arrest, or your friends and neighbors to assume your client is guilty after reading a news account, is not necessarily admissible at trial. It is your job to keep the jury from hearing that evidence. The purpose of this paper is not to discuss the substantive law governing the admissibility of evidence, but rather the procedures by which you raise

evidentiary issues.[1]

The discussion is geared principally toward jury trials in superior court. District courts, at least nominally, follow the Rules of Evidence. However, there is seldom a good reason for using tools such as a motion in limine in a district court trial, and in cases in which you have a right to a jury trial in superior court in the unlikely event that you lose, there is no need to worry about preserving evidentiary issues for later review. Rules governing the making of objections during trial still apply, although with less formality.

I. Pre-Trial: The Motion in Limine

Serious evidentiary issues can be raised prior to trial by way of a pre-trial motion in limine. A motion in limine is typically aimed at excluding evidence, although nothing prevents a motion being filed seeking a ruling prior to trial that certain evidence is admissible. There is no magic form to a motion in limine, nor is there any requirement that a motion be filed to preserve your right to object to the evidence at trial.[2]

There are benefits and risks to filing in limine motions. The principal benefits are that you are likely to get a more educated ruling from the trial court. and that you can adjust your trial strategy to fit the ruling. The principal risk is that you are likely to get a more educated response from the prosecution, and they can adjust their trial strategy to fit

[1] A useful book that gives coverage of most issues relating to the admissibility of most evidence is Admissibility of Evidence in North Carolina, by Adrienne Fox.

[2] In this regard, I am limiting myself to motions based upon the Rules of Evidence, and not upon violations of your client's constitutional rights. Motions to suppress must be filed according to the rules governing those issues.

the ruling.

In determining whether to file a motion in limine you should consider whether the contested evidence is such that the parties truly need a pre-trial ruling in order to adjust their opening statements and trial preparation. Not every contested item of evidence merits a pre-trial hearing.

Having chosen to litigate the issue prior to trial, your job is to draft a motion and be prepared to argue the point in a manner than educates the court as to the significant facts and law that govern the admissibility of the evidence. A motion that simply states what the evidence is that you wish to exclude, and which cites a Rule, but which contains no analysis is not likely to get you very far. Be prepared, either in the motion or in the hearing, to lay out the relevant factual background and legal basis for your argument. One of the significant benefits of a pre-trial hearing is a more considered ruling, but this will only happen if you take the time to educate the court. In addition, should the issue go up on appeal, and detailed and educated motion that is overruled is likely to get a more considered review that a boilerplate motion.

A final caution about motions in limine. Do not rely upon a pre-trial ruling to preserve your issue for appeal. First, should there be additional grounds for objection that come to light at trial, you need to assert them to preserve them. For example, a Rule 403 objection that is denied pre-trial cannot preserve a hearsay objection to the same evidence that should have been made at trial. Second, unlike the federal rules, the Rules of Evidence in North Carolina do not count a pre-trial ruling as sufficient to preserve an

objection for appeal.[3] To preserve the issue for appeal, you must renew your objection at trial, and if the pre-trial ruling was one that excluded evidence, you must renew your offer of the evidence. If you are going to rely on the trial court granting you a continuing objection to a line of questions, make sure that you are abundantly clear the scope of your objection. Second, make sure that when the same issue arises in the testimony of another witness, or even another portion of that witness's testimony, that you renew your objection. The appellate courts are quick to point out when an objection to improperly admitted evidence is waived by failure to object to the same evidence form another source.

II. At Trial: Convincing the Court and Preserving The Appeal

The first rule is to object when the question is asked or evidence offered. The second rule is to move to strike when the answer is inadmissible, even when the question was proper. Silence will not convince a trial court on its own to exclude evidence, particularly the State's evidence, and will make winning the point on appeal near impossible.

The applicable Rules are 103 and 105. Rule 103(a)(1) states that an erroneous ruling may not be grounds for relief unless a "timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent

[3] Rule 103 of the Federal Rules specifically includes definitive rules prior to trial as sufficient to preserve the issue for appeal.

from the context." Rule 105 provides that: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

The best objection is one that contains the specific ground for the objection, such as "Objection, hearsay." If, in fact, the evidence is inadmissible hearsay, you have properly made the objection. The next best is a simple "objection," as one can always argue on appeal that the basis of the objection was apparent from the context. The worst is the objection that assigns the wrong reason for the objection, as the trial court will rule based upon that ground and the appellate court will generally review only whether the trial court improperly ruled on the reason that was given. If there is more than one ground for your objection, state all of them.

When the objection legitimately requires some explanation or argument, request to approach the bench so that you can fully explain the context of your objection. If this request is denied, make sure you nonetheless state the basis for your objection with sufficient clarity that it can be reviewed if there is a conviction.

Rule 105 requires that a jury be instructed on the limited use of evidence when an appropriate objection is made. So, if you believe that evidence is admissible, but only for a limited purpose, you should object and request a limiting instruction. If you fail to make the objection, in the belief that the jury will not understand the instruction or the belief that everyone will inherently understand the proper purpose of the evidence, you

will have transformed evidence with limited value into evidence that is admissible for all purposes.

When the trial court is faced with an objection to your evidence, you should make clear the basis for admissibility; for example, if evidence of an out-of-court statement is being offered for a non-hearsay purpose, identify that purpose. The biggest stumbling block in reviewing the erroneous exclusion of evidence is the failure to make an adequate offer of proof. Rule 103(a)(2) requires that "the substance of the evidence was made known to the court by offer or was apparent from the context within which the questions were asked." The most appropriate time for making an offer of proof is while the witness from whom the testimony is sought is on the stand, and can be questioned out of the hearing of the jury. Do not delay making an offer of proof until after the witness has left unless the court has given you permission to do so while the witness is available.

III. Laying Foundation

There are categories of evidence that require foundation to be laid before they become admissible. For example, physical evidence and photographs, diagrams and other visual means of conveying information to a jury must have some foundation laid before they are admissible. There is no magic incantation that needs to be recited; rather, you need to show that the item is what it purports to be and that it is relevant. In the case of substantive exhibits - meaning anything that is not merely illustrative - you need to establish that the item is what it purports to be and that it is relevant. This last point

usually means establishing that the item has not changed in any significant way. For example, a knife that is relevant due to the size and shape of the blade would be admissible even if cleaned since it was used, while a knife that is relevant because of the location of blood stains would only be admissible if the stains were still in the same condition as they were at the time of the events. Illustrative evidence need only be shown to be a fair and accurate illustration of the item in question, and to be relevant.

The principal Rule governing foundation issues for physical evidence is Rule 901, which simply states that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The Rule then, helpfully, provides 10 non-exclusive examples, including "[t]estimony that a matter is what it is claimed to be."

There is no exhaustive list of the items that need to be authenticated, or the means of authentication that should work. However, several types of evidence come up with sufficient frequency that they merit some discussion.

Photographs: If the relevance depends upon the content of the photograph being a fair representation of s person or scene, then testimony from someone with knowledge sufficient to state that the photographs are a fair and accurate representation of the event or person. A "staged" photograph may still be admissible as illustrative, rather than substantive evidence. There is no need to call the photographer. Some photographs are relevant because they were found in a given location, such as a photograph of a

spouse in a compromising position that the State alleges was the motive for a murder. In such a case the issue is not the accuracy of what the photograph depicts, but rather whether the defendant in fact saw the photograph.

Handwriting: Obviously an expert can be used to identify handwriting as belonging to a given person, but so can anyone with familiarity with the person's handwriting. In addition, the jury can be allowed to make their own comparison if there is a known sample of the person's handwriting.

Identity of Person on Telephone: It is enough for one party to identify the other's voice; it is also enough if the caller identifies themselves or discusses fact that would only be known to a given person. Other circumstantial facts may also be used to identify a caller.

Tape recordings: It is enough that someone involved in conversation that is recorded testify that they have listened to the tape and that it accurately recorded the conversation. The witness must be able to testify that there have been no changes, additions or deletions. To authenticate a transcript the witness must also testify that they have compared the transcript to the tape and that it is accurate.

Diagrams etc: Diagrams, other pieces of evidence that have been created for the purpose of illustrating a place or event, need testimony that they fairly and accurately portray the place or event. This would include police sketches or composite drawings of a suspect. Generally, issues as to the degree to which an exhibit is a fair and accurate depiction of a subject goes to its weight and not its admissibility.

Rule 1001 requires that the "original" of a writing, recording or photograph be used. An original of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect. Printouts from a computer are considered originals. Any print made from a negative is an original of a photograph. Under Rule 1003 duplicates are also admissible unless genuine issue is raised as to the authenticity of the original or the circumstances render it unfair to admit the duplicate in lieu of the original.

There are situations in which a witness's live testimony must also be supported by some manner of foundation. Experts must be shown to be experts, character witnesses must be shown to have sufficient knowledge of the reputation or character of the person. In laying the foundation, as the proponent of the evidence, the foundation should be built into the direct testimony. You want the jury to understand the expert's education, experience etc, and you want the jury to give some weight to the character testimony.

In cases in which you are the opponent of the physical evidence, or live testimony, that you believe is not supported by adequate foundation, you should object before the evidence is admitted, and if need be ask to voir dire the witness. If your voir dire is one that you do not wish the jury to hear, you should ask to conduct the voir dire outside the presence of the jury. When given the chance to voir dire the witness who is being used to lay the foundation, use your time wisely. Questions directed to the adequacy of the foundation will not try the patience of the court, questions that appear to be a fishing expedition may result in your voir being cut short.

Introducing Evidence:

How to Get it In and Keep it Out

JOHN C. DONOVAN
CHARNS & DONOVAN, DURHAM NC

Categories of Evidence

- **Demonstrative Evidence**
  - Evidence that shows what something looks like (a neighborhood) or how something was done (an assault, or sobriety test). This can also be presented as an attorney or witness demo.
- **Documentary Evidence**
  - Paper documents, Phone records, Medical Records, Employment records.
- **Physical Evidence**
  - Physical objects of evidentiary value.

Demonstrations: Safety First!

Laying the Foundation

For physical or documentary evidence, you must establish:

- **1) Identity** - Can the witness identify it? (Rule 901)
  - Requirement of an "original" or acceptable "duplicate," (Rules 1001-1003)
- **2) Authentication** – Is the item what you say it is (Rule 901) or is it self-authenticating (Rule 902)?
- **3) Relevance** - Does it make a consequential fact more or less probable? (Rules 401, 402, 403)
- **4) Chain of Custody** – Has it been altered? (Custody requirements may be relaxed with some documentary evidence, e.g. medical records).

Relevance: Does it Move the Ball?

Identification and Authentication

- Often used interchangeably in Rule 901
- Identification – How can the witness identify it?
  - Markings on object, individual characteristics, serial number, witness is record custodian, or created the item himself
- Authentication – How does the evidence "connect to the relevant facts of the case"?
  - Linked to a relevant person, place, time, event?

RULE 901 – Requirement of Authentication or Identification

- Must present "evidence sufficient to support a [rational] finding that the matter in question is what its proponent claims."
  - Intentionally broad language – threshold standard
  - Rule 901 details many different ways to authenticate
  - Even if "authenticated" and admitted, the jury need not believe the authenticating witness' testimony, or that the admitted evidence is actually authentic.

Rule 901(b)(1), Testimony of Witness with Knowledge & Chain of Custody

- 901(b)(1) - "Testimony that a matter is what it is claimed to be"- a witness with first-hand knowledge can establish the foundation through testimony.
- Custody authentication : A chain of witnesses accounts for the precise whereabouts of an object from the time it is found in connection with the relevant facts of the case until the moment it is offered into evidence.

Beware of documentary evidence containing hearsay!

- If the DA attempts to introduce documentary evidence that does not fall under a hearsay exception, OBJECT. (If you are attempting this, perhaps you are actually "refreshing recollection" and stopping short of moving to introduce the item.)
- What is the item being offered for? Impeachment purposes? Illustrative purposes? Substantive purposes?
- Hearsay is not permitted if an item is being offered for substantive purposes without a hearsay exception

Types of Evidence to Introduce

- Phone records, Text messages, Facebook/electronic media
- Business records - Rule 803(6) hearsay exception - including Medical records.
- Photographs
- Diagrams

Phone records...

- You represent a client charged with assault on a female in domestic violence court. He wants to testify regarding harassing or amorous phone calls made to him by the prosecuting witness. You are seeking to introduce his phone records into evidence or in the alternative, use them to refresh his present recollection. Try this:

Phone Records in District Court

- Mark exhibit for identification
- Show exhibit to opposing counsel
- Ask to approach witness
- Show exhibit to witness – what is it?
- Does defendant own a phone? What is the phone number ?
- Who is the phone carrier? What is the account number?
- What is the billing address?
- Whether he recognizes the phone records
- Whether the information contained on the records matches his personal information and recollection
- Whether the records are an accurate account of the calls the defendant made/received on the date in question
- Ask to admit into evidence

Hearsay Objection

- Without a records custodian in court, phone records are subject to a hearsay objection from the State.
- If you must introduce phone records over the State's objection, use the business record exception to the hearsay rule contained in Evidence Rule 803(6).

Present Recollection Refreshed

- If the State's hearsay objection is sustained, ask the witness if the phone records would refresh his present recollection of the times and dates of the calls in question (Rule of Evidence 612).
- But remember the witness can't directly read from the records and they can't be introduced into evidence over a sustained hearsay objection.
- However the witness is allowed to refer to the document as an aid to memory
- State is entitled to see the document

Phone Records as Business Records

- Subpoena phone company records custodian
- Custodian must testify from first-hand knowledge that the phone records are:
  - 1) a record of activity on your client's phone number;
  - 2) made at or near the time of the phone activity;
  - 3) recorded by someone with personal knowledge of the phone activity;
  - 4) kept in the ordinary course of business as a regular business practice;
  - 5) by someone with a business duty to record such data.

Computerized Business Records

- If the phone records are computer-generated, the custodian-witness must have personal knowledge of how the computers gather and store information about phone activity so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy. *State v. Springer*, 283 N.C. 627, 636 (1973).

Business Records How To

- 1) Mark documents for identification
- 2) Show documents to opposing counsel
- 3) Approach witness
- 4) Show documents to witness
- 5) Ask witness to identify the documents
- 6) How the records are made, i.e. in the ordinary course of business by someone with a business duty to record such info
- 7) Storage of the documents, where the documents are retrieved from
- 8) Whether it is a regular part of business to keep and maintain this type of record
- 9) Whether documents of this type would be kept under the witness's custody or control – any changes since the records were made?
- 10) Move for admission of the documents

The Special Case of Medical Records

- NC law provides a method for you to subpoena medical records and introduce them into evidence without in-person authentication.
- Pursuant to N.C.G.S. §§ 1A-1 Rule 45(c)(2) and 8-44.1, a medical records custodian need not appear in response to subpoena so long as the custodian delivers certified copies of the records requested to the judge's chambers.
- The records must be accompanied by a copy of the subpoena and an affidavit by the custodian testifying that the copies are true and correct copies and that the records were made and kept in the regular course of business.
- Medical records can come in without further authentication if this procedure is followed.

Photographs

- Photographs are admissible under N.C.G.S. § 8-97 as either illustrative or substantive evidence.
- Under the NC Pattern Jury Instructions, the jury may consider a "substantive" photograph itself as "evidence of facts it illustrates or shows."
- An "illustrative" photograph may only be considered by the jury to the extent it "illustrates and explains" the testimony of a witness and not for any other purpose. The testimony is evidence, not the photograph.

Photographs as Substantive Evidence

- To introduce a photograph as substantive evidence, you must lay a foundation showing that the photograph establishes a relevant fact and that the photograph has not changed or been altered since it was taken.
- To lay such a foundation you need the witness to confirm:
  - First-hand knowledge of when and how the photo was taken, developed or displayed
  - The photograph accurately depicts its subject as it looked at a relevant time
  - No methods were used during photography, development or display to distort how the subject looks
  - The photograph has not been altered or changed since it was developed or taken

Introducing Photo - Illustrative

1) Mark exhibit and show to opposing counsel
2) Approach witness and show exhibit
3) Ask whether the witness recognizes and is familiar with the scene (person, product, etc.) portrayed in this photograph
4) How the witness recognizes what is shown in this photograph
5) Whether the photograph fairly and accurately represents the subject as the witness remembers it on the date in question
6) Would the photo assist you in illustrating your testimony?
7) Move for admission of the exhibit
8) Expect State's request for limiting instruction (illustrative purposes only)
9) Consider publishing photo to jury or placing on display screen during testimony

Introducing Photo - Substantive

- Who took the picture?
- What kind of camera? Film? Digital?
- Does the picture accurately depict how the subject looked at the relevant time?
- How was the picture developed or displayed?
- Any special methods used in development or display to alter how the subject looks?
- Any alterations since the photo was first taken?

Diagrams - Illustrative

1) Mark exhibit and show exhibit to opposing counsel
2) Approach witness and show exhibit
3) Whether witness is familiar with the area that this diagram depicts. If so, How?
4) Whether this diagram/map appears to be an accurate depiction of the area as the witness recalls it on the date in question
5) Is the diagram to scale?
6) Whether the diagram/map would be valuable in helping the witness describe the area included in the diagram or any events that occurred during the day in question
7) Move to admit the diagram into evidence for illustrative purposes

Internet Diagrams - Substantive

- If the diagram is created by a program such as Google Maps, consider asking the court to take judicial notice of the printout as substantive evidence.
- Potential substantive evidence includes layout of neighborhoods, distance between points, arrangement of highways, etc., under Rule of Evidence 201(b).
- Google Maps' diagrams have been recognized by federal appellate courts as a source containing information "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." See *U.S. v. Perea-Rey*, 680 F.3d 1179, 1182 n.1 (9th Cir. 2012); *Ke Chiang Dai v. Holder*, 455 Fed. Appx. 25, 26 n.1 (2d Cir. 2012); *Pahls v. Thomas*, 718 F.3d 1210 n.1 (10th Cir. 2012).

Text Messages - Substantive

- Courts will usually require circumstantial evidence tending to show who sent a text message, above and beyond evidence of the number the text was sent from.
- Rule of Evidence 901(b)(4) allows for the use of "distinctive characteristics and the like" to identify or authenticate writings, including "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances."

Text Message - Example

1) Mark phone (showing text) as exhibit
2) Show phone to opposing counsel
3) Approach witness and show phone with text
4) Whose phone is this
5) Is the witness familiar with the text – if so, how?
6) What number the text came from
7) Whether the defendant recognizes the number – if so, how?
8) What if any other communication to and from this number during the time in question
9) Later communication – on phone or in person – in response to or referring to this text
10) Other distinctive characteristics of the text message (use of nicknames, reference to prior texts whose origin in verified, reference to private details only the alleged sender would likely know, threats or promises in the text later carried out by alleged sender, later admission by alleged sender, etc.)
11) Who witness believes sent the text
12) Move to admit into evidence

Facebook & Electronic Media

- You want to introduce into evidence a print-out of threatening messages the prosecuting witness made on the wall of your client's Facebook page.

Facebook Example Part I

1) Whether the witness is familiar with Facebook
2) Whether the witness can explain what Facebook is
3) How the witness got a Facebook account
4) How the witness is identified as a Facebook user
5) How do users gain access to each other's pages
6) Once a user gains access to a page, how users can communicate between pages
7) What the term "wall" means and how it functions
8) The procedures for who can leave messages on witness's wall
9) Whether the witness can identify who writes on their wall
10) Mark exhibit

Facebook Example Part II

11) Show exhibit to opposing counsel
12) Approach witness and show exhibit
13) Whether defendant recognizes the exhibit – if so, how?
14) Who printed the exhibit out? (Witness should have done this)
15) Whether the information about the message writer included on the exhibit (account user name, other identification) matches identifying information of writer
16) Whether this print out is a fair and accurate depiction of the message left on the witness's Facebook page on that specific date and time
17) Who wrote on the witness's wall and the contents of the writing
18) Any distinctive characteristics of the message itself tending to show who wrote it (Rule 901(b)(4))
19) Move to admit print-out into evidence

Our contact information:

- Charns & Donovan, Durham NC
- JCDonovanLaw@gmail.com
- (919) 956-7564

Thanks - feel free to contact us with questions!

NEGOTIATING

North Carolina Commission on Indigent Defense Services

Performance Guidelines for Indigent Defense Representation in Non-Capital Criminal Cases at the Trial Level

Adopted November 12, 2004

Guideline 5.3 Subsequent Filing and Renewal of Pretrial Motions

Counsel should be prepared to raise during the subsequent proceedings any issue that is appropriately raised pretrial, but could not have been so raised because the facts supporting the motion were unknown or not reasonably available. Further, counsel should be prepared to renew pretrial motions or file additional motions at any subsequent stage of the proceedings if new supporting information is later disclosed or made available. Counsel should also renew pretrial motions and object to the admission of challenged evidence at trial as necessary to preserve the motions and objections for appellate review.

SECTION 6:

Guideline 6.1 The Plea Negotiation Process and the Duties of Counsel

(a) After appropriate investigation and case review, counsel should explore with the client the possibility and desirability of reaching a negotiated disposition of the charges rather than proceeding to trial. In doing so, counsel should fully explain to the client the rights that would be waived by a decision to enter a plea and not proceed to trial.

(b) Counsel should keep the client fully informed of any plea discussions and negotiations, and convey to the client any offers made by the prosecution for a negotiated settlement. Counsel may not accept any plea agreement without the client's express authorization.

(c) Counsel should explain to the client those decisions that ultimately must be made by the client, as well as the advantages and disadvantages inherent in those choices. The decisions that must be made by the client after full consultation with counsel include whether to plead guilty or not guilty, whether to accept a plea agreement, and whether to testify at the plea hearing. Counsel should also explain to the client the impact of the decision to enter a guilty plea on the client's right to appeal. Although the decision to enter a plea of guilty ultimately rests with the client, if counsel believes the client's decisions are not in his or her best interest, counsel should attempt to persuade the client to change his or her position.

(d) Notwithstanding the existence of ongoing tentative plea negotiations with the prosecution, counsel should continue to prepare and investigate the case to the extent necessary to protect the client's rights and interests in the event that plea negotiations fail.

(e) Counsel should not allow a client to plead guilty based on oral conditions that are not disclosed to the court. Counsel should ensure that all conditions and promises comprising a plea arrangement between the prosecution and defense are included in writing in the transcript of plea.

Guideline 6.2 The Contents of the Negotiations

(a) In conducting plea negotiations, counsel should attempt to become familiar with any practices and policies of the particular district, judge, and prosecuting attorney that may affect the content and likely results of a negotiated plea bargain.

(b) To develop an overall negotiation plan, counsel should be fully aware of, and fully advise the client of:

(1) the maximum term of imprisonment that may be ordered under the applicable sentencing laws, including any habitual offender statutes, sentencing enhancements, mandatory minimum sentence requirements, and mandatory consecutive sentence requirements;

(2) the possibility of forfeiture of assets seized in connection with the case;

(3) any registration requirements, including sex offender registration;

(4) the likelihood that a conviction could be used for sentence enhancement in the event of future criminal cases, such as sentencing in the aggravated range, habitual offender status, or felon in possession of a firearm;

(5) the possibility of earned-time credits;

(6) the availability of appropriate diversion or rehabilitation programs;

(7) the likelihood of the court imposing financial obligations on the client, including the payment of attorney fees, court costs, fines, and restitution; and

(8) the effect on the client's appellate rights.

Counsel should also discuss with the client that there may be other potential collateral consequences of entering a plea, such as deportation or other effects on immigration status; motor vehicle or other licensing; parental rights; possession of firearms; voting rights; employment, military, and government service considerations; and the potential exposure to or impact on any federal charges.

(c) In developing a negotiation strategy, counsel should be completely familiar with:

(1) concessions that the client might offer the prosecution as part of a negotiated settlement, including but not limited to:

(A) declining to assert the right to proceed to trial on the merits of the charges;

(B) refraining from asserting or litigating any particular pretrial motion(s);

(C) agreeing to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs;

(D) providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity;

(E) waiving challenges to validity or proof of prior convictions; and

(F) waiving the right to indictment and consenting to a bill of information on a related but unindicted offense;

(2) benefits the client might obtain from a negotiated settlement, including but not limited to, an agreement:

(A) that the prosecution will not oppose the client's release on bail pending sentencing or appeal;

(B) that the client may enter a conditional plea to preserve the right to litigate and contest the denial of a suppression motion;

(C) to dismiss or reduce one or more of the charged offenses either immediately, or upon completion of a deferred prosecution agreement;

(D) that the client will not be subject to further investigation or prosecution for uncharged alleged criminal conduct;

(E) that the client will receive, with the agreement of the court, a specified sentence or sanction or a sentence or sanction within a specified range;

(F) that at the time of sentencing and/or in communications with the preparer of a sentencing services plan or presentence report, the prosecution will take, or refrain from taking, a specified position with respect to the sanction to be imposed on the client by the court; and

(G) that at the time of sentencing and/or in communications with the preparer of a sentencing services plan or presentence report, the prosecution will not present certain information;

(3) information favorable to the client concerning such matters as the offense, mitigating factors and relative culpability, prior offenses, personal background, employment record and opportunities, educational background, and family and financial status;

(4) information that would support a sentencing disposition other than incarceration, such as the potential for rehabilitation or the nonviolent nature of the crime; and

(5) information concerning the availability of treatment programs, community treatment facilities, and community service work opportunities.

(d) In conducting plea negotiations, counsel should be familiar with:

(1) the various types of pleas that may be agreed to, including a plea of guilty, a plea of *nolo contendere*, a conditional plea of guilty in which the defendant retains the right to appeal the denial of a suppression motion, and a plea in which the defendant is not required to personally acknowledge his or her guilt (*Alford* plea);

(2) the advantages and disadvantages of each available plea according to the circumstances of the case; and

(3) whether the plea agreement is binding on the court and prison authorities.

Guideline 6.3 The Decision to Enter a Plea of Guilty

(a) Counsel shall inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement, including its advantages, disadvantages, and potential consequences.

(b) When counsel reasonably believes that acceptance of a plea offer is in the client's best interests, counsel should attempt to persuade the client to accept the plea offer. However, the decision to enter a plea of guilty ultimately rests with the client.

Guideline 6.4 Entry of the Plea before the Court

(a) Prior to the entry of a plea, counsel should:

(1) fully explain to the client the rights he or she will waive by entering the plea;

(2) fully explain to the client the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences the client will be exposed to by entering a plea; and

(3) fully explain to the client the nature of the plea hearing and prepare the client for the role he or she may play in the hearing, including answering questions of the judge and providing a statement concerning the offense.

(b) When entering the plea, counsel should ensure that the full content and conditions of the plea agreement between the prosecution and defense are made part of the transcript of plea.

(c) Subsequent to the acceptance of a plea, counsel should review and explain the plea proceedings to the client, and respond to any client questions and concerns.

BROCK, PAYNE & MEECE, P.A.

ATTORNEYS AT LAW

3130 HOPE VALLEY ROAD
DURHAM, NORTH CAROLINA 27707

PAUL B. BROCK
BARRI HILTON PAYNE
DARIN P. MEECE
C. SCOTT HOLMES
MICHAEL C. ATKINS

TELEPHONE: (919) 401-5913
FACSIMILE: (919) 419-1018
WRITER'S EMAIL:
scott.holmes@bpm-law.com

Negotiations Training 2008

Effective negotiation in District Court requires handling a lot of limited information in a short period of time under circumstances that make effective communication difficult. I hope to discuss some areas of preparation and thinking that may assist in your ability to become an effective negotiator in District Court.

I. **Client information**: It is important to have basic information regarding the client when conducting negotiations. I begin many of my interviews with the statement, "There is a lot of information that I will need to help you figure out what you want to do, but before I begin, what are your main concerns and questions?"

A. Client personal situation: What makes this client's case unique? What are this client's main concerns?

B. Potential Exposure: How much time is this client facing? What is the likely outcome?

C. Bottom Line: What punishment is the client willing to receive in a plea agreement before going to trial? What is your client's bottom line?

II. Assistant District Attorney Information: It is important to know something about your opponent. More experienced Assistant District Attorneys are often more reasonable in District Court because they have dealt with a wide variety of cases, and have handled more serious felonies. They are often more likely to give a better deal in District Court than less experienced ADAs who may feel like they need to be tough, or consider misdemeanor charges to be more serious than they really are.

A. Personality Type: What motivates this ADA? Are they overworked bureaucrats? Are they social engineers? Are they more or less experienced? Do they like trying cases?

III. **Judge information**: It is important to know something about the judge who will be asked to accept the plea or sentence within a range set forth in the plea.

A. Pet Peeves: Are there any charges that this Judge particularly despises?

B. Normal sentence under circumstances: What does this judge normally do under these circumstances?

C. How much information will I need to present to the judge about my client to get them to accept the plea? What can I do if the Judge rejects the plea? You may want to consider using a continuance to get a different judge.

IV. **Trial Preparation**: Sometimes the ability to get a good plea offer for a client is directly proportional to the time and effort put into preparing the case for trial. Knowing the strengths and weaknesses of your case enables you to discuss your case with specifics and with a tone which demonstrates a willingness to try the case if you are unable to reach an agreement.

A. Credible Threat: Your only leverage in a plea negotiation in District Court may be your willingness to try a case and take up the Court's time with your case. You must therefore pose a credible threat of trial.

B. Willing to Try Losers: To pose a credible threat for trial, you must be willing to try losing cases like they were capital cases and make your opponent regret their failure to make a better offer – even if you lose.

V. **Credibility**: The most important thing in plea negotiations and perhaps in all aspects of advocacy is your own credibility. As attorneys all we do is communicate, verbally and in writing. If people ever doubt the truthfulness of what you say, you have lost your effectiveness as an advocate.

A. Going the extra mile to be absolutely clear about the truth

B. Why your offer makes sense in this case

VI. **Timing**: The ability to get a particular plea offer or get a plea agreement entered before a judge is assisted by good timing.

A. It is good to handle very complicated cases late in the day, or last. Your case may not get the attention it deserves if you approach an Assistant District Attorney or Judge with a complicated or nuanced case early in the morning. Wait until the easier cases have moved along, and the ADA or Judge has moved their docket a bit before clogging up the pipeline.

B. Likewise if you have something straightforward, get in early and get out quickly.

VII. Explaining the Offer: It is important that every client understands exactly what they are getting with a plea offer, and what they are giving up. It is easy in District Court to assume clients know more about the system than they really do. Try to treat every client like they are a first offender.

A. See Plea Transcript Check List

B. Knowing and Voluntary Plea: What is the client's exposure if found guilty? What is the likely outcome of a trial? What are the details of the plea agreement? What are the time commitments and monetary commitments? What rights does the client give up if they plead guilty? What are the direct consequences of their plea on their life?

C. Rejecting Plea Signed rejection of plea offer: It is sometimes a good practice to have clients sign a rejection of plea letter.

1. Charges, Record Level, Potential Exposure, Plea offer
2. Knowingly and voluntarily reject plea

VIII. **Taking Plea**: Closing the deal with a judge can be tricky. So it is helpful to prepare the client for accepting the offer.

A. Prepare Client for Appearing before Judge

B. "Yes, Sir"

C. Tuck in your shirt

D. Admission of responsibility

E. Less is more

C. Scott Holmes was an assistant Public Defender in Durham for two years before entering private practice where he handles primarily state and federal criminal cases and criminal appeals. He also takes civil cases involving Constitutional rights, discrimination, and excessive force.

CONFRONTATION

A GUIDE TO *CRAWFORD* AND THE CONFRONTATION CLAUSE

Jessica Smith, UNC School of Government (Aug. 2015)

Contents

I. The New *Crawford* Rule.

The Sixth Amendment's confrontation clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[1] This protection applies to the states by way of the Fourteenth Amendment.[2] In *Crawford v. Washington*,[3] the Court radically revamped the analysis that applies to confrontation clause objections. *Crawford* overruled the reliability test for confrontation clause objections and set in place a new, stricter standard for admission of hearsay statements under the confrontation clause. Under the former *Ohio v. Roberts*[4] reliability test, the confrontation clause did not bar admission of an unavailable witness's statement if the statement had an "adequate indicia of reliability."[5] Evidence satisfied that test if it fell within a firmly rooted hearsay exception or had particularized guarantees of trustworthiness.[6] *Crawford* rejected the *Roberts* analysis, concluding that although the ultimate goal of the confrontation clause is to ensure reliability of evidence, "it is a procedural rather than a substantive guarantee."[7] It continued: The confrontation clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[8] *Crawford* went on to hold that testimonial statements by declarants who do not appear at trial may not be admitted unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.[9]

The *Crawford* Rule

Testimonial statements by witnesses who are not subject to cross-examination at trial may not be admitted unless the witness is unavailable and there has been a prior opportunity for cross-examination.

A. When *Crawford* Issues Arise.

Crawford issues arise whenever the State seeks to introduce statements of a witness who is not subject to cross-examination at trial.[10] For example, *Crawford* issues arise when the State seeks to admit:

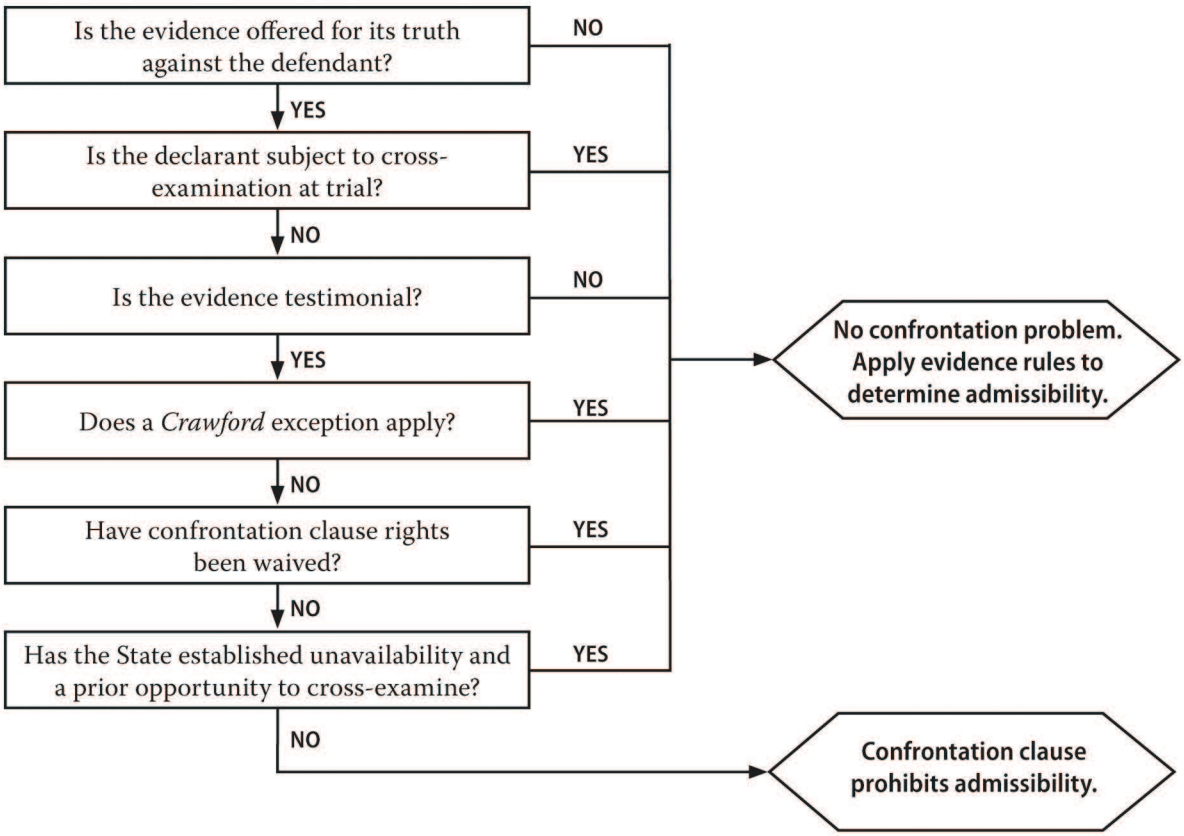
1. U.S. CONST. amend. VI.
2. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309 (2009).
3. 541 U.S. 36 (2004).
4. 448 U.S. 56 (1980).
5. *Crawford*, 541 U.S. at 40 (quotation omitted) (describing the *Roberts* test).
6. *Id*.
7. *Id*. at 61.
8. *Id*.
9. *Id.* at 68. For a more detailed discussion and analysis of *Crawford*, see JESSICA SMITH, CRAWFORD V. WASHINGTON: CONFRONTATION ONE YEAR LATER (UNC School of Government 2005), *available at* http://shopping.netsuite.com/s.nl/c.433425/it.A/id.4164/.f.
10. When no out-of-court statement is offered, the confrontation clause is not implicated. State v. Carter, ___ N.C. App. ___, 765 S.E.2d 56, 61 (2014) (where the defendant failed to identify any testimony by the investigating officer

- out-of-court statements of a nontestifying domestic violence victim to first-responding officers or to a 911 operator;
- out-of-court statements of a nontestifying child sexual assault victim to a family member, social worker, or doctor;
- a forensic report, by a nontestifying analyst, identifying a substance as a controlled substance or specifying its weight;
- an autopsy report, by a nontestifying medical examiner, specifying the cause of a victim's death;
- a chemical analyst's affidavit in an impaired driving case, when the analyst is not available at trial;
- a written record prepared by an evidence custodian to establish chain of custody, when the custodian does not testify at trial.

B. Framework for Analysis.

The flowchart in Figure 1 below sets out a framework for analyzing *Crawford* issues. The steps of this analysis are fleshed out in the sections that follow.

Figure 1. *Crawford* flowchart



that repeated an out-of-court statement of the confidential source, the defendant's confrontation clause argument was without merit).

II. Statement Offered For Its Truth Against the Defendant.

A. For Its Truth.

Crawford is implicated only if the out of court statement is offered for its truth.[11]

1. Role of Hearsay Rules.

Hearsay is defined as an out of court statement offered for its truth.[12] Because *Crawford* applies to out of court statements offered for their truth, one might wonder how the *Crawford* analysis relates to the hearsay rules, if at all. Although *Crawford* severed the connection between the confrontation clause and the hearsay rules, more recent cases muddy the waters on this issue.

In *Crawford* Justice Scalia made clear that the confrontation clause analysis is not informed by the hearsay rules.[13] This was an important analytical change. Under the old *Roberts* test, evidence that fell within a firmly rooted hearsay exception was deemed sufficiently reliable for confrontation clause purposes. In this way, under the old test, confrontation clause analysis collapsed into hearsay analysis. In *Crawford* the Court rejected this approach, creating a separate standard for admission under the confrontation clause, and making clear that constitutional confrontation standards cannot be determined by reference to federal or state evidence rules.[14]

Notwithstanding this clear language in *Crawford,*[15] in more recent cases the Court has stated that "in determining whether a statement is testimonial, 'standard rules of hearsay, designed to identify some statements as reliable, will be relevant.'"[16] Whether this language suggests an eventual return to an *Ohio v. Roberts* hearsay-dependent analysis remains to be seen.

2. Offered for a Purpose Other Than the Truth.

If a statement is offered for a purpose other than for its truth, it falls outside of the confrontation clause.[17]

a. Impeachment. If the out of court statement is offered for impeachment, it is offered for a purpose other than its truth and is not covered by the *Crawford* rule.[18]

b. Basis of an Expert's Opinion. Prior to the Court's decision in *Williams v. Illinois*,[19] the North Carolina appellate courts, like many

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11. *See, e.g.*, Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009) (testimonial statements are solemn declarations or affirmations "made for the purpose of establishing or proving some fact" (quoting *Crawford*, 541 U.S. at 51)).
12. N.C. R. EVID. 801(c).
13. *Crawford*, 541 U.S. at 50-51 (rejecting the view that confrontation analysis depends on the law of evidence).
14. *Id.* at 61 (the Framers did not intend to leave the Sixth Amendment protection "to the vagaries of the rules of evidence.").
15. Amplifying this point, in *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009), the Court noted that "[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because - having been created for the administration of the entity's affairs and not for the purpose of establishing or proving some fact at trial - they are not testimonial." *Id.* at 324.
16. Ohio v. Clark, __ U.S. __, 135 S. Ct. 2173, 2180 (2015) (quoting Michigan v. Bryant, 562 U.S. 344, 358-59 (2011)).
17. *Crawford,* 541 U.S. at 59 n.9 ("The [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."). For North Carolina cases, *see, e.g.*, State v. Ross, 216 N.C. App. 337, 346 (2011) (same); State v. Mason, 222 N.C. App. 223, 230 (2012) (same); State v. Rollins, __ N.C. App. __, 738 S.E.2d 440, 446 (2013) (same).
18. Five Justices agreed on this issue in *Williams v. Illinois*, 567 U.S.__, 132 S. Ct. 2221 (2012); *id.* at __, 132 S. Ct. at 2256 (Thomas, J., concurring) (calling this a "*legitimate* nonhearsay purpose"); *id.* at 2269 (Kagan, J., dissenting).

courts around the nation, held that a statement falls outside of the *Crawford* rule when offered as the basis of a testifying expert's opinion.[20] They reasoned that when offered for this purpose, a statement is not offered for its truth. While *Williams* is a fractured opinion of questionable precedential value, it is significant in that five Justices rejected the reasoning of the pre-existing North Carolina cases. Thus, while *Williams* did not overrule North Carolina's decisions on point, they clearly are on shaky ground. *Williams* is discussed in more detail in Section IV.F.3. below.

c. Corroboration. When the evidence is admitted for the purpose of corroboration, cases hold that it is not offered for its truth and therefore falls outside of the scope of the *Crawford* rule.[21] It is not yet clear whether the Court's rejection of the "basis of the expert's opinion" rationale in *Williams* will impact these cases.[22]

d. To Explain the Course of an Investigation. Sometimes statements of a nontestifying declarant are admitted to explain an officer's action or the course of an investigation. Cases have held that such statements are not admitted for their truth and thus present no *Crawford* issue.[23]

e. To Explain a Listener's or Reader's Reaction or Response. Cases hold that when a statement is introduced to show the reaction or response of a listener or reader, it is not offered for its truth and the confrontation clause is not implicated. This issue can arise when the State introduces into evidence an interrogation of the defendant during which the interrogating officer incorporated into his or her questioning statements made to the officer by others.[24] But it can arise in other contexts as well.[25]

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19. 567 U.S. __, 132 S. Ct. 2221 (2012).

20. *See, e.g.*, State v. Mobley, 200 N.C. App. 570, 576 (2009) (no *Crawford* violation occurred when a substitute analyst testified to her own expert opinion, formed after reviewing data and reports prepared by nontestifying expert); State v. Hough, 202 N.C. App. 674, 680-82 (2010) (following *Mobley* and holding that no *Crawford* violation occurred when reports by a nontestifying analyst as to composition and weight of controlled substances were admitted as the basis of a testifying expert's opinion on those matters; the testifying expert performed the peer review of the underlying reports, and the underlying reports were offered not for their truth but as the basis of the testifying expert's opinion), *aff'd per curiam by an equally divided court*, 367 N.C. 79 (2013).

21. *See, e.g.*, State v. Mason, 222 N.C. App. 223, 230 (2012) (the defendant's confrontation rights were not violated when an officer testified to the victim's statements made to him at the scene where the statements were not admitted for the truth of the matter asserted but rather for corroboration); State v. Ross, 216 N.C. App. 337, 346-47 (2011) (*Crawford* does not apply to evidence admitted for purposes of corroboration).

22. See Section II.A.2.b. above.

23. *See, e.g.*, State v. Rollins, __ N.C. App. __, 738 S.E.2d 440, 448-49 (2013) (statements made to an officer were not introduced for their truth but rather to show the course of the investigation, specifically why officers searched a location for evidence); State v. Batchelor, 202 N.C. App. 733, 736-37 (2010) (statements of a nontestifying informant to a police officer were nontestimonial; statements were offered not for their truth but rather to explain the officer's actions); State v. Hodges, 195 N.C. App. 390, 400 (2009) (declarant's consent to search vehicle was admitted to show why the officer believed he could and did search the vehicle); State v. Tate, 187 N.C. App. 593, 600-01 (2007) (declarant's identification of "Fats" as the defendant was not offered for the truth but rather to explain subsequent actions of officers in the investigation); State v. Wiggins, 185 N.C. App. 376, 383-84 (2007) (informant's statements offered not for their truth but to explain how the investigation unfolded, why the defendants were under surveillance, and why an officer followed a vehicle; noting that a limiting instruction was given); State v. Leyva, 181 N.C. App. 491, 500 (2007) (to explain the officers' presence at a location).

24. *See, e.g.*, State v. Castaneda, 215 N.C. App. 144, 148 (2011) (officer's statements during an interrogation repeating what others had told the police were not admitted for their truth but rather to provide context for the defendant's responses); State v. Miller, 197 N.C. App. 78, 87-91 (2009) (purported statements of co-defendants and others contained in the detectives' questions posed to the defendant were not offered to prove the truth of the matters

f. **As Illustrative Evidence.** One unpublished North Carolina case held that when evidence is admitted for illustrative purposes, it is not admitted for its truth and the confrontation clause is not implicated.[26]

g. **Limiting Instructions.** When a statement is admitted for a proper "not for the truth" purpose, a limiting instruction should be given.[27]

B. Against the Defendant.

Because the confrontation clause confers a right to confront witnesses against the accused, the defendant's own statements do not implicate the clause or the *Crawford* rule.[28] Similarly, the confrontation clause has no applicability to evidence presented by the defendant.[29]

III. Subject to Cross-Examination at Trial.

Crawford does not apply when the declarant is subject to cross-examination at trial.[30] Normally, a witness is subject to cross-examination when he or she is placed on the stand, put under oath, and responds willingly to questions.

A. Memory Loss.

Cases both before and after *Crawford* have held that a witness is subject to cross-examination at trial even if the witness testifies to memory loss as to the events in question.[31]

B. Privilege.

When a witness takes the stand but is prevented from testifying on the basis of privilege, the witness has not testified for purposes of the *Crawford* rule. In fact, this is what happened in *Crawford*, where state marital privilege barred the witness from testifying at trial.[32]

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asserted but to show the effect they had on the defendant and his response; the defendant originally denied all knowledge of the events but when confronted with statements from others implicating him, the defendant admitted that he was present at the scene and that he went to the victim's house with the intent of robbing him).

25. State v. Hayes, ___ N.C. App. ___, 768 S.E.2d 636, 640-41 (2015) (the trial court did not err by admitting into evidence a forensic psychologist's report prepared in connection with a custody proceeding regarding the defendant's and the victim's children or by allowing the psychologist to testify about her report; although the psychologist's report and testimony contained third party statements from non-testifying witnesses who were not subject to cross-examination at trial, the evidence was not admitted for the truth of the matter asserted but rather to show the defendant's state of mind with respect to how he felt about the custody dispute with his wife); State v. Byers, 175 N.C. App. 280, 289 (2006) (statement offered to explain why witness ran, sought law enforcement assistance, and declined to confront defendant single-handedly).

26. State v. Larson, 189 N.C. App. 211, *3 (2008) (unpublished) (child sexual assault victim's drawings offered to illustrate and explain the witness's testimony).

27. N.C. R. EVID. 105; *see also Wiggins*, 185 N.C. App. at 384 (noting that a limiting instruction was given).

28. State v. Richardson, 195 N.C. App. 786, *5 (2009) (unpublished) ("*Crawford* is not applicable if the statement is that of the defendant . . . ."); *see also* CONFRONTATION ONE YEAR LATER, *supra* note 9, at 28 & n.156.

29. Giles v. California, 554 U.S. 353, 376 n.7 (2008) (confrontation clause limits the evidence that the state may introduce but does not limit the evidence that a defendant may introduce).

30. *See, e.g.*, *Crawford*, 541 U.S. at 59 n.9 ("[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."); State v. Burgess, 181 N.C. App. 27, 34 (2007) (no confrontation violation when the victims testified at trial); State v. Harris, 189 N.C. App. 49, 54-55 (2008) (same); State v. Lewis, 172 N.C. App. 97, 103 (2005) (same).

31. *See* CONFRONTATION ONE YEAR LATER, *supra* note 9, at 28–29 & n.159.

32. *Crawford,* 541 U.S. at 40.

C. *Maryland v. Craig* Procedures For Child Abuse Victims.

In *Maryland v. Craig*,[33] the United States Supreme Court upheld a Maryland statute that allowed a judge to receive, through a one-way closed-circuit television system, the testimony of an alleged child abuse victim. Under the one-way system, the child witness, prosecutor, and defense counsel went to a separate room while the judge, jury, and defendant remained in the courtroom. The child witness was examined and cross-examined in the separate room, while a video monitor recorded and displayed the child's testimony to those in the courtroom.[34] The procedure prevented the child witness from seeing the defendant as she testified against the defendant at trial.[35] However, the child witness had to be competent to testify and to testify under oath; the defendant retained full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant were able to view by video monitor the demeanor of the witness as she testified.[36] Throughout the procedure, the defendant remained in electronic communication with defense counsel, and objections were made and ruled on as if the witness were testifying in the courtroom.[37]

Upholding the Maryland procedure, the *Craig* Court reaffirmed the importance of face-to-face confrontation of witnesses appearing at trial but concluded that such confrontation was not an indispensable element of the right to confront one's accusers. It held that while "the Confrontation Clause reflects a preference for face-to-face confrontation . . . that [preference] must occasionally give way to considerations of public policy and the necessities of the case."[38] It went on to explain that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."[39]

As to the important public policy, the Court stated: "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court."[40] However, the Court made clear that the State must make a case-specific showing of necessity. Specifically, the trial court must (1) "hear evidence and determine whether use of the one-way closed-circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify"; (2) "find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant"; and (3) "find that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis, i.e., more than mere nervousness or excitement or some reluctance to testify."[41]

The Court went on to note that in the case before it, the reliability of the testimony was otherwise assured. Although the Maryland procedure prevented a child witness from seeing the defendant as he or she testified at trial, the procedure required that (1) the child be competent to testify and testify under

33. 497 U.S. 836 (1990).
34. *Id*. at 841–42.
35. *Id.* at 841–42 & 851.
36. *Id.* at 851.
37. *Id.* at 842.
38. *Id*. at 849 (citations and internal quotation marks omitted).
39. *Id.* at 850.
40. *Id*. at 853.
41. *Id.* at 855–56 (citations and internal quotation marks omitted).

oath; (2) the defendant have full opportunity for contemporaneous cross-examination; and (3) the judge, jury, and defendant be able to view the witness's demeanor while he or she testified.[42]

Crawford called into question the continued validity of *Maryland v. Craig* procedures.[43] Although the United States Supreme Court has not yet considered whether the type of procedure sanctioned in *Craig* for child victims survives *Crawford*, the North Carolina courts have held that it does.[44]

D. Remote Testimony.

Relying on *Maryland v. Craig,*[45] some have argued that when a witness testifies remotely through a two-way audio-visual system the witness is subject to cross-examination at trial and the requirements of the confrontation clause are satisfied. To date, courts have been willing to uphold such a procedure only when the prosecution can assert a pressing public policy interest, such as:

- protecting child sexual assault victims from trauma,
- national security in terrorism cases,
- combating international drug smuggling,
- protecting a seriously ill witness's health, and
- protecting witnesses who have been intimidated.

At the same time, courts have either held or suggested that the following rationales are insufficient to justify abridging a defendant's confrontation rights:

- convenience,
- mere unavailability,
- cost savings, and
- general law enforcement.

For a detailed discussion of this issue, see the publication cited in the footnote.[46]

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42. *Id*. at 851.

43. *See Crawford*, 541 U.S. at 67-68 ("By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design."); JESSICA SMITH, EMERGING ISSUES IN CONFRONTATION LITIGATION: A SUPPLEMENT TO *CRAWFORD V. WASHINGTON*: CONFRONTATION ONE YEAR LATER 27 (UNC School of Government 2007), *available at* http://www.sog.unc.edu/sites/www.sog.unc.edu/files/additional_files/crawfordsuppl.pdf

44. State v. Jackson, 216 N.C. App. 238, 244-47 (2011) (in a child sexual assault case, the defendant's confrontation rights were not violated when the trial court permitted the child victim to testify by way of a one-way closed circuit television system; the court held that *Craig* survived *Crawford* and that the procedure satisfied *Craig*'s procedural requirements; the court also held that the child's remote testimony complied with the statutory requirements of G.S. 15A-1225.1); State v. Lanford, 225 N.C. App. 189, 204-08 (2013) (following *Jackson*, the court held that the trial court did not err by removing the defendant from the courtroom and putting him in another room where he could watch the child victim testify on a closed circuit television while staying connected with counsel through a phone line; the trial court's findings of fact about the trauma that the child would suffer and the impairment to his ability to communicate if required to face the defendant in open court were supported by the evidence).

45. *See* Section III.C. above (discussing *Craig*).

46. Jessica Smith, *Remote Testimony and Related Procedures Impacting a Criminal Defendant's Confrontation Rights*, ADMIN. JUST. BULL. No. 2013/02 (UNC School of Government Feb. 2013), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1302.pdf. For a recent North Carolina case decided after publication of that paper, see *State v. Seelig*, __ N.C. App. __, 738 S.E.2d 427, 432-35 (2013) (the trial court did not err by allowing an ill witness to testify by way of a two-way, live, closed-circuit web broadcast; the trial court found that the witness had a history of panic attacks, suffered a severe panic attack on the day he was scheduled to fly to North Carolina for trial, was hospitalized as a result, and was unable to travel because of his medical condition; the court found these findings sufficient to establish that allowing the witness to testify remotely was necessary to meet an

Of course, if confrontation rights are waived, remote testimony is permissible. In 2014, the North Carolina General Assembly enacted legislation allowing for remote testimony by forensic analysts in certain circumstances after a waiver of confrontation rights by the defendant through a notice and demand statute.[47]

E. Making the Witness "Available" to the Defense.

In *Melendez-Diaz v. Massachusetts*,[48] the United States Supreme Court seemed to foreclose any argument that a witness is subject to cross-examination when the prosecution informs the defense that the witness will be made available if called by that side or when the prosecution produces the witness in court but does not call that person to the stand.[49]

IV. Testimonial Statements.

The *Crawford* rule, by its terms, applies only to testimonial evidence; nontestimonial evidence falls outside of the confrontation clause and need only satisfy the Evidence Rules for admissibility.[50] In addition to classifying as testimonial the particular statements at issue (a suspect's statements during police interrogation at the station house), the *Crawford* Court suggested that the term had broader application. Specifically, the Court clarified that the confrontation clause applies to those who "bear testimony" against the accused.[51] "Testimony," it continued, is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."[52] Foreshadowing its analysis in *Davis v. Washington*[53] and *Michigan v. Bryant*[54], the Court suggested that "[a]n accuser who makes a formal statement to government officers bears testimony" within the meaning of the confrontation clause.[55] However, the *Crawford* Court expressly declined to comprehensively define the key term, "testimonial."[56] The meaning of that term is explored throughout the remainder of this section.

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important state interest of protecting the witness's ill health and that reliability of the witness's testimony was otherwise assured, noting, among other things that the witness testified under oath and was subjected to cross-examination).

47. S.L. 2014-119 sec 8(a) & 8(b) (enacting G.S. 15A-1225.3 and G.S. 20-139.1(c5) respectively). *See generally* Section VI.B. below, discussing notice and demand statutes.

48. 557 U.S. 305 (2009).

49. *Id*. at 324 ("[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court."); *see also* D.G. v. Louisiana, 559 U.S. 967 (2010) (vacating and remanding, in light of *Melendez-Diaz*, a state court decision that found no confrontation violation when the declarant was present in court but not called to the stand by the state).

50. Michigan v. Bryant, 562 U.S. 344, 354 (2011) ("We … limited the Confrontation Clause's reach to testimonial statements . . . ."); Whorton v. Bockting, 549 U.S. 406, 420 (2007) ("Under *Crawford* … the Confrontation Clause has no application to [nontestimonial] statements …."); Ohio v. Clark, 576 U.S. __, 135 S. Ct. 2173, 2180 (2015) (quoting *Bryant*).

51. *Crawford*, 541 U.S. at 51.

52. *Id.* (quotation omitted).

53. 547 U.S. 813, 829-30 (2006) (holding, in part, that a victim's statements to responding officers were testimonial).

54. 562 U.S. 344, 378 (2011) (holding that a shooting victim's statements to first responding officers were nontestimonial).

55. *Crawford*, 541 U.S. at 51.

56. *Id.* at 68; *see also Clark*, 576 U.S. at __,135 S. Ct. at 2179 ("[O]ur decision in *Crawford* did not offer an exhaustive definition of 'testimonial' statements.").

A. Prior Trial, Preliminary Hearing, and Grand Jury Testimony.
Crawford stated: "[w]hatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial."[57] It is thus clear that this type of evidence is testimonial.

B. Plea Allocutions.
Crawford classified plea allocutions as testimonial.[58]

C. Deposition Testimony.
Davis suggests that deposition testimony is testimonial.[59]

D. Police Interrogation.
Crawford held that recorded statements made by a suspect to the police during a custodial interrogation at the station house and after *Miranda* warnings had been given qualified "under any conceivable definition" of the term interrogation.[60] The *Crawford* Court noted that when classifying police interrogations as testimonial it used the term "interrogation" in its "colloquial, rather than any technical, legal sense."[61] Additionally, the term police interrogation includes statements that are volunteered to the police. The Court has stated: "[t]he Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation."[62] This language calls into doubt earlier North Carolina decisions holding that the testimonial nature of the statements at issue turned on whether or not they were volunteered to the police.[63]

1. Of Suspects.
As noted, *Crawford* held that recorded statements made by a suspect to the police during a tape-recorded custodial interrogation done after *Miranda* warnings had been given were testimonial.

2. Of Victims.
Crawford did not indicate whether its new rule was limited to police interrogation of suspects or whether it extended to questioning of victims as well. The Court answered that question two years later in *Davis v. Washington*,[64] clarifying that the new *Crawford* rule extends to questioning of victims. In 2011, the Court again addressed the testimonial nature of a victim's statements to law enforcement officers in *Michigan v. Bryant*.[65] The guidance that emerged from those cases is discussed below.

a. *Davis v. Washington* and the Emergence of a "Primary Purpose" Analysis. *Davis* was a consolidation of two separate domestic violence cases, *Davis v. Washington* and *Hammon v. Indiana.* Both cases involved statements by victims to police officers or their agents. The Court held that statements by one of

57. *Id.*; *see also Clark,* 576 U.S. at __, 135 S. Ct. at 2179 (so describing *Crawford*).
58. *Crawford,* 541 U.S. at 64.
59. *Davis*, 547 U.S. at 824 n.3, 825.
60. *Crawford*, 541 U.S. at 53 n.4.
61. *Id*.
62. *Melendez-Diaz*, 557 U.S. at 316 (quoting *Davis*, 547 U.S. at 822–23 n.1).
63. *See, e.g.*, State v. Hall, 177 N.C. App. 463, *2 (2006) (unpublished).
64. 547 U.S. 813 (2006).
65. 562 U.S. 344 (2011).

the domestic violence victims during a 911 call were nontestimonial but that statements by the other domestic violence victim to first-responding officers were testimonial. In so doing the *Davis* Court adopted a "primary purpose" test for determining the testimonial nature of statements made during a police interrogation.[66] Specifically, it articulated a two-part rule for determining the testimonial nature of statements to the police or their agents: (a) statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency; and (b) statements are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past facts potentially relevant to later criminal prosecution.[67]

The *Davis* Rules:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.

Statements are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past facts potentially relevant to later criminal prosecution.

b. ***Michigan v. Bryant* and the Ongoing Emergency Factor in the Primary Purpose Analysis.** In *Michigan v. Bryant*,[68] the Court held that a mortally wounded shooting victim's statements to first-responding officers were nontestimonial. The Court noted that unlike *Davis,* the case before it involved a non-domestic dispute, a victim found in a public location suffering from a fatal gunshot wound, and a situation where the perpetrator's location was unknown. These facts required the Court to "confront for the first time circumstances in which the 'ongoing emergency' … extends beyond an initial victim to a potential threat to the responding police and the public at large," and to provide additional clarification on how a court determines whether the primary purpose of the interrogation is to enable police to meet an ongoing

66. Ohio v. Clark, 576 U.S. __, 135 S. Ct. 2173, 2179 (2015) (in *Davis* we "[a]nnounc[ed] what has come to be known as the 'primary purpose' test").
67. In more recent cases the Court has made clear that the *Davis* primary purpose test still reigns. *Id.* at __, 135 S. Ct. at 2181.
68. 562 U.S. 344 (2011).

emergency.[69] It concluded that when determining the primary purpose of an interrogation, a court must objectively evaluate the circumstances of the encounter and the statements and actions of both the declarant and the interrogator.[70] It further explained that the existence of an ongoing emergency "is among the most important circumstances informing the 'primary purpose' of an interrogation."[71]

Applying this analysis, the Court began by examining the circumstances of the interrogation to determine if an ongoing emergency existed. Relying on the fact that the victim said nothing to indicate that the shooting was purely a private dispute or that the threat from the shooter had ended, the Court found that the emergency was broader than those at issue in *Davis*, encompassing a threat to the police and the public.[72] The Court also found it significant that a gun was involved.[73] "At bottom," it concluded, "there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded [the victim] within a few blocks and a few minutes of the location where the police found [the victim]."[74]

c. Determining Whether an "Ongoing Emergency" Exists. As noted, *Bryant* made clear that the existence of an ongoing emergency is an important circumstance to consider when assessing the primary purpose of an interrogation. However, even after *Bryant,* there are no clear rules on what constitutes an ongoing emergency. The following factors would seem to support the conclusion that an emergency was ongoing:

- The perpetrator remains at the scene and is not in law enforcement custody
- The dispute is a public, not a private one
- The perpetrator is at large
- The perpetrator's location is unknown
- The perpetrator's motive is unknown
- The perpetrator presents a continuing threat
- A gun or other weapon with a "long reach" is involved
- The perpetrator is armed with such a weapon
- Physical violence is occurring
- The location is disorderly
- The location is unsecure
- The victim is seriously injured
- Medical attention is needed or the need for it is not yet determined

69. *Id.* at 359.
70. *Id*. at 367.
71. *Id*. at 361. Whether or not an ongoing emergency exists is not the sole factor to be considered in the testimonial inquiry; rather, it is simply one factor that must be assessed. *Clark*, 576 U.S. at __, 135 S. Ct. at 2180.
72. *Bryant*, 562 U.S. at 372-73.
73. *Id*. at 373.
74. *Id*. at 374.

- The victim or others are in danger
- The questioning occurs close in time to the event
- The victim or others call for assistance
- The victim or others are agitated
- No officers are at the scene

On the other hand, the following factors would seem to support the conclusion that an emergency ended or did not exist:

- The perpetrator has fled and is unlikely to return
- The dispute is a private, not a public one
- The perpetrator is in law enforcement custody
- The perpetrator's location is known
- The perpetrator's motive is known and does not extend beyond the current victim
- The perpetrator presents no continuing threat
- A fist or another weapon with a "short reach" is involved
- The perpetrator is not armed with a "long reach" weapon
- No physical violence is occurring
- The location is calm
- The location is secure
- No one is seriously injured
- No medical attention is needed
- The victim and others are safe
- There is a significant lapse of time between the event and the questioning
- No call for assistance is made
- The victim or others are calm
- Officers are at the scene

d. Other Factors Relevant to the Primary Purpose Analysis. In addition to clarifying that whether an ongoing emergency exists is one of the most important circumstances informing the primary purpose analysis, *Bryant* made clear that the analysis also must examine the statements and actions of both the declarant and the interrogators[75] and the formality of the statement itself.[76] The Court did just that in *Bryant,* determining that given the circumstances of the emergency, it could not say that a person in the victim's situation would have had the primary purpose of establishing past facts relevant to a criminal prosecution.[77] As to the motivations of the police, the Court concluded that they solicited information from the victim to meet the ongoing emergency.[78] Finally, it found that the informality of the situation

75. *Id*. at 367.
76. *Id*. at 377.
77. *Id*. at 374-75.
78. *Id*. at 375-76.

and interrogation further supported the conclusion that the victim's statements were nontestimonial.[79]

Subsequent Supreme Court case law has emphasized that the existence of an ongoing emergency is not the "touchstone" of the analysis; rather it is just one factor in the primary purpose analysis, and courts should consider other factors, such as the informality of the situation and the interrogation.[80] It explained: "A 'formal station-house interrogation,' like the questioning in *Crawford*, is more likely to provoke testimonial statements, while less formal questioning is less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused."[81] And perhaps suggesting a rolling back of the strict *Crawford* doctrine, the Court recently stated that "in determining whether a statement is testimonial, standard rules of hearsay, designed to identify some statements as reliable, will be relevant."[82] How this language can be squared with *Crawford*'s rejection of the hearsay rules as a basis for interpreting the confrontation clause[83] remains to be seen.

Analysis of statements made by child victims to the police should take into consideration *Ohio v. Clark*, discussed in Sections IV.E.3. and IV.J., below.

e. Equally Weighted or Other Purposes. The primary purpose test requires the decision-maker to determine the primary purpose of the interrogation. It is not clear how the statements should be categorized if the interrogation had a dual, evenly weighted purpose. On the other hand, the Court has clarified "that 'there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony'"; in these instances the statements will be nontestimonial.[84] For example, a business record created for the administration of an entity's affairs and not to establish or prove a fact at trial is nontestimonial.[85]

f. Objective Determination. As the Court stated in *Davis* and reiterated in *Bryant,* when determining the primary purpose of questioning, courts must objectively evaluate the circumstances.[86]

g. Post-*Bryant* North Carolina Cases. To date North Carolina has only one published post-*Bryant* case on point. In *State v. Glenn*,[87] the court of appeals held that a victim's statement to a law enforcement officer was testimonial. The court distinguished *Bryant* and reasoned in part that there was no ongoing emergency when the statement was made.

79. *Id*. at 377.
80. Ohio v. Clark, 576 U.S. __, 135 S. Ct. 2173, 2180 (2015).
81. *Id.*
82. *Id.* (quotation omitted).
83. *See* Section II.A.1 above.
84. *Clark*, 576 U.S. at __, 135 S. Ct. at 2180.
85. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324 (2009).
86. *Bryant,* 562 U.S. at 349; *Davis*, 547 U.S. at 822.
87. 220 N.C. App. 23, 29-32 (2012).

3. Of Witnesses.

For confrontation clause purposes, there seems to be no reason to treat police questioning of witnesses any differently from police questioning of victims. Consistent with that suggestion, one North Carolina decision considered the purpose of a private citizen's communication with a police officer and held that the communication at issue was nontestimonial.[88]

Analysis of statements made by child victims to the police should take into consideration *Ohio v. Clark*, discussed in Sections IV.E.3. and IV.J., below.

4. Interrogation by Police Agents.

Crawford clearly applies whenever questioning is done by the police or a police agent (in *Davis,* the Court assumed but did not decide that the 911 operator was a police agent). Factors cited by post-*Davis* decisions when determining that actors were agents of the police include the following:

- The police directed the victim to the interviewer or requested or arranged for the interview
- The interview was forensic
- A law enforcement officer was present during the interview
- A law enforcement officer observed the interview from another room
- A law enforcement officer videotaped the interview
- The interviewer consulted with a prosecution investigator before or during the interview
- The interviewer consulted with a law enforcement officer before or during the interview
- The interviewer asked questions at the behest of a law enforcement officer
- The purpose of the interview was to further a criminal investigation
- The lack of a non-law enforcement purpose to the interview
- The fact that law enforcement was provided with a videotape of the interview after it concluded

E. Statements to People Other Than the Police or Their Agents.

Crawford, Davis, and *Bryant* all involved questioning by the police or their agents. Until its 2015 decision in *Ohio v. Clark,*[89] the Court only had hinted that statements to people other than the police or their agents can be testimonial.[90]

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88. State v. Call, __ N.C. App. __, 748 S.E.2d 185, 188-89 (2013) (in a larceny from a merchant case, any assertions by the store's deceased assistant manager in a receipt for evidence form were nontestimonial; the receipt—a law enforcement document—established ownership of stolen baby formula that had been recovered by the police, as well as its quantity and type; its purpose was to release the property from the police department back to the store after having been seized during a traffic stop).

89 576 U.S. __, 135 S. Ct. 2173 (2015).

90. In *Whorton v. Bockting*, 549 U.S. 406 (2007), the Court held that the new *Crawford* rule did not apply retroactively. In that case, the defendant had asserted that his confrontation clause rights were violated when the trial court admitted statements by a child victim to both an officer and to her mother. In its decision the Court gave no indication that the child's statements to her mother fell outside of the protections of the confrontation clause. Additionally, the *Davis* Court's discussion of an old English case can be read to suggest that statements to family members can be testimonial. *Davis*, 547 U.S. at 828 (noting that the defendant offered *King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779), as an example of statements by a "witness" in support of his argument that the victim's statements during the 911 call were testimonial; *Brasier* involved statements of a young rape victim to her mother immediately upon coming home; the *Davis* Court suggested that the case might have been helpful to the defendant

In *Clark,* however, the Court was faced with determining whether statements by a child abuse victim, L.P., to his preschool teachers were testimonial. Applying the primary purpose analysis, the Court held that the child's statements were nontestimonial. Significantly, the Court declined to adopt a categorical rule excluding statements made to persons other than law enforcement officers or their agents from the scope of the Sixth Amendment. It did state however that "such statements are much less likely to be testimonial than statements to law enforcement officers."[91] Section IV.E.3. below discusses *Clark* in more detail.

The lower courts have had to consider whether *Crawford* applies to statements made to a variety of people who do not qualify as the police and their agents. The sections below discuss those cases.

1. Statements to Family, Friends, Co-Workers, and Other Private Persons.

As noted below,[92] *Crawford* classified a casual remark to an acquaintance as nontestimonial. Since *Crawford*, courts have had to grapple with classifying statements made to acquaintances, family, and friends that are decidedly not casual,[93] such as a statement by a domestic violence victim to her friends about the defendant's abuse and intimidation. While some cases seem to adopt a *per se* rule that statements to family, friends, and other private persons are nontestimonial, other cases have applied the *Davis* primary purpose test to such remarks. North Carolina courts both before and after *Davis* have, without exception, treated statements made to private persons as nontestimonial.[94] Note that the *per*

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had it involved the girl's scream for aid as she was being chased; the Court noted that "by the time the victim got home, her story was an account of past events"). *But see Davis*, 547 U.S. at 825 (citing *Dutton v. Evans*, 400 U.S. 74, 87-89 (1970), a case involving statements from one prisoner to another, as involving nontestimonial statements); Giles v. California, 554 U.S. 353, 376-353 (2008) (suggesting that "[s]tatements to friends and neighbors about abuse and intimidation" would be nontestimonial).

91 576 U.S. at __, 135 S. Ct. at 2181. It added:

> [A]lthough we decline to adopt a rule that statements to individuals who are not law enforcement officers are categorically outside the Sixth Amendment, the fact that L.P. was speaking to his teachers remains highly relevant. Courts must evaluate challenged statements in context, and part of that context is the questioner's identity. Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers. It is common sense that the relationship between a student and his teacher is very different from that between a citizen and the police. We do not ignore that reality.

Id. at __, 135 S. Ct. at 2182 (citations omitted).

92. *See* Section IV.E.7.

93. *See* CONFRONTATION ONE YEAR LATER, *supra* note 9, at 19 (cataloging cases); EMERGING ISSUES, *supra* note 43, at 22–23 (same).

94. North Carolina cases decided after *Davis* include: State v. Call, __ N.C. App. __, 748 S.E.2d 185, 187-88 (2013) (in a larceny by merchant case, statements made by a deceased Wal-Mart assistant manager to the store's loss prevention coordinator were nontestimonial; the loss prevention coordinator was allowed to testify that the assistant manager had informed him about the loss of property, triggering the loss prevention coordinator's investigation of the matter); State v. Calhoun, 189 N.C. App. 166, 170 (2008) (victim's statement to a homeowner identifying the shooter was a nontestimonial statement to a "private citizen" even though a responding officer was present when the statement was made); State v. Williams, 185 N.C. App. 318, 325 (2007) (applying the *Davis* test and holding that the victim's statement to a friend made during a private conversation before the crime occurred was nontestimonial); *see also* State v. McCoy, 185 N.C. App. 160, *7 (2007) (unpublished) (victim's statements to her mother after being assaulted by the defendant were nontestimonial); State v. Hawkins, 183 N.C. App. 300, *3 (2007) (unpublished) (victim's statements to family members were nontestimonial).

Cases decided before *Davis* include: State v. Scanlon, 176 N.C. App. 410, 426 n.1 (2006) (victim's statements to her sister were nontestimonial); State v. Lawson, 173 N.C. App. 270, 275 (2005) (statement identifying

se rule approach appears inconsistent with the Supreme Court's 2015 *Clark* decision. As discussed in Section IV.E.3 below, in *Clark* the high Court declined to adopt a categorical rule excluding from the scope of the confrontation clause statements to persons who are not law enforcement officers. As that section also notes, however, statements made to people who are not responsible for investigating and prosecuting crimes are less likely to be testimonial than those made to law enforcement officers. When the statements at issue involve those made by children, *Clark's* suggestion that "statements by very young children will rarely, if ever, implicate the Confrontation Clause," should be considered. This issue is discussed in Sections IV.E.3. and IV.J., below.

2. Statements to Medical Personnel.

The United States Supreme Court has indicated that "statements to physicians in the course of receiving treatment" are nontestimonial.[95] Notwithstanding this statement, there has been a significant amount of litigation about the testimonial nature of statements to medical providers such as pediatricians, emergency room doctors, and sexual assault nurse examiners (SANE nurses).[96] Although the law is still developing, recent cases tend to focus on whether the services have a medical purpose (as opposed to, for example, a purely forensic purpose).[97]

Analysis of statements made by children to medical providers should take into consideration *Ohio v. Clark,* discussed in Sections IV.E.3. and IV.J., below.

3. Statements to Teachers.

In *Ohio v. Clark*,[98] the United States Supreme Court held that a child abuse victim's statements to his preschool teachers were nontestimonial. Because *Clark* is likely to impact the testimonial/nontestimonial analysis of statements made by children to a wide variety of individuals, it is discussed in detail here.

The facts of *Clark* were as follows: The defendant, who went by the nickname "Dee," was caring for three-year-old L.P. and his 18-month-old sister A.T. The defendant was the children's mother's boyfriend and her pimp. The defendant was taking care of the children after having sent their mother out of town on prostitution work. After the defendant left L.P. at preschool, L.P.'s teacher, Ramona Whitley, observed that L.P.'s left eye was bloodshot. When Whitley asked him "[w]hat happened," L.P. initially said nothing. Eventually, however, he told Whitley that he "fell." Once in brighter lights, Whitley noticed "[r]ed marks, like whips of some sort," on L.P.'s face. She notified the lead teacher, Debra Jones, who asked L.P., "Who did this? What happened to you?" L.P. "said something like, Dee, Dee." Jones asked L.P. whether Dee is "big or little;" L.P. responded that "Dee is big." Jones then brought L.P. to her supervisor,

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the perpetrator, made by a private person to the victim as he was being transported to the hospital was nontestimonial); State v. Brigman, 171 N.C. App. 305, 313 (2005) (victims' statements to foster parents were nontestimonial); and State v. Blackstock, 165 N.C. App. 50, 62 (2004) (victim's statements to wife and daughter about the crimes were nontestimonial).

95. *Giles*, 554 U.S. at 376.

96. *See e.g.*, CONFRONTATION ONE YEAR LATER, *supra* note 9, at 23-24 (cataloging cases); EMERGING ISSUES, *supra* note 43, at 22 (same).

97. *See, e.g.*, State v. Miller, 264 P.3d 461, 490 (Kan. 2011) (surveying the law on point from around the country and concluding that a child's statements to a SANE nurse were nontestimonial).

98. 576 U.S. __, 135 S. Ct. 2173 (2015).

who lifted the boy's shirt, revealing more injuries. Whitley called a child abuse hotline to alert authorities about suspected abuse.

The defendant was charged with abusing both L.P. and A.T. At trial L.P. did not testify, having been found incompetent to do so. Over the defendant's confrontation clause objection, the State introduced L.P.'s statements to his teachers as evidence of guilt. The defendant was convicted and appealed. The Ohio Supreme Court held that L.P.'s statements were testimonial, reasoning that the primary purpose of the teachers' questioning was not to deal with an emergency but rather to gather evidence potentially relevant to a subsequent criminal prosecution. Because Ohio has a mandatory reporting law requiring preschool teachers and others to report suspected child abuse to authorities, the Ohio court concluded that the teachers acted as agents of the State. The U.S. Supreme Court granted review and reversed. It held:

> In this case . . . [w]e are . . . presented with the question we have repeatedly reserved: whether statements to persons other than law enforcement officers are subject to the Confrontation Clause. Because at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns, we decline to adopt a categorical rule excluding them from the Sixth Amendment's reach. Nevertheless, such statements are much less likely to be testimonial than statements to law enforcement officers. And considering all the relevant circumstances here, L.P.'s statements clearly were not made with the primary purpose of creating evidence for [the defendant's] prosecution. Thus, their introduction at trial did not violate the Confrontation Clause.[99]

The Court reasoned that "L.P.'s statements occurred in the context of an ongoing emergency involving suspected child abuse."[100] It explained:

> When L.P.'s teachers noticed his injuries, they rightly became worried that the 3–year–old was the victim of serious violence. Because the teachers needed to know whether it was safe to release L.P. to his guardian at the end of the day, they needed to determine who might be abusing the child. Thus, the immediate concern was to protect a vulnerable child who needed help.…[T]he emergency in this case was ongoing, and the circumstances were not entirely clear. L.P.'s teachers were not sure who had abused him or how best to secure his safety. Nor were they sure whether any other children might be at risk. As a result, their questions and L.P.'s answers were primarily aimed at identifying and ending the threat. Though not as harried, the conversation here was also similar to the 911 call in *Davis*. The teachers'

99. 576 U.S. at __, 135 S. Ct. at 2181.
100. *Id*.

> questions were meant to identify the abuser in order to protect the victim from future attacks. Whether the teachers thought that this would be done by apprehending the abuser or by some other means is irrelevant. And the circumstances in this case were unlike the interrogation in *Hammon*, where the police knew the identity of the assailant and questioned the victim after shielding her from potential harm.[101]

The Court continued, concluding that "[t]here is no indication that the primary purpose of the conversation was to gather evidence for [the defendant's] prosecution. On the contrary, it is clear that the first objective was to protect L.P."[102] The Court noted that L.P.'s teachers never told him that his responses would be used to arrest or punish the person who had hurt him and that L.P. himself never hinted that he intended his statements to be used by police or prosecutors.[103] Additionally, the Court noted, the conversation was "informal and spontaneous."[104]

The Court found that L.P.'s age "fortifie[d]" its conclusion that his statements were nontestimonial, stating: "Statements by very young children will rarely, if ever, implicate the Confrontation Clause."[105] The Court further noted that as a historical matter, there is strong evidence that similar statements were admissible at common law. It continued: "although we decline to adopt a rule that statements to individuals who are not law enforcement officers are categorically outside the Sixth Amendment, the fact that L.P. was speaking to his teachers remains highly relevant."[106] It explained: "Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers."[107]

Finally, the Court rejected the defendant's argument that Ohio's mandatory reporting statutes made L.P.'s statements testimonial, concluding: "mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution."[108]

4. Statements to Social Workers.

The testimonial nature of statements by child victims to social workers has been a hotly litigated area of confrontation clause analysis[109] and the law is still evolving. The Fourth Circuit weighed in on the issue in *United States v. DeLeon,*[110] holding that although no ongoing emergency

101. *Id.* (footnote omitted).
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at __, 135 S. Ct. at 2182.
106. *Id.*
107. *Id.*
108. *Id.* at __, 135 S. Ct. at 2183.
109. Jessica Smith, *Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses*, ADMIN. JUST. BULL. No. 2008/07 at 14-34 (UNC School of Government Dec. 2008) (cataloging cases), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0807.pdf.
110. 678 F.3d 317 (4th Cir. 2012), *reversed on other grounds*, 133 S. Ct. 2850 (2013).

existed, the child's statements to a social worker were nontestimonial based on an objective analysis of the primary purpose and circumstances of the interview.[111] Note that if the social worker is acting as an agent of the police, the statement will likely be testimonial.[112]

Analysis of statements made by children to social workers should take into consideration *Ohio v. Clark*, discussed in Sections IV.E.3., IV.J.

5. Statements to Informants.

The *Davis* Court indicated that statements made unwittingly to government informants are nontestimonial.[113]

6. Statements in Furtherance of a Conspiracy.

The Supreme Court has indicated that statements in furtherance of a conspiracy are nontestimonial.[114]

7. Casual or Offhand Remarks to An Acquaintance.

Crawford indicated that "off-hand, overheard remark[s]" and "casual remark[s] to an acquaintance" bear little relation to the types of evidence that the confrontation clause was designed to protect and thus are nontestimonial.[115] A casual or offhand remark would include, for example, a victim's statement to a friend: "I'll call you later after I go to the movies with Defendant."

F. Forensic Reports.

Because of the ubiquitous nature of forensic evidence in criminal cases, a tremendous amount of post-*Crawford* litigation has focused on the testimonial nature of forensic reports, such as chemical analysts' affidavits, drug test reports, autopsy reports, DNA reports and the like.[116] The sections that follow explore how *Crawford* applies to this type of evidence.

1. Forensic Reports Are Testimonial.

In a pair of cases, the United States Supreme Court held that forensic reports are testimonial. First, in *Melendez-Diaz v. Massachusetts*[117] the Court held to be testimonial a report, sworn to before a notary by the preparer, stating that the substance at issue was cocaine. The Court further held that the defendant's confrontation clause rights were violated when the report was admitted into evidence to prove that the substance was cocaine without a witness to testify to its contents. Then, in *Bullcoming v. New Mexico,*[118] the Court applied *Melendez-Diaz* and held that the defendant's confrontation clause rights were violated in an impaired driving case when the State's witness read into evidence a forensic report by a non-testifying analyst.

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111. *Id.* at 324-26. For a discussion of this case, see Jessica Smith, *4th Circuit Ruling: Child's Statements to Social Worker Are Non-testimonial*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 13, 2012), http://nccriminallaw.sog.unc.edu/?p=3666.
112. *See* Section IV.D.4. above.
113. *Davis*, 547 U.S. at 825.
114. *Crawford*, 541 U.S. at 56; *see also Giles*, 554 U.S. at 374, n.6 (2008).
115. *Crawford*, 541 U.S. at 51.
116. *See* CONFRONTATION ONE YEAR LATER, *supra* note 9, at 10-11 (cataloging cases); EMERGING ISSUES, *supra* note 43, at 13-17 (same); Jessica Smith, *Understanding the New Confrontation Clause Analysis*: *Crawford*, *Davis*, *and Melendez-Diaz*, ADMIN. OF JUSTICE BULL. 2010/02 (UNC School of Government Apr. 2010) (same), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1002.pdf.
117. 557 U.S. 305 (2009).
118. 564 U.S. __, 131 S. Ct. 2705 (2011).

2. Surrogate Testimony.

Bullcoming makes clear that "surrogate testimony"—when the testifying analyst simply reads into evidence the non-testifying analyst's opinion—is impermissible. In that case, the state's evidence against the defendant included a forensic laboratory report certifying that the defendant's blood-alcohol concentration was above the threshold for aggravated impaired driving. At trial, the prosecution did not call the analyst who signed the certification. Instead, the State called another analyst who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on the defendant's blood sample. That witness read the report into evidence. The Court held that this procedure violated the defendant's confrontation rights. North Carolina case law is in accord with *Bullcoming.*[119] At least one North Carolina case has held that the person who directly supervised the report's preparation may testify in lieu of the testing analyst.[120]

3. Substitute Analysts.

a. Guidance from the United States Supreme Court. Neither *Melendez-Diaz* nor *Bullcoming* addressed the issue of whether substitute analyst testimony is consistent with the confrontation clause. Substitute analyst testimony refers to when the state presents an expert witness who testifies to an independent opinion based on information in a non-testifying analyst's forensic report. North Carolina had endorsed the use of substitute analysts, distinguishing *Melendez-Diaz* and *Bullcoming* and reasoning that in this scenario, the underlying report is not being used for its truth but rather as the basis of the testifying expert's opinion. However, the United States Supreme Court's most recent case in this line, *Williams v. Illinois,*[121] calls this reasoning into question. *Williams* held that the defendant's confrontation clause rights were not violated when the State's DNA expert testified to an opinion based on a report done by a non-testifying analyst. However, the *Williams* decision is a fractured one in which no one line of reasoning garnered a five-vote majority. The fractured nature of the decision has resulted in confusion and uncertainty with regard to substitute analyst testimony. Adding to the confusion is the fact that five of the Justices in *Williams* expressly rejected the "not for the truth" rationale that had been used by the North Carolina courts to validate this procedure.[122]

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119. State v. Craven, 367 N.C. 51, 53 (2013) (applying *Bullcoming* and holding that the defendant's confrontation rights were violated when the testifying analyst did not give her own independent opinion, but rather gave "surrogate testimony" that "parroted" the testing analysts' opinions as stated in their lab reports); *see also* State v. Ortiz-Zape, 367 N.C. 1, 9 (2013) ("We emphasize that the expert must present an independent opinion obtained through his or her own analysis and not merely 'surrogate testimony' parroting otherwise inadmissible statements."); State v. Brewington, 367 N.C. 29, 32 (2013) (another cocaine case; following *Ortiz-Zape* and finding no error where the testifying expert gave an independent opinion, "not mere surrogate testimony").

120. State v. Harris, 221 N.C. App. 548, 556 (2012) (a trainee prepared the DNA report under the testifying expert's direct supervision and the findings in the report were the expert's own).

121. 567 U.S.__132 S. Ct. 2221 (2012).

122. For an extensive discussion of *Williams* and its implications on the admissibility of forensic reports in North Carolina, see Jessica Smith, *Confrontation Clause Update: Williams v. Illinois and What It Means for Forensic Reports,* ADMIN. JUST. BULL. 2012/03 (UNC School of Government Sept. 2012), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1203.pdf.

b. North Carolina Cases. Lower courts have noted that *Williams* did little to clarify the constitutionality of using substitute analysts at trial.[123] However, *Williams* did affirm the conviction on appeal, indicating that at least in the circumstances presented in that case, use of a substitute analyst is permissible. Since *Williams,* the North Carolina Supreme Court has held that substitute analyst testimony is permissible in certain circumstances. Specifically, substitute analyst testimony is permissible if the expert testifies to an independent opinion based on information reasonably relied upon by experts in the field and the state lays a proper foundation for the testimony. This was the holding of *State v. Ortiz-Zape,*[124] a drug case. Over the defendant's objection, the trial court allowed the State's expert witness, Tracey Ray of the CMPD crime lab to testify about the lab's practices and procedures, her review of the testing in the case, and her opinion that the substance at issue was cocaine. Ray was not involved in the actual testing of the substance at issue; her opinion was based on tests done by a non-testifying analyst. The trial court excluded the non-testifying analyst's report under Rule 403. The defendant was convicted and appealed. The North Carolina Supreme Court upheld the conviction, finding that no confrontation clause violation occurred. It explained:

> [W]hen an expert gives an opinion, [i]t is the expert opinion itself, not its underlying factual basis, that constitutes substantive evidence. Therefore, when an expert gives an opinion, the expert is the witness whom the defendant has the right to confront. In such cases, the Confrontation Clause is satisfied if the defendant has the opportunity to fully cross-examine the expert witness who testifies against him, allowing the factfinder to understand the basis for the expert's opinion and to determine whether that opinion should be found credible. Accordingly, admission of an expert's independent opinion based on otherwise inadmissible facts or data of a type reasonably relied upon by experts in the particular field does not violate the Confrontation Clause so long as the defendant has the opportunity to cross-examine the expert.[125]

The court continued, "[w]e emphasize that the expert must present an independent opinion obtained through his or her own analysis and not merely 'surrogate testimony' parroting otherwise inadmissible statements."[126]

123. *See, e.g.*, State v. Michaels, 95 A.3d 648, 665 (N.J. 2014) ("[T]he fractured holdings of *Williams* provide little guidance in understanding when testimony by a laboratory supervisor or co-analyst about a forensic report violates the Confrontation Clause").
124. 367 N.C. 1 (2013).
125. *Id.* at 9 (quotations and citations omitted).
126. *Id.*; *see also* State v. Brewington, 367 N.C. 29, 32 (2013) (another cocaine case; following *Ortiz-Zape* and finding no error where the testifying expert gave an independent opinion, "not mere surrogate testimony"); State v.

Notwithstanding this North Carolina law, judges and litigants should be aware that the issue is likely to be addressed again by the United States Supreme Court, hopefully with more clarity than was provided in *Williams.*

c. Foundational Requirements. While case law from the North Carolina Supreme Court allows substitute analyst testimony post-*Williams,* the prosecution must lay a proper foundation for that evidence. In this regard, *Ortiz-Zape* is instructive. In that case, the court noted that the prosecutor had laid a proper foundation for Ray's testimony. Specifically, that the information she relied upon—the tests done by the non-testifying analyst—was reasonably relied upon by experts in the field and that Ray was asserting her own independent opinion.[127] The court elaborated on the foundational requirements:

> [W]e suggest that prosecutors err on the side of laying a foundation that establishes compliance with Rule of Evidence 703, as well as the lab's standard procedures, whether the testifying analyst observed or participated in the initial laboratory testing, what independent analysis the testifying analyst conducted to reach her opinion, and any assumptions upon which the testifying analyst's testimony relies.[128]

4. Machine Generated Data.

One post-*Williams* North Carolina case suggests that "machine-generated" raw data likely is not testimonial. In *State v. Ortiz-Zape*,[129] the court stated in dicta that "machine-generated raw data," such as a printout from a gas chromatograph, is nontestimonial.[130] As a result, the court suggested, if such data is reasonably relied upon by experts in the field, this information may be disclosed at trial.[131] Note however that a non-testifying analyst's opinion based on machine-generated data is testimonial.[132] Thus, while the raw data may be admissible as a basis of a testifying expert's opinion, the non-testifying analyst's conclusion based on that data is not.

5. Other Options for Proving the State's Case.

Two post-*Williams* North Carolina Supreme Court cases suggest that a defendant's admission that the substance is a controlled substance may be sufficient evidence for conviction. In *State v. Williams*,[133] a drug case, the court held that even if a confrontation clause error occurred with regard to the substitute analyst's testimony, it was harmless beyond a reasonable doubt because the defendant testified that the substance at

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Hurt, 367 N.C. 80 (2013) (per curiam) (applying *Ortiz-Zape* to a case involving substitute analysts in serology and DNA).
127. *Ortiz-Zape*, 367 N.C. 1, 11-12.
128. *Id.* at 13 n.3.
129. 367 N.C. 1 (2013).
130. *Id.* at 9-10.
131. *Id.*
132. *See* Section IV.F.1. above.
133. 367 N.C. 64 (2013).

issue was cocaine.[134] Likewise, in *Ortiz-Zape*, the court found that any possible confrontation error was harmless, noting in part that the defendant told the arresting officer that the substance was cocaine.[135]

G. Medical Reports and Records.

Melendez-Diaz indicated that "medical reports created for treatment purposes . . . would not be testimonial under our decision today."[136] Medical reports prepared for forensic purposes obviously are not prepared for treatment purposes; forensic reports are prepared for the very purpose of establishing or proving some fact at trial.[137]

H. Other Business and Public Records.

Crawford offered business records as an example of nontestimonial evidence.[138] In *Melendez-Diaz*, the Court was careful to clarify: "Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial."[139] Also, the Court has suggested that documents created to establish guilt are testimonial, whereas those unrelated to guilt or innocence are nontestimonial.[140]

1. Records Regarding Equipment Maintenance.

Melendez-Diaz stated that "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records."[141] Consistent with this statement, a number of cases have held that such records are nontestimonial.[142]

2. Police Reports.

Melendez-Diaz suggests that police reports are testimonial when they are used to establish a fact at trial.[143]

3. Fingerprint Cards.

In one pre-*Melendez-Diaz* case, the North Carolina Court of Appeals held, with little analysis, that a fingerprint card contained in the Automated Fingerprint Identification System (AFIS) database was a nontestimonial

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134. *Id.* at 69.

135. *Ortiz-Zape*, 367 N.C. at 13-14 (noting also that defense counsel elicited testimony from the officer that the substance "appear[ed] to be powder cocaine"). The court's earlier decision in *State v. Nabors*, 365 N.C. 306 (2011), may have hinted at this result. In that case, the court held that the testimony of defendant's witness identifying the substance at issue as cocaine "provided evidence of a controlled substance sufficient to withstand defendant's motion to dismiss." *Id.* at 313.

136. *Melendez-Diaz*, 557 U.S. at 312 n.2; *see also* State v. Smith, 195 N.C. App. 462, *3-4 (2009) (unpublished) (hospital reports and notes prepared for purposes of treating the patient were nontestimonial business records).

137. *See* Section IV.F.1. above (discussing forensic reports).

138. *Crawford*, 541 U.S. at 56 (business records are "by their nature" not testimonial).

139. *Melendez-Diaz*, 557 U.S. at 324.

140. *See Davis,* 547 U.S. at 825 (citing *Dowdell v. United States*, 221 U.S. 325, 330-31 (1911), and describing it as holding that "facts regarding [the] conduct of [a] prior trial certified to by the judge, the clerk of court, and the official reporter did not relate to the defendants' guilt or innocence and hence were not statements of 'witnesses' under the Confrontation Clause"); *Melendez-Diaz*, 557 U.S. at 323 n.8. *Compare Melendez-Diaz*, 557 U.S. 305 (affidavit identifying a substance as a controlled substance in a drug case—a fact that established guilt—is testimonial), *with id.* at 311 n.1 (records of equipment maintenance on testing equipment—which do not go to guilt—are nontestimonial).

141. *Melendez-Diaz*, 557 U.S. at 311 n.1.

142. *See* EMERGING ISSUES, *supra* note 43, at 17–18.

143. *See Melendez-Diaz*, 557 U.S. at 316, 321-22 (suggesting that an officer's investigative report describing the crime scene is testimonial and stating that police reports do not qualify as business records because they are made essentially for use in court).

business record.[144] After *Melendez-Diaz*, a report of a comparison between a fingerprint taken from the crime scene and an AFIS card used to identify the perpetrator is almost certainly testimonial. However, it is not clear how *Melendez-Diaz* applies to the fingerprint card itself.

4. 911 Event Logs.

In a pre-*Melendez-Diaz* case, the North Carolina Court of Appeals cited a now discredited North Carolina Supreme Court case and held that a 911 event log was a nontestimonial business record.[145] The log detailed the timeline of a 911 call and the law enforcement response to it.[146] To the extent that such a log is kept for administrative purposes and not to establish guilt at trial, the logs may be nontestimonial even after *Melendez-Diaz*. However, if such logs are determined to be like police reports, they probably will be held to be testimonial.[147]

5. Private Security Firm Records.

In *State v. Hewson*,[148] relying again on the same discredited North Carolina Supreme Court case, the North Carolina Court of Appeals held that a "pass on information form" used by security guards in the victim's neighborhood was a nontestimonial business record. The forms were used by the guards to stay informed about neighborhood events. Analysis of the testimonial nature of such records after *Melendez-Diaz* likely will proceed as with 911 event logs.

6. Detention Center Incident Reports.

In a pre-*Melendez-Diaz* case, the North Carolina Supreme Court held that detention center incident reports were nontestimonial.[149] The court reasoned that the reports were created as internal documents concerning administration of the detention center, not for use in later legal proceedings. This analysis appears consistent with classifying business records "created for the administration of an entity's affairs" as nontestimonial and those created for the purpose of establishing or proving a fact at trial as testimonial.[150]

7. Certificates of Nonexistence of Records.

Melendez-Diaz indicates that certificates of nonexistence of records are testimonial.[151] An example of a certificate of nonexistence of record (from an identity fraud case involving an allegedly fraudulent driver's license) is a certificate from a DMV employee stating that there is no record of the defendant ever having been issued a North Carolina driver's license.

8. Department of Motor Vehicle (DMV) Records.

The North Carolina Court of Appeals has held, in a driving while license revoked case, that certain DMV records were nontestimonial.[152] In that

144. State v. Windley, 173 N.C. App. 187, 194 (2005).
145. State v. Hewson, 182 N.C. App. 196, 207 (2007). *Hewson* cited *State v. Forte*, 360 N.C. 427, 435-36 (2006), in support of its holding. *Forte* was abrogated by *Melendez-Diaz*, as discussed in *Understanding the New Confrontation Clause Analysis*, *supra* note 116, at 14 n.65, 16 n.74.
146. *Hewson*, 182 N.C. App. at 201.
147. *See Melendez-Diaz*, 557 U.S. at 316, 321-22 (suggesting that an officer's investigative report describing the crime scene is testimonial and stating that police reports do not qualify as business records because they are made essentially for use in court).
148. 182 N.C. App. 196, 208 (2007).
149. State v. Raines, 362 N.C. 1, 16-17 (2007).
150. *Melendez-Diaz*, 557 U.S. at 324.
151. *Id*. at 323.
152. State v. Clark, ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015).

case, the documents at issue included a copy of the defendant's driving record, certified by the DMV Commissioner; two orders indefinitely suspending his drivers' license; and a document attached to the suspension orders and signed by a DMV employee and the DMV Commissioner. In the last document, the DMV employee certified that the suspension orders were mailed to the defendant on the dates as stated in the orders, and the DMV Commissioner certified that the orders were accurate copies of the records on file with DMV. The court held that the records, which were created by the DMV during the routine administration of its affairs and in compliance with its statutory obligations to maintain records of drivers' license revocations and to provide notice to motorists whose driving privileges have been revoked, were nontestimonial.

9. GPS Tracking Records of Supervised Defendants.

In a sex offender residential restriction case, the North Carolina Court of Appeals held that GPS tracking reports generated in connection with electronic monitoring of a defendant, who was on post-release supervision for a prior conviction, were nontestimonial business records.[153] The court reasoned: "[T]he GPS evidence … was not generated purely for the purpose of establishing some fact at trial. Instead, it was generated to monitor defendant's compliance with his post-release supervision conditions."[154]

10. Court Records.

The United States Supreme Court has suggested that statements regarding a prior trial that do not relate to the defendant's guilt or innocence are nontestimonial.[155]

I. Chain of Custody Evidence.

Melendez-Diaz indicates that chain of custody information is testimonial.[156] However, the majority took issue with the dissent's assertion that "anyone whose testimony may be relevant in establishing the chain of custody … must appear in person as part of the prosecution's case."[157] It noted that while the state has to establish a chain of custody, gaps go to the weight of the evidence, not its admissibility.[158] It concluded: "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."[159] This language calls into question earlier North Carolina cases suggesting that chain of custody information is nontestimonial.[160]

153. State v. Gardner, __ N.C. App. __, 769 S.E.2d 196, 199 (2014).
154. *Id.*
155. *Davis*, 547 U.S. at 825 (citing *Dowdell v. United States*, 221 U.S. 325 (1911), for the proposition that facts regarding the conduct of a prior trial certified to by the judge, the clerk of court, and the official reporter did not relate to the defendant's guilt or innocence and thus were nontestimonial); *Melendez-Diaz*, 557 U.S. at 323 n.8 (same).
156. *Melendez-Diaz*, 557 U.S. at 311 n.1.
157. *Id.*
158. *Id*.
159. *Id.*; *see also* State v. Biggs, __ N.C. App. __, 680 S.E.2d 901, *5 (2009) (unpublished) (the defendant's confrontation clause rights were not violated when the State called only one of two officers who were present when the victim's blood was collected and did not call the nurse who drew the blood; to establish chain of custody, the State called a detective who testified that he was present when the sample was taken, he immediately received the sample from the other detective present and who signed for the sample, he kept the sample securely in a locker, and he transported it to the lab for analysis).
160. State v. Forte, 360 N.C. 427, 435 (2006) (SBI special agent's report identifying fluids collected from the victim was nontestimonial; relying, in part, on the fact that the reports contained chain of custody information); State v.

J. Special Issues Involving Statements by Children

As noted in Section IV.E.3. above, in *Ohio v. Clark,*[161] the United States Supreme Court held that, on the facts presented, statements by a young child to his preschool teachers were nontestimonial. After concluding that the primary purpose of the teachers' questioning of the victim L.P. was to address an ongoing emergency and that his answers were nontestimonial, the Court added:

> L.P.'s age fortifies our conclusion that the statements in question were not testimonial. Statements by very young children will rarely, if ever, implicate the Confrontation Clause. Few preschool students understand the details of our criminal justice system. Rather, "[r]esearch on children's understanding of the legal system finds that" young children "have little understanding of prosecution." And [the defendant] does not dispute those findings. Thus, it is extremely unlikely that a 3–year–old child in L.P.'s position would intend his statements to be a substitute for trial testimony. On the contrary, a young child in these circumstances would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all.[162]

This language may be relevant to the analysis of the testimonial nature of statements by young children to persons other than teachers.

V. Exceptions to the *Crawford* Rule.

A. Forfeiture by Wrongdoing.

The United States Supreme Court has recognized a forfeiture by wrongdoing exception to the confrontation clause that extinguishes confrontation claims on the equitable grounds that a person should not be able to benefit from his or her wrongdoing.[163] Forfeiture by wrongdoing applies when a defendant engages in a wrongful act designed to prevent the witness from testifying, such as threatening, killing, or bribing the witness.[164] When the doctrine applies, the defendant is deemed to have forfeited his or her confrontation clause rights. Put another way, if the defendant intends to cause the witness's absence at trial, he or she cannot complain of that absence. At least one published North Carolina case has applied the doctrine.[165]

1. Intent to Silence Required.

In *Giles v. California*,[166] the United States Supreme Court held that for forfeiture by wrongdoing to apply, the prosecution must establish that the defendant engaged in the wrongdoing with an intent to make the witness

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Hinchman, 192 N.C. App. 657, 664-65 (2008) (chemical analyst's affidavit was nontestimonial when it was limited to an objective analysis of the evidence and routine chain of custody information).

161. 576 U.S. __, 135 S. Ct. 2173 (2015).

162. *Id*. at __, 135 S. Ct. at 2181-82 (citation omitted).

163. Giles v. California, 554 U.S. 353, 359 (2008); *Crawford*, 541 U.S. at 62 (2004); *Davis*, 547 U.S. at 833; *Clark*, 576 U.S. at __, 135 S. Ct. at 2180 (dicta); *see also* State v. Lewis, 361 N.C. 541, 549-50 (2007) (inviting application of the doctrine on retrial).

164. *Giles*, 554 U.S. at 359, 365.

165. State v. Weathers, 219 N.C. App. 522, 525-26 (2012) (the trial court properly applied the forfeiture by wrongdoing exception where the defendant intimidated the witness).

166. 554 U.S. 353 (2008).

unavailable.[167] It is not enough that the defendant engaged in a wrongful act, for example, killing the witness; the act must have been undertaken with an intent to make the witness unavailable for trial.

2. Conduct Triggering Forfeiture.

Examples of conduct that likely will result in a finding of forfeiture include threatening, killing, or bribing a witness.[168] However, *Giles* suggests that the doctrine has broader reach. Addressing domestic violence, the Court stated:

> Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the or forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.[169]

3. Wrongdoing by Intermediaries.

The *Giles* Court suggested that forfeiture applies not only when the defendant personally engages in the wrongdoing that brings about the witness's absence but also when the defendant "uses an intermediary for the purpose of making a witness absent."[170]

4. Conspiracy Theory.

A Fourth Circuit case applied traditional principles of conspiracy liability to the forfeiture by wrongdoing analysis, concluding that the exception may apply when the defendant's co-conspirators engage in the wrongdoing that renders the defendant unavailable.[171] The court noted that mere participation in the conspiracy is not enough to trigger liability; rather the defendant must have (1) participated directly in planning or procuring the declarant's unavailability through wrongdoing; or (2) the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy.[172]

5. Procedural Issues.

a. Hearing. When the State argues for application of forfeiture by wrongdoing, a hearing may be required. There is some support for the argument that at a hearing, the trial judge may consider hearsay evidence, including the

167. *Id.* at 367.
168. *Id*. at 365.
169. *Id*. at 377.
170. *Id.* at 360.
171. United State v. Dinkins, 691 F.3d 358, 384-85 (4th Cir. 2012) (citing similar holdings from other circuits).
172. *Id.* at 385-86 (finding both prongs of the test met in this case).

unavailable witness's out-of-court statements.[173] One North Carolina case held that forfeiture can be found even if the threatened witness fails to testify at the forfeiture hearing.[174]

b. **Standard**. Although the United States Supreme Court has not ruled on the issue, many courts apply a preponderance of the evidence standard to the forfeiture by wrongdoing inquiry.[175]

B. Dying Declarations.

Although *Crawford* acknowledged cases supporting a dying declaration exception to the confrontation clause, it declined to rule on the issue.[176] However, the North Carolina Court of Appeals has recognized such an exception to the *Crawford* rule.[177]

C. Other Founding-Era Exceptions.

As discussed in Section IV.E.3. above, in *Ohio v. Clark*,[178] the United States Supreme Court held that statements by a child victim, L.P., were nontestimonial when they were made in response to his teachers' questioning, done for the primary purpose of addressing an ongoing emergency. After so holding, Court added:

> As a historical matter … there is strong evidence that statements made in circumstances similar to those facing L.P. and his teachers were admissible at common law. And when 18th-century courts excluded statements of this sort, they appeared to do so because the child should have been ruled competent to testify, not because the statements were otherwise inadmissible. It is thus highly doubtful that statements like L.P.'s ever would have been understood to raise Confrontation Clause concerns. Neither *Crawford* nor any of the cases that it has produced has mounted evidence that the adoption of the Confrontation Clause was understood to require the exclusion of evidence that was regularly admitted in criminal cases at the time of the founding.[179]

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173. *Davis*, 547 U.S. at 833.

174. State v. Weathers, 219 N.C. App. 522, 526 (2012) (rejecting the defendant's argument that application of the doctrine was improper because the witness never testified that he chose to remain silent out of fear; "It would be nonsensical to require that a witness *testify against a defendant* in order to establish that the defendant has intimidated the witness into *not* testifying. Put simply, if a witness is afraid to testify against a defendant in regard to the crime charged, we believe that witness will surely be afraid to finger the defendant for having threatened the witness, itself a criminal offense.").

175. *Cf. Giles*, 554 U.S. 353, 379 (Souter, J., concurring) (assuming that the preponderance standard governs); *see*, *e.g.*, *Dinkins*, 691 F.3d. at 383 (using the preponderance standard).

176. *Crawford*, 541 U.S. at 56 n.6; *see also Giles*, 554 U.S. at 357-59 (noting that dying declarations were admitted at common law even though unconfronted); *Bryant*, 562 U.S. at 395 (Ginsburg, J., dissenting) ("[W]ere the issue properly tendered here, I would take up the question whether the exception for dying declarations survives our recent Confrontation Clause decisions.").

177. State v. Bodden, 190 N.C. App. 505, 514 (2008); State v. Calhoun, 189 N.C. App. 166, 172 (2008).

178. 576 U.S. __, 135 S. Ct. 2173 (2015).

179. *Id.* at __, 135 S. Ct. at 2182 (citations omitted).

This language can be read to support the argument that other categories of statements that were "regularly admitted in criminal cases at the time of the founding" do not implicate the confrontation clause.

VI. Waiver.

A. Generally.

Confrontation clause rights, like constitutional rights generally, may be waived.[180] To be valid, a waiver of confrontation rights, like a waiver of any constitutional right, must be knowing, voluntary, and intelligent.[181] Waivers may be expressed or implied. The sections below explore waiver of confrontation rights.

B. Notice and Demand Statutes.

1. Generally.

Melendez-Diaz indicated that states are free to adopt procedural rules governing the exercise of confrontation objections.[182] The Court discussed "notice and demand" statutes as one such procedure, noting that in their simplest form these statutes require the prosecution to give the defendant notice that it intends to introduce a testimonial forensic report at trial without the testimony of the preparer. The defendant then has a period of time in which to object to the admission of the evidence absent the analyst's appearance live at trial.[183] The Court went on to note that these simple notice and demand statutes are constitutional.[184]

2. North Carolina Statutes Allowing for Admission of Forensic Reports without Testimony By Analysts.

In 2009, the North Carolina General Assembly responded to *Melendez-Diaz* by passing legislation amending existing notice and demand statutes and enacting others.[185] These statutes set up procedures by which the State may procure a waiver of confrontation rights with regard to forensic laboratory reports, chemical analyst affidavits, and certain chain of custody evidence. Table 1 summarizes North Carolina's notice and demand statutes.

a. Effect of the Statutes. If the State gives proper notice under a notice and demand statute and the defendant fails to timely file an objection, a waiver of the confrontation right occurs.[186] When this occurs, the trial judge is required to admit the report without the presence of the preparer.[187] If the defendant files a timely objection, there is no waiver and *Crawford* applies.[188]

b. Notice. For all of the statutes, the State must give notice to defense counsel or directly to the defendant if he or she is unrepresented.[189] In its notice, the State must provide the defendant with a copy of the relevant report.[190] While the notice need not contain proof of service or a file stamp,[191] following those

180. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 314 n.3 (2009) ("The right to confrontation may, of course, be waived.").
181. Maryland v. Shatzer, 559 U.S. 98, 104 (2010) (citing Johnson v. Zerbst, 304 U.S. 458 (1938)).
182. *Melendez-Diaz*, 557 U.S. at 314 n.3.
183. *Id*. at 326-27.
184. *Id*. at 327 n.12; *see also* State v. Whittington, 367 N.C. 186, 192-93 (2014) (if the defendant fails to object after notice is given under G.S. 90-95(g), a valid waiver of the defendant's constitutional right to confront the analyst occurs); State v. Steele, 201 N.C. App. 689, 696 (2010) (notice and demand statute in G.S. 90-95(g) is constitutional under *Melendez-Diaz*).
185. S.L. 2009-473.

procedures eliminates any question about whether notice was properly received.

c. Constitutionality. As noted above, the United States Supreme Court opined in *Melendez-Diaz* that simple notice and demand statutes are constitutional. Since that case was decided, the North Carolina Court of Appeals has upheld the constitutionality of G.S. 90-95(g), the notice and demand statute that applies in drug cases.[192] That holding is likely to apply to North Carolina's six other similarly worded notice and demand statutes.

3. North Carolina Statutes Allowing for Remote Testimony. In 2014, the North Carolina General Assembly enacted legislation allowing for remote testimony by forensic analysts in certain circumstances after a waiver of confrontation rights by the defendant through a notice and demand statute.[193]

186. *See, e.g.*, G.S. 8-58.20(f); G.S. 8-58.20(g)(5); *see also* State v. Jones, 221 N.C. App. 236, 238-39 (2012) (a report identifying a substance as cocaine was properly admitted; the State gave notice under the G.S. 90-95(g) and the defendant failed to object).

187. In 2013, the notice and demand statutes were amended, providing that when notice is given and no objection is made, the report "shall" be admitted into evidence without the presence of the preparer. S.L. 2013-171. The earlier versions of the statutes provided that upon a finding of waiver the court may, but was not required to, admit the evidence.

188. *See, e.g.*, G.S. 8-58.20(f) (if an objection is filed, the notice and demand provisions do not apply); G.S. 8-58.20(g)(6) (same).

189. State v. Blackwell, 207 N.C. App. 255, 259 (2010) (in a drug case, the trial court erred by admitting reports regarding the identity, nature, and quantity of the controlled substances where the State provided improper notice; instead of sending notice directly to the defendant, who was *pro se*, the State sent notice to a lawyer who was not representing the defendant at the time); *see also* G.S. 8-58.20(d).

190. State v. Whittington, 367 N.C. 186, 192 (2014) (the State's notice was deficient in that it failed to provide the defendant a copy of the report and stated only that "[a] copy of report(s) will be delivered upon request").

191. State v. Burrow, __ N.C. App. __, 742 S.E.2d 619, 620-22 (2013) (notice was properly given under G.S. 90-95(g) even though it did not contain proof of service or a file stamp; the argued-for service and filing requirements were not required by *Melendez-Diaz* or the statute; the notice was stamped "a true copy"; it had a handwritten notation saying "ORIGINAL FILED," "COPY FAXED," and "COPY PLACED IN ATTY'S BOX" and the defendant did not argue that he did not in fact receive the notice).

192. State v. Steele, 201 N.C. App. 689, 696 (2010) (notice and demand statute in G.S. 90-95(g) is constitutional under *Melendez-Diaz*).

193. S.L. 2014-119 sec. 8(a) & (b) (enacting G.S. 15A-1225.3 and G.S. 20-139.1(c5) respectively).

Table 1. North Carolina's Notice and Demand Statutes for Forensic Reports & Chain of Custody Evidence

Statute	Relevant Evidence	Proceedings	Time for State's Notice	Time for Defendant's Objection or Demand	AOC Form
G.S. 8-58.20(a)-(f)	Laboratory report of a written forensic analysis	Any criminal proceeding	No later than 5 business days after receipt or 30 days before the proceeding, whichever is earlier	Within 15 business days of receiving the State's notice	None
G.S. 8-58.20(g)	Chain of custody statement for evidence subject to forensic analysis	Any criminal proceeding	At least 15 business days before the proceeding	At least 5 business day before the proceeding	None
G.S. 20-139.1(c1)	Chemical analysis of blood or urine	Cases tried in district and superior court and adjudicatory hearings in juvenile court	At least 15 business days before the proceeding	At least 5 business days before the proceeding	AOC-CR-344
G.S. 20-139.1(c3)	Chain of custody statement for tested blood or urine	Cases tried in district and superior court and adjudicatory hearings in juvenile court	At least 15 business days before the proceeding	At least 5 business days before the proceeding	AOC-CR-344
G.S. 20-139.1(e1)-(e2)	Chemical analyst affidavit	Hearing or trial in district court	At least 15 business days before the proceeding	At least 5 business days before the proceeding	AOC-CR-344
G.S. 90-95(g)	Chemical analyses in drug cases	All proceedings in district and superior court	At least 15 business days before the proceeding	At least 5 business days before the proceeding	None
G.S. 90-95(g1)	Chain of custody statement in drug cases.	All proceedings in district and superior court	At least 15 business days before trial	At least 5 business days before trial	None

C. Failure to Call or Subpoena Witness.

The *Melendez-Diaz* Court rejected the argument that a confrontation clause objection is waived if the defendant fails to call or subpoena a witness, ruling that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court."[194] Any support for a contrary conclusion in earlier North Carolina cases is now questionable.[195]

Some viewed the Court's grant of certiorari in *Briscoe v. Virginia*,[196] issued four days after *Melendez-Diaz* was decided, as an indication that the Court might reconsider its position on this issue. The question presented in that case was as follows: If a state allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the state avoid violating the confrontation clause by providing that the accused has a right to call the analyst as his or her own witness? However, in January of 2010, the Court, in a two-sentence *per curiam* decision, vacated and remanded for further proceedings not inconsistent with *Melendez-Diaz*.[197] Since that *per curiam* decision, the Court has taken other action confirming its position on this issue.[198]

D. Stipulations as Waivers.

One North Carolina case held that the defendant waived a confrontation clause challenge to a laboratory report identifying a substance as a controlled substance by "stipulating" to the admission of the report "without further authentication or further testimony."[199] Although the trial judge in that case confirmed the defendant's "stipulation" through "extensive questioning,"[200] it is better practice for the trial court to deal with such a scenario as an express waiver and to make sure that the record reflects a knowing, voluntary and intelligent waiver of confrontation rights. Another North Carolina case can be read to suggest that a defendant's stipulation that the substance at issue is a controlled substance waives any objection to admission of the forensic report concluding that the substance is a controlled substance without the presence of a preparer.[201] However, that case is probably better read as involving an express waiver of confrontation rights,[202] and the better practice is to ensure that the record reflects a knowing, voluntary and intelligent waiver of confrontation rights.

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194. *Melendez-Diaz*, 557 U.S. at 324; *see also* D.G. v. Louisiana, 559 U.S. 967 (2010) (vacating and remanding, in light of *Melendez-Diaz*, a state court decision that found no confrontation violation when the declarant was present in court but not called to the stand by the state).
195. *See, e.g.*, State v. Brigman, 171 N.C. App. 305, 310 (2005).
196. 557 U.S. 933 (2009).
197. Briscoe v. Virginia, __ U.S. __, 130 S. Ct. 1316 (2010).
198. *See D.G.*, 559 U.S. 967 (vacating and remanding in light of *Melendez-Diaz* a state court decision that found no confrontation violation when the declarant was present in court but not called to the stand by the prosecution).
199. State v. English, 171 N.C. App. 277, 282-84 (2005).
200. *Id.*
201. *State v. Ward,* __ N.C. App. __, 742 S.E.2d 550, 554 (2013). *Ward* was a drug case in which the defendant stipulated that the pills at issue were oxycodone and a non-testifying analyst's report was introduced into evidence.
202. The *Ward* court noted that "[t]he trial court was explicit in announcing to Defendant that [the state's expert] would not testify as to [the non-testifying analyst's] report without Defendant's consent." *Ward,* __ N.C. App. at __, 742 S.E.2d at 554. It concluded: "the record belies Defendant's contention that his stipulation was not a 'knowing and intelligent waiver.'" *Id.*

VII. Unavailability.

Under *Crawford*, out of court statements by witnesses who do not testify at trial are not admissible unless the prosecution shows that the witness is unavailable and that the defendant has had a prior opportunity to cross-examine the witness. This section explores what it means for a witness to be unavailable.

A. Good Faith Effort.

A witness is not unavailable unless the State has made a good-faith effort to obtain the witness's presence at trial.[203]

B. Evidence Required.

To make the showing, the State must put on evidence to establish the steps it has taken to procure the witness for trial.[204]

VIII. Prior Opportunity to Cross-Examine.

Under *Crawford*, out of court statements by witnesses who do not testify at trial are not admissible unless the prosecution shows that the witness is unavailable and that the defendant has had a prior opportunity to cross-examine the witness. This section explores what it means to have a prior opportunity for cross-examination.

A. Prior Trial.

If a case is being retried and the witness testified at the first trial, the prior trial provided the defendant with a prior opportunity to cross-examine the witness.[205]

B. Probable Cause Hearing.

At least one North Carolina case has held that defense counsel's cross-examination of a declarant at a probable cause hearing satisfies *Crawford's* requirement of a prior opportunity to cross-examine.[206]

C. Pretrial Deposition.

It is an open issue whether a pretrial deposition constitutes a prior opportunity to cross-examine.[207]

D. Plea Proceeding.

At least one North Carolina case has held that a witness's testimony at a prior plea proceeding afforded the defendant a prior opportunity to cross-examination.[208]

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203. Hardy v. Cross, 565 U.S. __, 132 S. Ct. 490, 494 (2011) (the state court was not unreasonable in determining that the prosecution established the victim's unavailability for purposes of the confrontation clause).
204. *See* CONFRONTATION ONE YEAR LATER, *supra* note 9, at 30; *see also* State v. Ash, 169 N.C. App. 715, 727 (2005) ("Without receiving evidence on or making a finding of unavailability, the trial court erred in admitting [the testimonial evidence].").
205. CONFRONTATION ONE YEAR LATER, *supra* note 9, at 30–31; *see also* State v. Allen, 179 N.C. App. 434, *3-4 (unpublished).
206. State v. Ross, 216 N.C. App. 337, 345-46 (2011).
207. For a discussion of this issue, see REMOTE TESTIMONY, *supra* note 46, at 15-17; CONFRONTATION ONE YEAR LATER, *supra* note 9, at 31; and EMERGING ISSUES, *supra* note 43, at 9–10.
208. State v. Rollins, __ N.C. App. __, 738 S.E.2d 440, 446 (2013) (no violation of the defendant's confrontation rights occurred when the trial court admitted statements made by an unavailable witness at a proceeding in connection with the defendant's *Alford* plea; the court concluded that that the "defendant definitively had a prior opportunity to cross-examine" the witness during the plea hearing and "had a similar motive to cross-examine [the witness] as he would have had at trial").

IX. Retroactivity.

A. Generally.

Whenever the United States Supreme Court decides a case, its decision applies to all future cases and to those pending and not yet decided on appeal.[209] Whether the decision applies to cases that became final before the new decision was issued is a question of retroactivity.

B. Of *Crawford.*

The United States Supreme Court has held that *Crawford* is not retroactive under the rule of *Teague v. Lane*.[210] Later, in *Danforth v. Minnesota*,[211] the Court held that the federal standard for retroactivity does not constrain the authority of state courts to give broader effect to new rules of criminal procedure than is required under the *Teague* test.

Relying on *Danforth*, some defense lawyers argue that North Carolina judges are now free to disregard *Teague* and apply a more permissive retroactivity standard to new federal rules of criminal procedure—such as *Crawford*—in state court motion for appropriate relief proceedings. However, that argument is not on solid ground in light of the North Carolina Supreme Court's decision in *State v. Zuniga*.[212] In *Zuniga*, the North Carolina Supreme Court expressly adopted the *Teague* test for determining whether new federal rules apply retroactively in state court motion for appropriate relief proceedings. In so ruling it specifically rejected the argument that the state retroactivity rule of *State v. Rivens*[213] should apply in motion for appropriate relief proceedings. Instead, persuaded by concerns of finality, the court adopted the *Teague* rule. Although *Zuniga* is a pre-*Danforth* case, it is the law in North Carolina; although the North Carolina Supreme Court might come to a different conclusion if the issue is raised again, the lower courts are bound by the decision.[214]

C. Of *Melendez-Diaz.*

As noted above, *Melendez-Diaz* held that forensic laboratory reports are testimonial and thus subject to *Crawford.* Some have argued that *Melendez-Diaz* is not a new rule but, rather, was mandated by *Crawford*. If that is correct, *Melendez-Diaz* would apply retroactively at least back to the date *Crawford* was decided, March 8, 2004.[215] For more detail on this issue, see the publication

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209. *See generally* Jessica Smith, *Retroactivity of Judge-Made Rules*, ADMIN. JUST. BULL. No. 2004/10 (UNC School of Government Dec. 2004), *available at* http://www.sog.unc.edu/publications/bulletins/retroactivity-judge-made-rules; *see also* State v. Morgan, 359 N.C. 131, 153-54 (2004) (applying *Crawford* to a case that was pending on appeal when *Crawford* was decided); State v. Champion, 171 N.C. App. 716, 722-723 (2005) (same).

210. 489 U.S. 288 (1989). *See* Whorton v. Bockting, 549 U.S. 406, 416-21 (2007) (*Crawford* was a new procedural rule but not a watershed rule of criminal procedure).

211. 552 U.S. 264 (2008).

212. 336 N.C. 508 (1994).

213. 299 N.C. 385 (1980) (new state rules are presumed to operate retroactively unless there is a compelling reason to make them prospective only).

214. It is worth noting that the United States Supreme Court came to a different conclusion than the *Zuniga* court with regard to application of the *Teague* test to the new federal rule at issue. *Compare Zuniga*, 336 N.C. at 510 *with* Beard v. Banks, 542 U.S. 406, 408 (2004) (*Zuniga* held that the *McKoy* rule applied retroactively under *Teague*; ten years later in *Beard*, the United States Supreme Court concluded otherwise). However, even if that aspect of *Zuniga* is no longer good law, *Danforth* reaffirms the authority of the *Zuniga* court to adopt the *Teague* test for purposes of state post-conviction proceedings. *Danforth*, 552 U.S. at 275.

215. *See Whorton*, 549 U.S. at 416 (old rules apply retroactively).

noted in the footnote.[216] For a discussion of the related issue of whether North Carolina might hold *Melendez-Diaz* to be retroactive in state motion for appropriate relief proceedings under *Danforth*, see the section immediately above.

X. Proceedings to Which *Crawford* Applies.

A. Criminal Trials.

By its terms, the Sixth Amendment applies to "criminal prosecutions." It is thus clear that the confrontation protection applies in criminal trials.[217]

B. Pretrial Proceedings.

Neither *Crawford* nor any of the Court's subsequent cases address the question whether *Crawford* applies to pretrial proceedings. Nor is there a North Carolina post-*Crawford* published case on point. However, a look at post-*Crawford* published cases from other jurisdictions shows that the overwhelming weight of authority holds that *Crawford* does not apply in pretrial proceedings.[218] In fact,

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216. Jessica Smith, *Retroactivity of Melendez-Diaz*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 20, 2009), nccriminallaw.sog.unc.edu/?p=545.

217. *See*, *e.g.*, *Crawford*, 541 U.S. at 43.

218. *Proceedings to determine probable cause:* Peterson v. California, 604 F.3d 1166, 1169-70 (9th Cir. 2010) (in this §1983 case the court held that *Crawford* does not apply in a pretrial probable cause determination; "[T]he United States Supreme Court has repeatedly stated that the right to confrontation is basically a trial right."); State v. Lopez, 314 P.3d 236, 237, 239 (N.M. 2013) (same; "The United States Supreme Court consistently has interpreted confrontation as a right that attaches at the criminal trial, and not before."); Sheriff v. Witzenburg, 145 P.3d 1002, 1005 (Nev. 2006) (same); State v. Timmerman, 218 P.3d 590, 593-594 (Utah 2009) (same); State v. Leshay, 213 P.3d 1071, 1074-76 (Kan. 2009) (same); State v. O'Brien, 850 N.W.2d 8, 16-18 (Wis. 2014) (same); Gresham v. Edwards, 644 S.E.2d 122, 123-24 (Ga. 2007) (same), *overruled on other grounds*, Brown v. Crawford, 715 S.E.2d 132 (Ga. 2011); Com v. Ricker, __ A.3d __, 2015 WL 4381095 (Pa. Super. Ct. July 17, 2015) (same).

Notwithstanding this authority, it is worthwhile to note that in North Carolina, while Evidence Rule 1101(b) provides that the rules of evidence, other than with respect to privileges, do not apply to probable cause hearings, the criminal statutes limit the use of hearsay evidence at those hearings. Specifically, G.S. 15A-611(b) provides that subject to two exceptions, "[t]he State must by nonhearsay evidence, or by evidence that satisfies an exception to the hearsay rule, show that there is probable cause to believe that the offense charged has been committed and that there is probable cause to believe that the defendant committed it." The two exceptions are for (1) reports by experts or technicians and (2) certain categories of reliable hearsay, such as that to prove value or ownership of property. *Id.* at (b)(1) & (2).

Suppression hearings: State v. Rivera, 192 P.3d 1213, 1214, 1215-18 (N.M. 2008) (confrontation rights "do not extend to pretrial hearings on a motion to suppress"); State v. Woinarowicz, 720 N.W.2d 635, 640-41 (N.D. 2006) (same); Oakes v. Com., 320 S.W.3d 50, 55-56 (Ky. 2010) (same); State v. Fortun-Cebada, 241 P.3d 800, 807 (Wash. Ct. App. 2010) (same*);* State v. Williams, 960 A.2d 805, 820 (N.J. Super. Ct. App. Div. 2008) (same), *aff'd on other grounds,* 2013 WL 5808965 (N.J. Super. Ct. App. Div. Oct. 30, 2013) (unpublished); People v. Brink, 818 N.Y.S.2d 374, 374 (N.Y. App. Div. 2006) (same); *People v. Felder*, 129 P.3d 1072, 1073-74 (Colo. App. 2005) (same); Vanmeter v. State, 165 S.W.3d 68, 69-75 (Tex. App. 2005) (same); Ford v. State, 268 S.W.3d 620, 621 (Tex. App. 2008), *rev'd on other grounds,* 305 S.W.3d 530 (Tex. Crim. App. 2009).

Preliminary hearings on the admissibility of evidence: United States v. Morgan, 505 F.3d 332, 339 (5th Cir. 2007) (*Crawford* does not apply to a pretrial hearing on the admissibility of evidence at trial; at the pretrial hearing, grand jury testimony was used to authenticate certain business records); State v. Daly, 775 N.W.2d 47, 66 (Neb. 2009) (same; *Daubert* hearing).

Pretrial release & detention determinations: United States v. Hernandez, 778 F. Supp. 2d 1211, 1219-27 (D.N.M. 2011) (confrontation clause does not apply at a pretrial detention hearing; "[T]he Supreme Court has consistently held that the Sixth Amendment is a trial right . . . ."); United States v. Bibbs, 488 F. Supp.2d 925, 925-26 (N.D. Cal. 2007) ("Nothing in *Crawford* requires or even suggests that it be applied to a detention hearing under the Bail Reform Act, which has never been considered to be part of the trial."); *Godwin v. Johnson*, 957 So. 2d 39, 39-40 (Fla. Dist. Ct. App. 2007) ("The confrontation clause of the Sixth Amendment expressly applies in 'criminal prosecutions.' . . . [T]his does not include proceedings on the issue of pretrial release.")

Proceedings to determine jurisdiction under federal law: United States v. Campbell, 743 F.3d 802, 804, 806-08 (11th Cir. 2014) (holding that *Crawford* does not apply to a pretrial determination of jurisdiction under the Maritime

there appears to be just one published case applying *Crawford* to such proceedings, and that decision creates a split among sister courts in the relevant jurisdiction.[219]

C. Sentencing.

Crawford applies at the punishment phase of a capital trial.[220] The North Carolina Court of Appeals held that *Crawford* applies to *Blakely*-style non-capital sentencing proceedings in which the jury makes a factual determination that increases the defendant's sentence.[221]

D. Termination of Parental Rights.

Crawford does not apply in proceedings to terminate parental rights.[222]

E. Juvenile Delinquency Proceedings.

In an unpublished opinion, the North Carolina Court of Appeals applied *Crawford* in a juvenile adjudication of delinquency.[223] More recently the United States Supreme Court took action indicating that *Crawford* applies in these proceedings.[224]

XI. Harmless Error Analysis.

If a *Crawford* error occurs at trial, the error is not reversible if the State can show that it was harmless beyond a reasonable doubt.[225] This rule applies on appeal as well as in post-conviction proceedings.[226]

Drug Law Enforcement Act; "[T]he Supreme Court has never extended the reach of the Confrontation Clause beyond the confines of a trial."); United States v. Mitchell-Hunter, 663 F.3d 45, 51 (1st Cir. 2011) (same).

219. Curry v. State, 228 S.W.3d 292, 296-298 (Tex. App. 2007) (disagreeing with *Vanmeter,* cited above, and holding that the confrontation clause applies at pretrial suppression hearings).

220. State v. Bell, 359 N.C. 1, 34-35 (2004) (applying *Crawford* to such a proceeding).

221. State v. Hurt, 208 N.C. App. 1, 6 (2010) (*Crawford* applies to all "*Blakely*" sentencing proceedings in which a jury makes the determination of a fact or facts that, if found, increase the defendant's sentence beyond the statutory maximum; here, the trial court's admission of testimonial hearsay evidence during the defendant's non-capital sentencing proceeding violated the defendant's confrontation rights, where at the sentencing hearing the jury found the aggravating factor that the murder was especially heinous, atrocious, or cruel and the trial judge sentenced the defendant in the aggravated range; the court distinguished *State v. Sings*, 182 N.C. App. 162 (2007) (declining to apply the confrontation clause in a non-capital sentencing hearing), on the basis that it involved a sentencing based on the defendant's stipulation to aggravating factors not a *Blakely* sentencing hearing and limited that decision's holding to its facts), *reversed on other grounds* 367 N.C. 80 (2013).

222. *In Re* D.R., 172 N.C. App. 300, 303 (2005); *see also In Re* G.D.H., 186 N.C. App. 304, *4 (2007) (unpublished) (following *In Re* D.R.).

223. *In Re* A.L., 175 N.C. App. 419, *2-3 (2006) (unpublished).

224. *See* D.G. v. Louisiana, 559 U.S. 967 (2010) (reversing and remanding a juvenile delinquency case for consideration in light of *Melendez-Diaz*).

225. *Compare* State v. Lewis, 361 N.C. 541, 549 (2007) (error not harmless), *with* State v. Morgan, 359 N.C. 131, 156 (2004) (error was harmless in light of overwhelming evidence of guilt); *see generally* G.S. 15A-1443(b) (harmless error standard for constitutional errors).

226. *See* G.S. 15A-1420(c)(6) (incorporating into motion for appropriate relief procedure the harmless error standard in G.S. 15A-1443).

SUPPRESSION

Chapter 15

Stops and Warrantless Searches

15.1 General Approach

A. Five Basic Steps

This chapter outlines a five-step approach for analyzing typical "street encounters" with police. It covers situations involving both pedestrians and occupants of vehicles. For a fuller discussion of warrantless searches and seizures, see WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (5th ed. 2012) [hereinafter LAFAVE, SEARCH AND SEIZURE] and ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA (UNC School of Government, 4th ed. 2011) [hereinafter FARB].

Two additional resources on North Carolina law are: Jeff Welty, *Traffic Stops* (UNC School of Government, Mar. 2013) [hereinafter Welty, *Traffic Stops*] (reviewing permissible grounds for and actions during traffic stop), *available at* http://nccriminallaw.sog.unc.edu/wp-content/uploads/2013/03/2013-03-Traffic-Stops.pdf; and Jeffrey Welty, *Motor Vehicle Checkpoints*, ADMINISTRATION OF JUSTICE BULLETIN No. 2010/04 (UNC School of Government, Sept. 2010) [hereinafter Welty, *Motor Vehicle Checkpoints*], *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1004.pdf.

The five steps are:

1. Did the officer seize the defendant?
2. Did the officer have grounds for the seizure?

3. Did the officer act within the scope of the seizure?
4. Did the officer have grounds to arrest or search?
5. Did the officer act within the scope of the arrest or search?

Generally, if an officer lacks authorization at any particular step, evidence uncovered by the officer as a result of the unauthorized action is subject to suppression. A flowchart outlining these steps is attached to this chapter as Appendix 15-1.

B. Authority to Act without Warrant

In many (although not all) of the situations described in this chapter, an officer may act without first obtaining a warrant. The courts have long expressed a preference, however, for the use of both arrest and search warrants—even in situations where a warrant is not required. *See State v. Hardy*, 339 N.C. 207, 226 (1994) ("search and seizure of property unaccompanied by prior judicial approval in the form of a warrant is per se unreasonable unless the search falls within a well-delineated exception to warrant requirement"); *State v. Nixon*, 160 N.C. App. 31, 34–35 (2003), *relying on Aguilar v. Texas*, 378 U.S. 108, 110–11 (1964) ("informed and deliberate determinations of magistrates . . . are to be preferred over the hurried action of officers" (citation omitted)), *abrogated on other grounds by Illinois v. Gates*, 462 U.S. 213 (1983); *see also Flippo v. West Virginia*, 528 U.S. 11, 13 (1999) (court states that "warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement"; court rejects any "homicide crime scene" exception to warrant requirement); *United States v. Ventresca*, 380 U.S. 102, 106 (1965) ("in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall"); *Beck v. Ohio*, 379 U.S. 89, 96 (1964) ("arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause").

C. Effect of Constitutional and State Law Violations

Most of this chapter deals with violations of the U.S. Constitution, for which the remedy is suppression of evidence that is unconstitutionally obtained.

To the extent it provides greater protection, state constitutional law provides a basis for suppression of illegally obtained evidence. In the search and seizure context, the North Carolina courts have found that protections under the North Carolina Constitution differ from federal constitutional protections in limited instances. *See State v. Carter*, 322 N.C. 709 (1988) (rejecting good faith exception to exclusionary rule under state constitution); *see also supra* "Good faith exception for constitutional violations not valid in North Carolina" in § 14.2B, Search Warrants (discussing case law and impact of recent legislation). Several states have recognized additional circumstances in which their state constitutions provide greater protections than under the U.S. Constitution. Examples are cited in this chapter. North Carolina defense counsel should remain alert to opportunities for differentiating the North Carolina Constitution from more limited federal protections.

Substantial statutory violations also may warrant suppression under Section 15A-974 of

the North Carolina General Statutes (hereinafter G.S.). In 2011, the N.C. General Assembly amended G.S. 15A-974, effective for trials and hearings commencing on or after July 1, 2011, to provide a good-faith exception to the exclusionary rule for statutory violations. *See* 2011 N.C. Sess. Laws Ch. 6 (H 3). For a further discussion of statutory violations and the effect of the 2011 legislation, see *supra* "Good faith exception for constitutional violations not valid in North Carolina" in § 14.2B, Search Warrants, and § 14.5, Substantial Violations of Criminal Procedure Act.

Violations of other states' laws, not based on federal constitutional requirements or North Carolina law, generally do not provide a basis for suppression. *See State v. Hernandez*, 208 N.C. App. 591, 604 (2010) (declining to suppress evidence for violation of New Jersey state constitution); *see also Virginia v. Moore*, 553 U.S. 164 (2008) (Virginia law enforcement officers who had probable cause to arrest defendant for a misdemeanor did not violate Fourth Amendment when they arrested him and conducted search incident to arrest although state law did not authorize an arrest); *cf. State v. Stitt*, 201 N.C. App. 233 (2009) (even if State did not fully comply with 18 U.S.C. 2703(d) of the Stored Communications Act in obtaining records pertaining to cell phones possessed by defendant, federal law did not provide for suppression remedy).

15.2 Did the Officer Seize the Defendant?

The Fourth Amendment prohibits an officer from stopping, or "seizing," a person without legally sufficient grounds, and evidence obtained by an officer after seizing a person may not be used to justify the seizure. *See* FARB at 27. It is therefore critical for Fourth Amendment purposes to determine exactly when a seizure occurs.

A. Consensual Encounters

"Free to leave" test. As a general rule, a person is seized when, in view of all of the circumstances, a reasonable person would have believed that he or she was not "free to leave." *See United States v. Mendenhall*, 446 U.S. 544 (1980); *Florida v. Royer*, 460 U.S. 491 (1983); *see also Florida v. Bostick*, 501 U.S. 429 (1991) (when a person's freedom of movement is restricted for reasons independent of police conduct, such as when a person is a passenger on a bus, the test is whether a reasonable person would have felt free to decline the officer's requests or terminate the encounter).

The "free to leave" test used to determine whether a person has been seized requires a lesser degree of restraint than the test for "custody" used to determine whether a person is entitled to *Miranda* warnings. *See State v. Buchanan*, 353 N.C. 332 (2001) (test for custody is whether there was formal arrest or restraint on freedom of movement of degree associated with formal arrest); *see also infra* § 15.4G, Does *Miranda* Apply? (discussing circumstances in which *Miranda* warnings may be required following a seizure).

A seizure clearly occurs if an officer takes a person into custody, physically restrains the person, or otherwise requires the person to submit to the officer's authority. An encounter

may be considered "consensual" and not a seizure, however, if a person willingly engages in conversation with an officer.

Factors. Factors to consider in determining whether an encounter is consensual or a seizure include:

- number of officers present,
- display of weapon by officer,
- physical touching of defendant,
- use of language or tone of voice indicating that compliance is required,
- holding a person's identification papers or property,
- blocking the person's path, and
- activation or shining of lights.

See State v. Farmer, 333 N.C. 172 (1993) (discussing factors); *see also* Jeff Welty, *Is the Use of a Blue Light a Show of Authority?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Dec. 7, 2010) (suggesting that use of blue light is "conclusive" as to existence of seizure), http://nccriminallaw.sog.unc.edu/?p=1804.

Cases finding a seizure include: *State v. Icard*, 363 N.C. 303 (2009) (defendant was seized where officer initiated encounter, telling occupants of vehicle that the area was known for drug crimes and prostitution; was armed and in uniform; called for backup assistance; illuminated vehicle in which defendant was sitting with blue lights; knocked twice on defendant's window; and when defendant did not respond opened car door and asked defendant to exit, produce identification, and bring purse; backup officer also illuminated defendant's side of vehicle with take-down lights); *State v. Harwood*, ___ N.C. App. ___, 727 S.E.2d 891 (2012) (defendant was seized when officers parked directly behind his stopped vehicle, drew their firearms, ordered the defendant and his passenger to exit the vehicle, and placed defendant on the ground and handcuffed him); *State v. Haislip*, 186 N.C. App. 275 (2007) (defendant was seized where officer fell in behind defendant, activated blue lights, and after defendant parked car, got out, and began walking away, approached her and got her attention), *vacated and remanded on other grounds*, 362 N.C. 499 (2008) (remanded to trial court for written findings of fact and conclusions of law).

Cases not finding a seizure include: *State v. Campbell*, 359 N.C. 644 (2005) (defendant was not seized when officer parked her car in lot without turning on blue light or siren, approached defendant as defendant was walking from car to store, and asked defendant if she could speak with him; after talking with defendant, officer asked defendant to "hold up" while officer transmitted defendant's name to dispatcher; assuming that this statement constituted seizure, officer had developed reasonable suspicion by then to detain defendant); *State v. Williams*, 201 N.C. App. 566, 571 (2009) (officer parked his patrol car on the opposite side of the street from the driveway in which defendant was parked, did not activate the siren or blue lights on his patrol car, did not remove his gun from its holster, or use any language or display a demeanor suggesting that defendant was not free to leave); *State v. Johnston*, 115 N.C. App. 711 (1994) (defendant was not seized

where trooper drove over to where defendant's car was already parked, defendant voluntarily stepped out of car before trooper arrived, and trooper then exited his car and walked over to defendant).

B. Chases

Even if a reasonable person would not have felt "free to leave," the U.S. Supreme Court has held that a seizure does not occur until there is a physical application of force or submission to a show of authority. *See California v. Hodari D.*, 499 U.S. 621 (1991) (when police are chasing person who is running away, person is not "seized" until person is caught or gives up chase); *State v. Eaton*, 210 N.C. App. 142 (2011) (defendant was not seized before he discarded plastic baggie containing pills); *State v. Leach*, 166 N.C. App. 711 (2004) (following *Hodari D.* and holding that officers had not seized defendant until they detained him after high speed chase); *State v. West*, 119 N.C. App. 562 (1995) (following *Hodari D.*).

For example, under *Hodari D.*, if an officer directs a car to pull over, a seizure occurs when the driver stops, thus submitting to the officer's authority. A seizure also could occur when a person tries to get away from the police in an effort to terminate a consensual encounter. *See United States v. Wilson*, 953 F.2d 116 (4th Cir. 1991) (defendant initially agreed to speak with officer and produced identification at officer's request, but then declined request for consent to search and tried to leave; officer effectively seized defendant by following defendant and repeatedly asking for consent to search); *see also infra* § 15.3D, Flight (flight from consensual or illegal encounter does not provide grounds to stop person for resisting, delaying, or obstructing officer).

Generally, evidence observed or obtained before a seizure is not subject to suppression under the Fourth Amendment. *See State v. Eaton*, 210 N.C. App. 142 (2011) (defendant was not seized before he discarded plastic baggie containing pills; because defendant abandoned baggie in public place and seizure had not yet occurred, officer's recovery of baggie did not violate Fourth Amendment). If a defendant discards property as a result of illegal police action, however, he or she may move to suppress the evidence as the fruit of illegal action. *See State v. Joe*, ___ N.C. App. ___, 730 S.E.2d 779 (2012) (officers did not have grounds to arrest defendant for resisting an officer for ignoring their command to stop; bag of cocaine cannot be held to have been voluntarily abandoned by defendant when abandonment was product of unlawful arrest; suppression motion granted), *review granted*, ___ N.C. ___ , 736 S.E.2d 187 (2013).

C. Race-Based "Consensual" Encounters

If officers select a defendant for a "consensual" encounter because of the defendant's race, evidence obtained during the encounter potentially could be suppressed on equal protection and due process grounds. *See Whren v. United States*, 517 U.S. 806 (1996) (Equal Protection prohibits selective enforcement of law based on considerations such as race); *United States v. Avery*, 137 F.3d 343 (6th Cir. 1997); *United States v. Taylor*, 956 F.2d 572 (6th Cir. 1992); *see also United States v. Washington*, 490 F.3d 765 (9th Cir.

2007) (in totality of circumstances, encounter between two white police officers and African-American defendant was not consensual, as a reasonable person in defendant's circumstances would not have felt free to leave; court relied on, among other things, strained relations between police and African-American community and reputation of police among African-Americans).

If an officer's actions amount to a stop, racial motivation also may undermine the credibility of non-racial reasons asserted by the officer as the basis for the stop. *See infra* § 15.3M, Race-Based Stops.

In recognition of the potential for racial profiling, North Carolina law requires the Division of Criminal Information of the N.C. Department of Justice to collect statistics on traffic stops by state troopers and other state law enforcement officers. *See* G.S. 114-10.01. This statute also requires the Division to collect statistics on many local law enforcement agencies. Unless a specific statutory exception exists, records maintained by state and local government agencies are public records. *See generally News and Observer Publishing Co. v. Poole*, 330 N.C. 465 (1992).

D. Selected Actions before Seizure Occurs

Running tags. *See State v. Chambers*, 203 N.C. App. 373, at *2 (2010) (unpublished) ("Defendant's license tag was displayed, as required by North Carolina law, on the back of his vehicle for all of society to view. Therefore, defendant did not have a subjective or objective reasonable expectation of privacy in his license tag. As such, the officer's actions did not constitute a search under the Fourth Amendment.").

Installation of GPS tracking device. *See United States v. Jones*, ___ U.S. ___, 132 S. Ct. 945 (2012) (Government's attachment of GPS device to vehicle to track vehicle's movements was search under the Fourth Amendment); *see also* Jeff Welty, *Advice to Officers after Jones*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jan. 30, 2012) (observing that *Jones* requires that officers ordinarily obtain prior judicial authorization to attach GPS device to vehicle), http://nccriminallaw.sog.unc.edu/?p=3250.

15.3 Did the Officer Have Grounds for the Seizure?

A. Reasonable Suspicion

Officers may make a brief investigative stop of a person—that is, they may seize a person—if they have reasonable suspicion of criminal activity by the person. *See Terry v. Ohio*, 392 U.S. 1 (1968); *see also State v. Styles*, 362 N.C. 412 (2008) (holding that U.S. Constitution allows traffic stop based on reasonable suspicion); *State v. Duncan*, 43 P.3d 513 (Wash. 2002) (holding that although *Terry* authorizes stop based on reasonable suspicion of criminal offense and possibility of noncriminal traffic violation, it does not authorize stop based on reasonable suspicion of other noncriminal infractions). For a further discussion of the standard for traffic stops, see *infra* § 15.3E, Traffic Stops.

Factors to consider in determining reasonable suspicion include:

- the officer's personal observations,
- information the officer receives from others,
- time of day or night,
- the suspect's proximity to where a crime was recently committed,
- the suspect's reaction to the officer's presence, including flight, and
- the officer's knowledge of the suspect's prior criminal record

See also United States v. Foster, 634 F.3d 243, 248 (4th Cir. 2011) (in holding that stop was not supported by reasonable suspicion, court stated, "[w]e also note our concern about the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity" and "we are deeply troubled by the way in which the Government attempts to spin these largely mundane acts into a web of deception").

B. High Crime or Drug Areas

Presence in a high crime or drug area, standing alone, does not constitute reasonable suspicion. Other factors providing reasonable suspicion must be present. *See Brown v. Texas*, 443 U.S. 47 (1979) (defendant's presence with others on a corner known for drug-related activity did not justify investigatory stop); *State v. Fleming*, 106 N.C. App. 165 (1992) (following *Brown*); *see also United States v. Massenburg*, 654 F.3d 480, 488 (4th Cir. 2011) (disallowing stop and frisk of person based on generic anonymous tip; court states that allowing officer's actions "would be tantamount to permitting a regime of general searches of virtually any individual residing in or found in high-crime neighborhoods").

Although not extensively discussed in the North Carolina cases, some courts have questioned the characterization of a neighborhood as a high crime area and have required the State to make an appropriate factual showing. For example, the First Circuit Court of Appeals has held that, when considering an officer's testimony that a stop occurred in a "high crime area," the court must identify the relationship between the charged offense and the type of crime the area is known for, the geographic boundaries of the allegedly "high crime area," and the temporal proximity between the evidence of criminal activity and the observations allegedly giving rise to reasonable suspicion. *United States v. Wright*, 485 F.3d 45 (1st Cir. 2007), *cited with approval in United States v. Swain*, 324 F. App'x. 219, at *222 (4th Cir. 2009) (unpublished) ("Reasonable suspicion is a context-driven inquiry and the high-crime-area factor, like most others, can be implicated to varying degrees. For example, an open-air drug market location presents a different situation than a parking lot where an occasional drug deal might occur."); *see also United States v. Montero-Camargo*, 208 F.3d 1122, 1138 (9th Cir. 2000) ("[t]he citing of an area as 'high-crime' requires careful examination by the court, because such a description, unless properly limited and factually based, can easily serve as a proxy for race or ethnicity").

Cases finding a stop in a "high-crime" area not to be based on reasonable suspicion include:

State v. White, ___ N.C. App. ___, 712 S.E.2d 921, 928 (2011) (reasonable suspicion did not exist where officers responded to a complaint of loud music in a location they regarded as a high crime area but officers did not see the defendant engaged in any suspicious activity and did not see any device capable of producing loud music; that the defendant was running in the neighborhood did not establish reasonable suspicion; "[t]o conclude the officers were justified in effectuating an investigatory stop, on these facts, would render any person who is unfortunate enough to live in a high-crime area subject to an investigatory stop merely for the act of running")

State v. Hayes, 188 N.C. App. 313 (2008) (reasonable suspicion did not exist where defendant and another man were in area where drug-related arrests had been made in past, they were walking back and forth on a sidewalk in a residential neighborhood on a Sunday afternoon, the officer did not believe they lived in the neighborhood, and the officer observed in the car they had exited a gun under the seat of the defendant's companion but not of the defendant)

Cases finding a stop in a "high-crime" area to be justified by additional factors showing reasonable suspicion include:

State v. Butler, 331 N.C. 227 (1992) (presence of an individual on a corner specifically known for drug activity and the scene of multiple recent arrests for drugs, coupled with evasive actions by defendant, were sufficient to form reasonable suspicion to stop)

State v. Mello, 200 N.C. App. 437 (2009) (holding that the defendant's presence in a high-drug area, coupled with evasive action on the part of individuals seen interacting with defendant, provided reasonable suspicion to support a stop), *aff'd per curiam*, 364 N.C. 421 (2010)

In re I.R.T., 184 N.C. App. 579 (2007) (discussing factors relevant to whether an officer had reasonable suspicion)

C. Proximity to Crime Scenes or Crime Suspects

A factor similar to presence in a high-crime area, discussed in subsection B., above, is proximity to a crime scene. Without more, this factor does not establish reasonable suspicion. *See State v. Brown*, ___ N.C. App. ___, 720 S.E.2d 446 (2011) (proximity to area in which robbery occurred four hours earlier insufficient to justify stop); *State v. Chlopek*, 209 N.C. App. 358 (2011) (no reasonable suspicion to stop truck that drove into subdivision under construction and drove out thirty minutes later at a time of night when copper thefts had been reported in other parts of the county); *State v. Murray*, 192 N.C. App. 684 (2008) (officer did not have reasonable suspicion to stop vehicle when officer was on patrol at 4:00 a.m. in area where there had been recent break-ins; vehicle was not breaking any traffic laws, officer did not see any indication of any damage or break-in

that night, vehicle was on public street and was not leaving parking lot of any business, and officer found no irregularities on check of vehicle's license plate); *State v. Cooper*, 186 N.C. App. 100 (2007) (no reasonable suspicion where defendant, a black male, was in vicinity of crime scene and suspect was described as a black male); *compare State v. Campbell*, 188 N.C. App. 701 (2008) (court states that proximity to crime scene, time of day, and absence of other suspects in vicinity do not, by themselves, establish reasonable suspicion; however, noting other factors, court finds that reasonable suspicion existed in all the circumstances of the case).

Likewise, proximity to a person suspected of a crime or wanted for arrest, without more, does not establish reasonable suspicion. *See State v. Washington*, 193 N.C. App. 670 (2008) (defendant drove to and entered home of person who was wanted for several felonies; defendant and person came out of house a few minutes later and drove to nearby gas station, parked in lot, and got out of car, where officers arrested other person and ordered defendant to stop; trial court's finding that officer had right to make investigative stop of defendant because he transported wanted person was erroneous as matter of law).

D. Flight

Generally. In *Illinois v. Wardlow*, 528 U.S. 119 (2000), the U.S. Supreme Court held that the defendant's headlong flight on seeing the officers, along with his presence in an area of heavy narcotics trafficking, constituted reasonable suspicion to stop. The Court reaffirmed that mere presence in a high drug area does not constitute reasonable suspicion and cautioned that reasonable suspicion is based on the totality of the circumstances, not any single factor. *See also In re J.L.B.M.*, 176 N.C. App. 613 (2006) (officer did not have reasonable suspicion to stop in following circumstances: officer received police dispatch of suspicious person, described as Hispanic male, at gas station; when officer drove up, he saw a Hispanic male in baggy clothes, who spoke to someone in another car and then walked away from location of officer's patrol car).

Flight from consensual or illegal encounter not RDO. If an officer has grounds to seize a person, the person's flight may constitute resisting, delaying, or obstructing an officer in the lawful performance of his or her duties (RDO). *See, e.g., State v. Lynch*, 94 N.C. App. 330 (1989). If the initial encounter between an officer and defendant is consensual and not a seizure, however, a defendant's attempt to leave would not constitute RDO. *See, e.g.*, *State v. Joe*, ___ N.C. App. ___, 730 S.E.2d 779 (2012), *review granted*, ___ N.C. ___, 736 S.E.2d 187 (2013); *State v. White*, __ N.C. App. __, 712 S.E.2d 921, 927–28 (2011) (so holding); *In re A.J. M.-B.*, 212 N.C. App. 586 (2011) (same); *State v. Sinclair*, 191 N.C. App. 485, 490–91 (2008) ("Although Defendant's subsequent flight may have contributed to a reasonable suspicion that criminal activity was afoot thereby justifying an investigatory stop, Defendant's flight from a consensual encounter cannot be used as evidence that Defendant was resisting, delaying, or obstructing [the officer] in the performance of his duties."); *compare State v. Washington*, 193 N.C. App. 670 (2008) (officer had reasonable suspicion to stop defendant, so defendant's flight constituted RDO). For a discussion of the difference between consensual encounters and seizures, see *supra* § 15.2A, Consensual Encounters.

Likewise, if an officer illegally stops a person, the person's attempt to leave thereafter ordinarily would not give the officer grounds to stop the person and charge him or her with RDO. *See, e.g.*, *White*¸ ___ N.C. App. ___, 712 S.E.2d 921 (if officer is attempting to effect unlawful stop, defendant's flight is not RDO because officer is not discharging a lawful duty); *Sinclair*, 191 N.C. App. 485 (same); *State v. Swift*, 105 N.C. App. 550 (1992) (recognizing that person may flee illegal stop or arrest); JOHN RUBIN, THE LAW OF SELF-DEFENSE IN NORTH CAROLINA 137–38 (UNC Institute of Government, 1996) (person has limited right to resist illegal stop). *But cf. State v. Branch*, 194 N.C. App. 173 (2008) (officer had reasonable suspicion to stop defendant but did not have grounds to continue detention after completing purpose of stop; defendant had right to resist continued detention but used more force than reasonably necessary by driving away while officer was reaching into vehicle; officer therefore had probable cause to arrest defendant for assault); *In re J.L.B.M.*, 176 N.C. App. 613 (2006) (juvenile could be adjudicated delinquent of obstructing officer for giving false name to officer during illegal stop).

E. Traffic Stops

Standard for making stop. An officer may not randomly stop motorists to check their driver's license or vehicle registration; an officer must have at least reasonable suspicion of criminal activity. *See Delaware v. Prouse*, 440 U.S. 648 (1979). Police may establish systematic checkpoints, without individualized suspicion, under certain conditions. *See infra* § 15.3J, Motor Vehicle Checkpoints.

The N.C. Court of Appeals previously held in several opinions that when an officer makes a traffic stop based on a readily observed traffic violation, such as speeding or running a red light, the stop had to be supported by probable cause. In contrast, according to these decisions, reasonable suspicion was sufficient if the suspected violation was one that could be verified only by stopping the vehicle, such as impaired driving or driving with a revoked license. *See State v. Baublitz*, 172 N.C. App. 801 (2005) and cases cited therein; *see also State v. Ivey*, 360 N.C. 562 (2006) (suggesting under U.S. and N.C. constitutions that probable cause may be required to stop for any traffic violation). The N.C. Supreme Court has since held that reasonable suspicion, not probable cause, is sufficient for a traffic stop, regardless of whether the traffic violation is readily observed or merely suspected. *See State v. Styles*, 362 N.C. 412 (2008). *But cf.* G.S. 15A-1113(b) (an officer who has probable cause of a noncriminal infraction may detain the person to issue and serve a citation); *State v. Day*, 168 P.3d 1265 (Wash. 2007) (officer may not make investigatory stop for parking violation); *State v. Holmes*, 569 N.W.2d 181 (Minn. 1997) (to same effect).

Standing of passenger to challenge stop. In *Brendlin v. California*, 551 U.S. 249 (2007), the U.S. Supreme Court held that a passenger in a car is seized under the Fourth Amendment when the police make a traffic stop, and the passenger may challenge the stop's constitutionality. *Accord State v. Canty*, ___ N.C. App. ___, 736 S.E.2d 532 (2012). Consequently, when evidence incriminating a passenger is obtained following an illegal stop, the passenger has standing to move to suppress the evidence. This ruling

overrules any contrary authority in North Carolina. *See State v. Smith*, 117 N.C. App. 671 (1995) (suggesting that a passenger did not have standing to move to suppress). The North Carolina Court of Appeals has recognized under *Brendlin* that a passenger also has standing to challenge the duration of a stop. *See State v. Jackson*, 199 N.C. App. 236 (2009).

If a stop is valid, a passenger's standing to challenge actions taken during the stop (such as frisks or searches) will depend on whether the officer's actions infringe on the passenger's rights. *See State v. Franklin*, ___ N.C. App. ___, 736 S.E.2d 218 (2012) (although a passenger who has no possessory interest in a vehicle has standing to challenge a stop of the vehicle, that passenger does not have standing to challenge a search of the vehicle).

F. Selected Reasons for Traffic Stops

Delay at light. *Compare, e.g., State v. Barnard*, 362 N.C. 244 (2008) (driver's unexplained thirty-second delay before proceeding through green traffic light gave rise to reasonable suspicion of impaired driving in all the circumstances), *with State v. Roberson*, 163 N.C. App. 129 (2004) (defendant's eight to ten second delay after light turned green did not give officer reasonable suspicion to stop for impaired driving).

Failure to use turn signal. *Compare, e.g., State v. Ivey*, 360 N.C. 562 (2006) (failure to use turn signal when making turn did not give officer grounds to stop; failure to signal did not affect operation of any other vehicle or any pedestrian), *and State v. Watkins*, ___ N.C. App. ___, 725 S.E.2d 400 (2012) (suggesting that unsignaled lane change was insufficient to justify stop), *with State v. Styles*, 362 N.C. 412 (2008) (failure to use turn signal gave officer grounds to stop because failure could affect operation of another vehicle, in this case vehicle driven by officer, which was directly behind defendant), *and State v. McRae*, 203 N.C. App. 319 (2010) (similar).

Speeding or slowing. *See, e.g., State v. Canty*, ___ N.C. App. ___, 736 S.E.2d 532 (2012) (no reasonable suspicion; car touched fog line and slowed to 59 m.p.h. in 65 m.p.h. when officers passed car, and driver and passengers appeared nervous and failed to make eye contact with passing officer); *State v. Royster*, ___ N.C. App. ___, 737 S.E.2d 400 (2012) (officer had sufficient time to form opinion that defendant was speeding); *State v. Barnhill*, 166 N.C. App. 228 (2004) (officer's estimate that defendant was going 40 m.p.h. in 25 m.p.h. zone justified stop); *State v. Aubin*, 100 N.C. App. 628 (1990) (driving excessively slowly and weaving in own lane justified stop); *see also* Welty, *Traffic Stops*, at 3 (noting that "if a vehicle is speeding only slightly, an officer's visual estimate of speed may be insufficiently reliable and accurate to support a traffic stop"; citing cases), *available at* http://nccriminallaw.sog.unc.edu/wp-content/uploads/2013/03/2013-03-Traffic-Stops.pdf.

Weaving. Numerous cases address "weaving" in one's own lane. While weaving is not a traffic violation and alone may not provide reasonable suspicion, it may provide reasonable suspicion to stop when combined with other factors or when severe. *See also* Jeff Welty, *Weaving and Reasonable Suspicion*, N.C. CRIM. L., UNC SCH. OF GOV'T

BLOG (June 19, 2012), http://nccriminallaw.sog.unc.edu/?p=3677.

Cases not finding grounds for a stop include: *State v. Canty*, ___ N.C. App. ___, 736 S.E.2d 532 (2012) (no reasonable suspicion; car touched fog line and slowed to 59 m.p.h. in 65 m.p.h. when officers passed car and driver and passengers appeared nervous and failed to make eye contact with passing officer); *State v. Peele*, 196 N.C. App. 668 (2009) (single instance of weaving in own lane, without more, did not constitute reasonable suspicion to stop; officer's reliance on dispatcher's report of impaired driving in the area, in addition to officer's observation of weaving, did not provide reasonable suspicion; dispatcher's report was treated as based on anonymous tip, as State provided no evidence that report of bad driving came from identified caller); *State v. Fields*, 195 N.C. App. 740 (2009) (weaving in own lane three times, without more, did not establish reasonable suspicion to stop for impaired driving; defendant violated no other traffic laws, was driving at 4:00 p.m. in afternoon, which was not unusual hour, and was not near places that furnished alcohol); *see also State v. Tarvin*, 972 S.W.2d 910 (Tex. App. 1998) (trial court granted motion to suppress, observing that driving a car, in and of itself, is "controlled weaving"; appellate court upholds suppression of stop).

Cases finding grounds for a stop include: *State v. Kochuk*, ___ N.C. ___, 742 S.E.2d 801 (2013), *rev'g per curiam for reasons stated in dissenting opinion*, ___ N.C. App. ___, 741 S.E.2d 327 (2012); *State v. Otto*, 366 N.C. 134 (2012) (traffic stop justified by the defendant's "constant and continual" weaving for three quarters of a mile at 11:00 p.m. on Friday night); *State v. Fields*, ___ N.C. App. ___, ___, 723 S.E.2d 777, 778 (2012) (officer followed defendant for three quarters of a mile and saw him "weaving in his own lane . . . sufficiently frequent[ly] and erratic[ally] to prompt evasive maneuvers from other drivers"); *State v. Simmons*, 205 N.C. App. 509, 525 (2010) (stop was supported by reasonable suspicion where the defendant "was not only weaving within his lane, but was also weaving across and outside the lanes of travel, and at one point actually ran off the road"); *State v. Jacobs*, 162 N.C. App. 251, 255 (2004) (court recognizes that "defendant's weaving within his lane was not a crime," but finds that all of the facts—slowly weaving within own lane for three-quarters of a mile, late at night, in area near bars—justified stop); *State v. Thompson*, 154 N.C. App. 194 (2002) (weaving within the lane and touching the centerline with both left tires, combined with speeding and other factors, justified stop); *State v. Watson*, 122 N.C. App. 596 (1996) (driving on center line and weaving in own lane at 2:30 a.m. near nightclub justified stop); *State v. Aubin*, 100 N.C. App. 628 (1990) (driving excessively slowly and weaving in own lane justified stop); *see also State v. Hudson*, 206 N.C. App. 482 (2010) (crossing center line and fog line twice provided probable cause for stop for violation of G.S. 20-146(a), which requires driving on right side of highway).

Proximity to bars. *See, e.g.*, *State v. Roberson*, 163 N.C. App. 129 (2004) (driving at 4:30 a.m. in area with several bars and restaurants did not increase level of suspicion and justify stop; by law, those establishments must stop serving alcohol at 2:00 a.m.); *State v. Watson*, 122 N.C. App. 596 (1996) (proximity to nightclub at 2:30 a.m., combined with driving on center line and weaving in own lane, justified stop).

Anonymous tip of impaired driving. *See infra* § 15.3G, Anonymous Tips.

Ownership and registration. *See, e.g., State v. Burke*, 212 N.C. App. 654 (2011) (stop based merely on low number of temporary tag not supported by reasonable suspicion), *aff'd per curiam*, 365 N.C. 415 (2012); *State v. Hess*, 185 N.C. App. 530 (2007) (owner of car had suspended license; absent evidence that owner was not driving car, officer had reasonable suspicion to stop car to determine whether owner was driving); *State v. Hudson*, 103 N.C. App. 708 (1991) (officer had reasonable suspicion that faded, temporary registration had expired and that vehicle was improperly registered); *see also United States v. Wilson*, 205 F.3d 720 (4th Cir. 2000) (Fourth Amendment does not allow traffic stop simply because vehicle had temporary tags and officer could not read expiration date while driving behind defendant at night).

For a discussion of limitations on an officer's actions after discovering that a car was not improperly registered, *see infra* § 15.3L, Mistaken Belief by Officer.

Seatbelt violations. *See, e.g., State v. Villeda*, 165 N.C. App. 431 (2004) (trooper did not have grounds to stop defendant for seat belt violation; evidence indicated that trooper could not see inside vehicles driving in front of him at night on stretch of road on which defendant was stopped).

G. Anonymous Tips

General test. Information from informants is evaluated under the "totality of the circumstances," but the most critical factors are the reliability of the informant and the basis of the informant's knowledge. *See Alabama v. White*, 496 U.S. 325 (1990).

When a tip is anonymous, the reliability of the informant is difficult to assess, and the tip is insufficient to justify a stop unless the tip itself contains strong indicia of reliability or independent police work corroborates significant details of the tip. *See State v. Johnson*, 204 N.C. App. 259, 260–61 (2010) (finding tip insufficient under these principles; anonymous caller merely alleged that black male wearing a white shirt in a blue Mitsubishi with a certain license plate number was selling guns and drugs at certain street corner); *see also State v. Watkins*, 337 N.C. 437 (1994) (upholding stop based on corroboration), *rev'g* 111 N.C. App. 766 (1993); *State v. Harwood*, ___ N.C. App. ___, ___, 727 S.E.2d 891, 899 (2012) (uncorroborated, anonymous tip did not provide basis for stop; "tip in question simply provided that Defendant would be selling marijuana at a certain location on a certain day and would be driving a white vehicle"); *State v. Peele*, 196 N.C. App. 668 (2009) (officer's reliance on dispatcher's report of impaired driving in the area along with observation of single instance of weaving did not provide reasonable suspicion; dispatcher's report was treated as based on anonymous tip, as State provided no evidence that report of bad driving came from identified caller); *see also State v. Coleman*, ___ N.C. App. ___, 743 S.E.2d 62 (2013) (even though caller gave her name, court concluded that information that defendant had open container of alcohol was no more reliable than information provided by anonymous tipster; caller did not identify or describe the defendant, did not provide any way for the officer to assess her credibility,

failed to explain the basis of her knowledge, and did not include any information concerning defendant's future actions).

A tip from a person whom the police fail to identify might not be considered anonymous, or at least not completely anonymous, if the tipster has put his or her anonymity sufficiently at risk. *See State v. Maready*, 362 N.C. 614 (2008) (driver who approached officers in person to report erratic driving was not completely anonymous informant even though officers did not take the time to get her name; also, informant had little time to fabricate allegations); *State v. Allen*, 197 N.C. App. 208 (2009) (tip was not anonymous; victim had face-to-face encounter with police when reporting alleged assault); *State v. Hudgins*, 195 N.C. App. 430 (2009) (caller, although not identified, placed his anonymity at risk; he remained on his cell phone with the dispatcher for eight minutes, gave detailed information about the person who was following him, followed the dispatcher's instructions, which allowed an officer to intercept the person who was following the caller, and remained at scene long enough to identify person stopped by the officer).

Weapons offenses. In *Florida v. J.L.*, 529 U.S. 266 (2000), the Court found that an anonymous tip—stating that a young black male was at a particular bus stop wearing a plaid shirt and carrying a gun—did not give officers reasonable suspicion to stop. The tip lacked sufficient indicia of reliability and provided no predictive information about the person's conduct. The Court refused to adopt a "firearm exception," under which a tip alleging possession of an illegal firearm would justify a stop and frisk even if the tip fails the standard test for reasonable suspicion. *See also State v. Hughes*, 353 N.C. 200 (2000) (following *Florida v. J.L.*, court finds anonymous tip insufficient to support stop); *State v. Brown*, 142 N.C. App. 332 (2001) (to same effect).

Impaired driving cases. *Florida v. J.L.* indicates that the standard for evaluating anonymous tips should be the same regardless of the type of offense involved, with possible exceptions for certain offenses (such as offenses involving explosives).

In cases in North Carolina in which the police have received a tip about impaired or erratic driving, the courts have applied the same standard for assessing reasonable suspicion as in cases involving other offenses. They have not recognized an exception for impaired driving. *See State v. Maready*, 362 N.C. 614 (2008) (finding in totality of circumstances that tip about erratic driving and other information gave officers reasonable suspicion to stop); *State v. Peele*, 196 N.C. App. 668 (2009) (following *Maready*, court finds that tip about erratic driving and other information did not give officers reasonable suspicion to stop). However, a tip might not be treated as completely anonymous if the tipster placed his or her anonymity sufficiently at risk. *See supra* "General test" in this subsection G.

Drug cases. An anonymous tip to police that a person is involved in illegal drug sales is not sufficient, without more, to justify an investigatory stop. *See State v. McArn*, 159 N.C. App. 209 (2003) (anonymous tip that drugs were being sold from particular vehicle was not sufficient to justify stop of vehicle); *compare State v. Sutton*, 167 N.C. App. 242 (2004) (tip from pharmacist with whom officer had been working on ongoing basis to

uncover illegal activity involving prescriptions, combined with officer's own observations, provided reasonable suspicion to stop defendant after defendant left pharmacy).

H. Information from Other Officers

Generally. An officer may stop a person based on the request of another officer if:

- the officer making the stop has reasonable suspicion for the stop based on his or her personal observations;
- the officer making the stop received a request to stop the defendant from another officer who, before making the request, had reasonable suspicion for the stop; or
- the officer making the stop received information from another officer before the stop, which when combined with the stopping officer's observations constituted reasonable suspicion.

See State v. Battle, 109 N.C. App. 367, 371 (1993) (discussing general standard for stops based on collective knowledge); *State v. Bowman*, 193 N.C. App. 104 (2008) (collective knowledge of team of officers investigating defendant imputed to officer who conducted search of vehicle); *State v. Watkins*, 120 N.C. App. 804 (1995) (information fabricated by one officer and supplied to stopping officer may not be used to show reasonable suspicion, even if stopping officer did not know that the information was fabricated); *see also State v. Harwood*, ___ N.C. App. ___, 727 S.E.2d 891 (2012) (anonymous tip did not provide basis for stop; court appears to reject argument that officers could rely on outstanding arrest warrant unknown to stopping officers when they stopped defendant); Jeff Welty, *Fascinating Footnote 3*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Aug. 13, 2012) (discussing *Harwood*), http://nccriminallaw.sog.unc.edu/?p=3815.

Police broadcasts. Police broadcasts may or may not be based on an officer's observations. Without any showing as to the basis of the broadcast, it should be given no more weight than an anonymous tip. *See State v. Peele*, 196 N.C. App. 668 (2009) (dispatcher's report of impaired driving was treated as based on anonymous tip, as State provided no evidence that report of driving came from identified caller); *see also supra* § 15.3G, Anonymous Tips.

I. Pretext

In some instances, a court may find that a stop or search is unconstitutional because the purported justification for the stop or search is a pretext for an impermissible reason.

Stops based on individualized suspicion. The U.S. Supreme Court has significantly cut back the pretext doctrine. Generally, an officer's subjective motivation in stopping a person or vehicle is irrelevant under the Fourth Amendment if the officer has probable cause to make the stop. In *Whren v. United States*, 517 U.S. 806 (1996), the Court held that an officer's actual motivation in making a stop (for example, to investigate for drugs) is generally irrelevant if the officer has probable cause for the stop and could have

stopped the person for that reason (for example, the person committed a traffic violation). *Accord State v. McClendon*, 350 N.C. 630 (1999) (adopting *Whren* under state constitution); *State v. Hamilton*, 125 N.C. App. 396 (1997) (court recognizes effect of *Whren* under U.S. Constitution); *compare State v. Ladson*, 979 P.2d 833 (Wash. 1999) (rejecting *Whren* under state constitution). Before *Whren*, the test in many jurisdictions, including North Carolina, was what a reasonable officer "would have" done in a similar circumstance, not what an officer lawfully "could have" done. *See State v. Hunter*, 107 N.C. App. 402 (1992) (stating former standard), *overruled on other grounds by State v. Pipkins*, 337 N.C. 431 (1994); *State v. Morocco*, 99 N.C. App. 421 (1990) (to same effect).

Whren did not specifically address whether a defendant may challenge as pretextual a stop based on reasonable suspicion. *See also Hamilton*, 125 N.C. App. 396 (dissent notes that *Whren* left this question open). It seems unlikely, however, that *Whren* would not apply to circumstances in which officers have reasonable suspicion to stop, a lesser degree of proof than probable cause but still a form of individualized suspicion. *See Ashcroft v. al-Kidd*, ___ U.S. ___, 131 S. Ct. 2074 (2011) (in upholding validity of material-witness arrest warrant requiring less than probable cause for issuance, Court states that subjective intent is pertinent only in cases not involving individualized suspicion).

Facts known to officer. *Whren* and cases following it consider the objective facts supporting a stop. Consequently, if the facts known to an officer amount to a violation of the law, the stop is valid even though the officer may have made the stop for a different reason. *See State v. Barnard*, 362 N.C. 244 (2008) (based on defendant's thirty-second delay after traffic light turned green, officer stopped defendant for impaired driving, for which there was reasonable suspicion, and for impeding traffic, which was not a traffic violation; court upholds stop, reasoning that its constitutionality depends on the objective facts observed by officer, not the officer's subjective motivation); *State v. Osterhoudt*, ___ N.C. App. ___, 731 S.E.2d 454 (2012) (trooper had reasonable, articulable suspicion to stop defendant based on observed traffic violations notwithstanding his mistaken belief that defendant violated different traffic law).

Relatedly, facts unknown to the officer at the time of the stop do not provide a basis for a stop. *See Devenpeck v. Alford*, 543 U.S. 146, 152 (2004) ("[w]hether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest"; officer's subjective reason for making arrest need not be criminal offense as to which known facts provide probable cause); *see also* 2 LAFAVE, SEARCH AND SEIZURE § 3.2(d), at 57–58 (for actions without warrant, information to be considered is totality of facts available to officer). For a discussion of reliance on the collective knowledge of the investigating officers, see *supra* § 15.3H, Information from Other Officers.

Accordingly, if the facts known to an officer do not satisfy the State's burden of showing grounds for the stop, the stop is invalid. This result does not depend on whether the stop was or was not pretextual, although as a practical matter judges may scrutinize more

closely whether grounds existed for the stop if they believe an officer acted for a pretextual reason. *See infra* § 15.3M, Race Based Stops (discussing cases); *see also State v. Franklin*, ___ N.C. App. ___, 736 S.E.2d 218 (2013) (Elmore, J., dissenting) (finding that evidence failed to show that officer observed seat belt violation and therefore failed to show officer possessed probable cause for stop).

Exceptions. There are some limits to *Whren*.

- *Whren* itself stated that a defendant may challenge as pretextual inventory searches or administrative inspections because they are not based on individualized suspicion.
- Likewise, a defendant may challenge as pretextual a license or other checkpoint when the real purpose is impermissible. *See infra* "Pretextual checkpoints" in § 15.3J, Motor Vehicle Checkpoints.
- A stop for a traffic violation or other matter still violates the Fourth Amendment if the officer exceeds the scope of the stop—for example, the officer unduly detains the defendant about a matter unrelated to the purpose of the stop without additional grounds to do so. *See infra* § 15.4E, Nature, Length, and Purpose of Detention.
- If an officer stops a defendant because of his or her race, the stop may violate equal protection regardless of whether probable cause exists. *See supra* § 15.2C, Race-Based "Consensual" Encounters. Or, the racial motivation may undermine the credibility of the officer's stated reason for the stop. *See infra* § 15.3M, Race-Based Stops.

Effect of not issuing citation. The failure of an officer to issue a citation for the traffic violation that was the basis of a traffic stop does not affect the stop's validity if objective circumstances indicate that the defendant committed a violation. *See State v. Baublitz*, 172 N.C. App. 801 (2005) (officer's "objective observation" that defendant's vehicle twice crossed center line of highway provided officer with probable cause to stop for traffic violation, regardless of officer's subjective motivation for making stop; court finds it irrelevant that officer did not issue traffic ticket to defendant after arresting him for possession of cocaine).

Nevertheless, a stop would be unlawful if the circumstances indicate that the officer did not have grounds for the stop—for example, the officer could not have observed the alleged traffic or other violation. *See State v. Villeda*, 165 N.C. App. 431 (2004) (trooper did not have probable cause to stop defendant for seat belt violation; evidence indicated that trooper could not see inside vehicles driving in front of him at night on stretch of road on which defendant was stopped). The failure to issue a citation, along with other factors, may bear on the credibility of the officer's claimed observation of a violation. *See State v. Parker*, 183 N.C. App. 1, 8 (2007) (noting rule in *Baublitz* that failure to issue citation for violation that was basis of stop does not affect validity of stop if objective circumstances support stop, but also noting holding in *Villeda* that evidence may not support officer's claimed observations).

J. Motor Vehicle Checkpoints

The discussion below reviews selected principles governing motor vehicle checkpoints. For an in-depth discussion of checkpoints as well as additional information on some of the issues discussed below, see Welty, *Motor Vehicle Checkpoints*, *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1004.pdf.

License and registration checkpoints. In *Delaware v. Prouse*, 440 U.S. 648 (1979), the U.S. Supreme Court held that officers may not randomly stop motorists to check their driver's license or vehicle registration; the Court indicated, however, that checkpoints at which drivers' licenses and registrations are systematically checked may be permissible. *See also State v. Sanders*, 112 N.C. App. 477 (1993) (upholding license checkpoint under authority of *Prouse*). Motor vehicle checkpoints are authorized in North Carolina under G.S. 20-16.3A, which allows checkpoints for the purpose of determining compliance with G.S. Chapter 20. The N.C. Court of Appeals has questioned whether it is constitutionally permissible to set up a checkpoint to check for "any and all" motor vehicle violations; subsequent decisions have not specifically addressed the question. *State v. Veazey*, 191 N.C. App. 181, 189 (2008) (questioning whether it is constitutionally permissible to set up a checkpoint to check for "any and all" motor vehicle violations), *appeal after remand*, 201 N.C. App. 398 (2009) (finding that checkpoint was for lawful purpose of checking licenses and that checkpoint was tailored to that purpose); *see also* 5 LAFAVE, SEARCH AND SEIZURE § 10.8(b), at 420–22 (suggesting that vehicle safety checkpoints may be permissible if they do not involve unrestrained discretion and are not a subterfuge for other purposes). *But cf. infra* § 15.3K, Drug and Other Checkpoints (noting disapproval of general crime control checkpoints).

A license and registration checkpoint must comply with both constitutional limitations and the procedures in G.S. 20-16.3A. For a further discussion of these limitations, see Welty, *Motor Vehicle Checkpoints*, *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1004.pdf.

DWI checkpoints. The U.S. Supreme Court has upheld the constitutionality of impaired-driving checkpoints conducted under guidelines regulating officers' discretion. *See Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990). Impaired-driving checkpoints in North Carolina must comply with both constitutional limitations and the procedures in G.S. 20-16.3A. For a further discussion of these limitations, see Welty, *Motor Vehicle Checkpoints*.

Pretextual checkpoints. A license or impaired-driving checkpoint is subject to challenge as pretextual under the Fourth Amendment. *See City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (checkpoint is unconstitutional if primary purpose is unlawful; checkpoint was unlawful in this case because primary purpose was to investigate for drugs).

Avoiding checkpoint. In *State v. Foreman*, 351 N.C. 627 (2000), the North Carolina Supreme Court held that avoidance of a lawful checkpoint constituted reasonable suspicion to stop to inquire why the defendant turned away from the checkpoint. Cases since *Foreman* have looked at the totality of the circumstances, implicitly recognizing

that turning away from a checkpoint may not always constitute reasonable suspicion to stop. *See State v. Griffin*, ___ N.C. ___, ___ S.E.2d ___ (2013) (defendant made three-point turn in middle of road, not at intersection, to avoid checkpoint where police lights were visible; court states that "even a legal turn, when viewed in the totality of the circumstances, may give rise to reasonable suspicion" and finds that "place and manner of defendant's turn in conjunction with his proximity to the checkpoint" provided reasonable suspicion to stop); *White v. Tippett*, 187 N.C. App. 285 (2007) (from a combination of the driver's evasion of the checkpoint, odor of alcohol surrounding the driver, and brief conversation with the driver, the officer had reasonable grounds to believe that the driver had committed an implied-consent offense); *State v. Bowden*, 177 N.C. App. 718 (2006) (defendant broke hard before checkpoint, causing front of car to dip, abruptly turned into parking lot, pulled in and out of parking space, headed toward exit, and pulled into another space when officer drove up; totality of circumstances justified officer in pursuing and stopping defendant's car).

Challenge to illegal checkpoint by person who turns away. The N.C. Court of Appeals has held that the illegality of a checkpoint is not relevant when a driver turns away from the checkpoint because the checkpoint is not the basis for the stop in those circumstances. *See State v. Collins*, ___ N.C. App. ___, 724 S.E.2d 82 (2012); *see also White v. Tippett*, 187 N.C. App. 285 (2007) (so stating in civil license proceedings). (These decisions are inconsistent with the decision of another panel of the court of appeals, but the decision of that panel was vacated and remanded for other reasons. *See State v. Haislip*, 186 N.C. App. 275 (2007) (if checkpoint is unconstitutional, turning away from checkpoint would not be grounds to stop defendant), *vacated and remanded on other grounds*, 362 N.C. 499 (2008) (remanded to trial court for written findings of fact and conclusions of law).)

The above principle does not necessarily end the inquiry. In remanding the case for further findings, the court in *Collins* recognized that an officer must have reasonable suspicion to stop a defendant who turns away from an unconstitutional checkpoint; mere turning away may not be sufficient. *See also State v. Griffin*, ___ N.C. ___, ___ S.E.2d ___ (2013) (stating that court did not need to address alleged unconstitutionality of checkpoint because in circumstances of case officer had reasonable suspicion to stop defendant). Also at play is the principle that a person has the right to avoid an illegal action. Turning away from an illegal checkpoint, along with other factors, may provide reasonable suspicion, just as running on foot from an unlawful stop, along with other factors, may provide reasonable suspicion. Without more, however, merely failing to obey an unlawful action by the police may not constitute reasonable suspicion. *See supra* § 15.3D, Flight; *see also* Jeff Welty, *Ruse Checkpoints*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 1, 2011) (citing cases holding that a person's avoidance of a "ruse" checkpoint—that is, one in which officers put up signs warning of a checkpoint ahead that does not actually exist or that is illegal so that officers may observe drivers' reactions—does not without more provide reasonable suspicion to stop), http://nccriminallaw.sog.unc.edu/?p=2516.

Limits on detention at checkpoint. Although motorists may be briefly stopped at an impaired driving checkpoint, detention of a particular motorist for more extensive

investigation, such as field sobriety testing, requires satisfaction of an individualized suspicion standard. *See Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 451 (1990). For a further discussion of these issues, see Welty, *Motor Vehicle Checkpoints*, at 6–7 (questions 10 and 11), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1004.pdf.

K. Drug and Other Checkpoints

Drug and general crime control checkpoints. Drug checkpoints and general crime control checkpoints are not permissible. *See City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

Information-seeking checkpoints. Distinguishing *Edmond*, 531 U.S. 32, which found drug checkpoints unconstitutional, the Court held that brief stops of motorists at a highway checkpoint at which police sought information about a recent fatal hit-and-run accident on that highway were not presumptively invalid under the Fourth Amendment. *See Illinois v. Lidster*, 540 U.S. 419 (2004).

Public housing checkpoints. *See State v. Hayes*, 188 S.W.3d 505 (Tenn. 2006) (identification checkpoint at entrance to public housing development violated Fourth Amendment where goal was to reduce crime, exclude trespassers, and enforce lease agreement provisions to decrease crime and drug use; checkpoint was aimed at general crime control); *Wilson v. Commonwealth*, 509 S.E.2d 540 (Va. Ct. App. 1999) (drug checkpoint inside entrance to public housing project unconstitutional).

L. Mistaken Belief by Officer

A mistaken belief by an officer may or may not justify a stop depending on the nature of the belief. If a mistake of "law," the mistake generally does not justify a stop; if a mistake of "fact," the mistake may not invalidate the stop. Distinguishing between a mistake of law and mistake of fact may be difficult in some cases.

Mistake of law. Generally, a stop based on observed facts that do not amount to a violation of the law—a mistake of "law"—violates the Fourth Amendment. *See State v. McLamb*, 186 N.C. App. 124 (2007) (officer stopped defendant for speeding for going 30 m.p.h. in what the officer thought was a 20 m.p.h. zone; speed limit was actually 55 m.p.h., and stop violated Fourth Amendment); *State v. Schiffer*, 132 N.C. App. 22 (1999) (officer was mistaken in believing that out-of-state vehicle was subject to North Carolina's window-tinting restrictions; however, officer had reasonable suspicion to stop vehicle for violation of North Carolina's windshield-tinting restrictions, which do apply to out-of-state vehicles); *see also State v. Hopper*, 205 N.C. App. 175, 182–83 (2010) (upholding trial court's finding that defendant was driving on public street and therefore was subject to traffic laws; therefore, case was distinguishable "from the line of decisions holding that a law enforcement officer's mistaken belief that a defendant had committed a traffic violation is constitutionally insufficient to support a traffic stop" [this opinion supersedes the court of appeals' prior opinion in this case, which was withdrawn, discussing whether the officer made a mistake of law or fact about whether the defendant

was on a public street]); *cf. State v. Osterhoudt*, ___ N.C. App. ___, 731 S.E.2d 454 (2012) (trooper had reasonable suspicion to stop vehicle based on observed traffic violations even where trooper was mistaken about which motor vehicle statute had been violated).

In a 4 to 3 decision, the N.C. Supreme Court recognized an exception to the rule that a mistake of law will not support a stop. The Court held that if an officer makes a stop based on an objectively reasonable mistake of law, the stop is not invalid because of the mistake. *See State v. Heien*, 366 N.C. 271 (2012) (holding that although law requires vehicle to have only one working brake light, stop by officer based on mistaken belief that vehicles must have two working brake lights was objectively reasonable). This decision may have a limited impact. The court in *Heien* noted that North Carolina's brake light requirements were particularly ambiguous and, until this case, had not been interpreted by the appellate courts. In cases in which the legal requirements are clearer or more established, an officer's mistake would not meet the standard announced in *Heien*. *See State v. Coleman*, ___ N.C. App. ___, 743 S.E.2d 62 (2013) (finding that mistake of law about lawfulness of possession of open container of alcohol in public vehicular area was not reasonable).

The dissenters in *Heien* argued that the majority's decision is inconsistent with North Carolina cases refusing to recognizing a good faith exception to the exclusionary rule in search warrant cases and other instances in which the police rely on official records. The majority did not overrule or question that line of cases, however. *See supra* "Good faith exception for constitutional violations not valid in North Carolina" in § 14.2B, Search Warrants (discussing case law and impact of recent legislation).

Mistake of fact. A stop based on an officer's incorrect assessment of the facts—that is, a mistake of fact—does not violate the Fourth Amendment *if* the officer's mistake was reasonable. *See State v. Smith*, 192 N.C. App. 690 (2008) (so holding); *see also State v. Williams*, 209 N.C. App. 255 (2011) (officers had reasonable suspicion to stop a vehicle in which defendant was a passenger based on the officers' good faith belief that the driver had a revoked license and information about the defendant's drug sales, corroborated by the officers, from three reliable informants; the officer's mistake about who was driving the vehicle was reasonable under the circumstances).

Once the officer realizes his or her mistake, the officer must terminate the encounter unless he or she has developed additional reasonable suspicion for the stop. *See, e.g.*, *State v. Diaz*, 850 So. 2d 435 (Fla. 2003) (once officer determined that temporary license tag on defendant's automobile was valid, any further detention violated defendant's Fourth Amendment rights); *McGaughey v. State*, 37 P.3d 130 (Okla. Crim. App. 2001) (although initial stop of truck was permissible based on officer's belief that truck's taillights were not working, officer could not continue to detain truck once officer saw that both taillights were working); *State v. Lopez*, 631 N.W.2d 810 (Minn. Ct. App. 2001) (officer, who stopped car for having no license plates but then discovered when approaching car that car had lawful temporary sticker, could continue stop long enough to

explain to driver that he was free to go; when officer approached driver, odor of alcohol coming from interior of car provided officer with reasonable suspicion to continue detention and investigate).

M. Race-Based Stops

The North Carolina appellate courts have taken a closer look at stops that may have been motivated by the defendant's race. Although the Fourth Amendment does not prohibit a stop if the objective facts known to the officer justify the stop (*see supra* "Facts known to officer" in § 15.3I, Pretext), the courts have sometimes found that an officer's asserted, non-racial basis for the stop was not credible or not sufficient to support the stop. *See State v. Ivey*, 360 N.C. 562, 564 (2006) (court states that it could not determine whether stop of car driven by black male was "selective enforcement of the law based upon race," which would be a violation of equal protection; court states, however, that it "will not tolerate discriminatory application of the law" based on race and finds that officer did not have grounds to stop defendant for failure to use turn signal), *abrogated on other grounds by State v. Styles*, 362 N.C. 412 (2008); *In re J.L.B.M.*, 176 N.C. App. 613 (2006) (officer did not have reasonable suspicion to stop in following circumstances: officer received police dispatch of suspicious person, described as Hispanic male, at gas station; when officer drove up, he saw Hispanic male in baggy clothes, who spoke to someone in another car and then walked away from location of officer's patrol car); *State v. Villeda*, 165 N.C. App. 431 (2004) (court reviews at length evidence that trooper's stop of Hispanic driver was racially motivated; court upholds trial court's finding that trooper was not able to observe whether driver was wearing seat belt).

A stop based on race also may violate Equal Protection. *See supra* § 15.2C, Race-Based "Consensual" Encounters.

N. Limits on Officer's Territorial Jurisdiction

If an officer acts outside his or her territorial jurisdiction, the actions may constitute a substantial statutory violation under G.S. 15A-974 and warrant the exclusion of any evidence discovered. *See generally* FARB at 14–17, 89–90 (discussing territorial jurisdiction of city officers, campus officers, and others, and cases addressing motions to suppress); G.S. 20-38.2 ("[a] law enforcement officer who is investigating an implied-consent offense or a vehicle crash that occurred in the officer's territorial jurisdiction is authorized to investigate and seek evidence of the driver's impairment anywhere in-state or out-of-state, and to make arrests at any place within the State"); *cf. Parker v. Hyatt*, 196 N.C. App. 489 (2009) (State wildlife officer had authority to make warrantless stop for impaired driving).

A statutory violation by an officer may be excused if based on an objectively reasonable, good faith belief in the lawfulness of the action. *See* G.S. 15A-974(a); *see also supra* § 14.5, Substantial Violations of Criminal Procedure Act.

O. Community Caretaking

A detention may be constitutionally permissible if it is reasonably conducted in furtherance of the government agent's community caretaking function and is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *See Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) (defendant, who was police officer and was apparently drunk, was in car accident and was taken to local hospital; permissible for other officers to return to car, which had been towed to garage and left outside on street, to look for and retrieve defendant's service revolver from car as public safety measure; *State v. Maddox*, 54 P.3d 464 (Idaho Ct. App. 2002) (stop of motorist not justified by community caretaking function; evidence did not show that motorist needed assistance); *see also* G.S. 15A-285 (authorizing non-law-enforcement actions when urgently necessary); *State v. Hocutt*, 177 N.C. App. 341 (2006) (officers were authorized to take defendant to jail to "sober up" under G.S. 122C-303; defendant was very intoxicated and was staggering, barefoot, dirty, and very scratched up on shoulder of highway in isolated area late at night).

15.4 Did the Officer Act within the Scope of the Seizure?

This part concentrates on the restrictions on an officer's investigation following a stop of a person based on reasonable suspicion. The same principles generally apply to stops for traffic violations, whether based on reasonable suspicion or probable cause. *See Arizona v. Johnson*, 555 U.S. 323, 330 (2009) ("most traffic stops . . . resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*" (citations omitted)); *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) ("the usual traffic stop is more analogous to a so-called 'Terry stop' . . . than to a formal arrest"); *State v. Styles*, 362 N.C. 412, 414 (2008) ("Traffic stops have 'been historically reviewed under the investigatory detention framework first articulated in *Terry*." (citation omitted)).

A. Frisks for Weapons

Grounds for frisk. An officer who has reasonable suspicion to stop a person does not automatically have the right to frisk the person for weapons. The officer must have reasonable suspicion that the person has a weapon and presents a danger to the officer or others. *See Terry v. Ohio*, 392 U.S. 1 (1968); *State v. Morton*, 363 N.C. 737 (2009) (per curiam) (finding frisk permissible for reasons stated in section one of dissenting opinion from court of appeals), *rev'g* 198 N.C. App. 206 (2009); *State v. Pearson*, 348 N.C. 272 (1998) (officer did not have grounds for weapons frisk during traffic stop; defendant's consent to search of car did not authorize frisk of person); *State v. Phifer*, ___ N.C. App. ___, 741 S.E.2d 446, 449 (2013) ("nervous pacing of a suspect, temporarily detained by an officer to warn him not to walk in the street," was insufficient to warrant further detention and frisk for weapons); *State v. Rhyne*, 124 N.C. App. 84 (1996) (insufficient grounds for weapons frisk; drugs discovered during frisk suppressed); *State v. Artis*, 123 N.C. App. 114 (1996) (suppressing evidence for same reason); *see also United States v.*

Burton, 228 F.3d 524 (4th Cir. 2000) (in absence of reasonable suspicion, officer may not frisk person merely because officer feels uneasy for his or her safety).

Factors. Circumstances to consider include:

- the nature of the suspected offense,
- a bulge in the person's clothing,
- observation of an object that appears to be a weapon,
- sudden, unexplained movements by the person,
- failure to remove a hand from a pocket, and
- the person's prior criminal record and history of dangerousness

Other protective measures. Whether officers may take other protective measures in connection with a weapons frisk depends on the circumstances of the case. *See State v. Carrouthers*, ___ N.C. App. ___, 714 S.E.2d 460 (2011) (handcuffing permissible during stop if special circumstances exist and handcuffing is least intrusive means reasonably necessary to carry out purpose of investigatory stop); *State v. Campbell*, 188 N.C. App. 701 (2008) (handcuffing reasonable in light of previous occasions in which defendant had fled from law enforcement); *State v. Smith*, 150 N.C. App. 317 (lifting of long shirt to expose pants pocket during frisk was reasonable under circumstances), *aff'd per curiam*, 356 N.C. 605 (2002); *State v. Sanchez*, 147 N.C. App. 619 (2001) (multiple occupants of vehicle were briefly handcuffed while officers frisked for weapons and then handcuffs were removed; handcuffing did not exceed scope of stop and convert stop into arrest); *see also State v. Gay*, 748 N.W.2d 408 (N.D. 2008) (although officer had reasonable grounds to handcuff defendant initially, officer acted unreasonably by failing to remove handcuffs once frisk revealed no weapons and the officer's concerns were dissipated; evidence discovered thereafter was subject to suppression); *People v. Delaware*, 731 N.E.2d 904 (Ill. App. Ct. 2000) (stop was converted into arrest, requiring probable cause, when officers kept defendant handcuffed after patdown search revealed no weapons).

If protective measures are excessive, the stop may become a de facto arrest, for which probable cause is required. *See Carrouthers*, ___ N.C. App. at ___, 714 S.E.2d at 464 (so stating). If probable cause does not exist, evidence discovered following a de facto arrest is subject to suppression.

An officer likely does not have the authority to direct a suspect to empty his or her pockets as part of the officer's authority to frisk or take other protective action during a stop. *See In re V.C.R.*, ___ N.C. App. ___, 742 S.E.2d 566 (2013) (directing juvenile to empty pockets was unlawful, nonconsensual search); Jeff Welty, *Empty Your Pockets*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 29, 2011), http://nccriminallaw.sog.unc.edu/?p=2924. A frisk during a consensual encounter likewise would be unauthorized in most circumstances. *See* Jeff Welty, *Terry Frisk During a Consensual Encounter?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Dec. 22, 2009), http://nccriminallaw.sog.unc.edu/?p=937.

B. Vehicles

Ordering driver to exit vehicle. On a stop based on reasonable suspicion, an officer may require the driver to exit the vehicle without specifically showing that requiring such an action was necessary for the officer's protection. *See Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *see generally* 5 LAFAVE, SEARCH AND SEIZURE § 10.8(d), at 450–51 (in context of impaired-driving checkpoints, there is not automatically a need for self-protective measures and therefore an officer may not order a motorist out of a vehicle at such a checkpoint either as a matter of routine or on a hunch); Jeff Welty, *Traffic Stops, Part II*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Oct. 28, 2009) (questioning whether officer may routinely require occupant of vehicle to sit in patrol car during stop), http://nccriminallaw.sog.unc.edu/?p=811.

Ordering passengers to exit or remain in vehicle; frisking of passengers. Under earlier decisions, officers could require passengers to exit the vehicle only if the officers had grounds to do so. *See State v. Hudson*, 103 N.C. App. 708 (1991) (officer had reasonable belief that passenger might be armed); *State v. Adkerson*, 90 N.C. App. 333 (1988) (officer arrested defendant for driving while impaired and had right to require passenger to exit vehicle so officer could search vehicle incident to arrest of driver). In *Maryland v. Wilson*, 519 U.S. 408 (1997), the Court held that an officer making a traffic stop may order the passengers out of the car, without specific grounds, pending completion of the stop. *Compare Commonwealth v. Gonsalves*, 711 N.E.2d 108 (Mass. 1999) (based on state constitution, court rejects rule that officer may automatically order driver or passenger to exit vehicle).

The Court in *Maryland v. Wilson* expressed no opinion on whether an officer may automatically detain a passenger during the duration of the stop. *See Wilson*, 519 U.S. at 415 n.3. In *Arizona v. Johnson*, 555 U.S. 323 (2009), the Court indicated that officers may detain passengers to frisk them if they reasonably believe the passengers are armed and dangerous, observing that officers are not constitutionally obligated to allow a passenger to depart without first ensuring that they are not "permitting a dangerous person to get behind" them. *Id.* at 334; *see also Owens v. Kentucky*, ___ U.S. ___, 129 S. Ct. 2155 (2009) (court summarily vacates state court decision authorizing automatic pat down of passengers when officers arrest a vehicle occupant and are preparing to conduct search incident to arrest; case remanded). Relatedly, officers may order a passenger to remain temporarily in the vehicle for safety reasons. *State v. Shearin*, 170 N.C. App. 222 (2005) (majority finds that officer had grounds to order passenger to remain temporarily inside vehicle).

These decisions do not resolve whether officers may continue to detain passengers once they have addressed safety concerns. Cases after *Wilson*, although before *Johnson*, indicate that an officer must have reasonable suspicion to do so. *See State v. Brewington*, 170 N.C. App. 264 (2005) (officer had reasonable suspicion of criminal activity by passenger to require that passenger remain at scene); *Shearin*, 170 N.C. App. at 235 (Wynn, J., concurring) (concurring judge disagrees with majority opinion to extent it suggests that officer may require passenger to remain in vehicle during traffic stop

without any reason to believe that passenger poses threat to safety or is engaged in criminal activity).

Regardless whether officers may detain a passenger during a stop, a passenger may challenge the validity and duration of the stop and thus may suppress the results of any investigation after an invalid stop or unduly extended stop. *See supra* "Standing of passenger to challenge stop" in § 15.3E, Traffic Stops.

Other actions involving passengers. *See Arizona v. Johnson*, 555 U.S. 323 (2009) (questioning of passengers during traffic stop that did not relate to justification for stop did not measurably lengthen stop and was constitutionally permissible); *Illinois v. Harris*, 543 U.S. 1135 (2005) (court summarily vacates Illinois Supreme Court decision, which found that officers could not run warrant check on passenger that did not prolong otherwise valid traffic stop).

Sweep of interior of vehicle. Officers may conduct a protective sweep of the passenger compartment of a vehicle in areas where a weapon may be located—in other words, they may conduct a "vehicle frisk" but not a search for evidence—if the officers reasonably believe that the suspect is dangerous and may gain immediate control of a weapon. *See Michigan v. Long*, 463 U.S. 1032 (1983) (stating standard); *State v. Minor*, 132 N.C. App. 478 (1999) (officer had insufficient grounds to search car for weapons); *State v. Green*, 103 N.C. App. 38 (1991) (officer could not look in glove compartment of defendant's car as part of protective weapons search; officer had already placed defendant in patrol car and defendant could not obtain any weapon or other item from car); *State v. Braxton*, 90 N.C. App. 204 (1988) (facts did not warrant belief that suspect was dangerous and could gain control of weapon); *see also infra* § 15.6B, Search Incident to Arrest (discussing *Arizona v. Gant*, 556 U.S. 332 (2009), which precludes search of vehicle incident to arrest of occupant if purpose is to prevent occupant from obtaining weapon or destroying evidence and occupant has already been secured by officers).

For a further discussion of car sweeps, see Welty, *Traffic Stops*, at 7 (reviewing cases and observing that "North Carolina's appellate courts have been fairly demanding regarding reasonable suspicion in this context, several times finding ambiguously furtive movements, standing alone, to be insufficient"), http://nccriminallaw.sog.unc.edu/wp-content/uploads/2013/03/2013-03-Traffic-Stops.pdf.

License, warrant, and record checks. *See* Welty, *Traffic Stops*, at 7 (reviewing authorities and observing that "courts have generally viewed these checks, and the associated brief delays, as permissible" during a traffic stop); *see also infra* § 15.4E, Nature, Length, and Purpose of Detention.

C. Plain View

Generally, observations by officers of things in "plain view" do not constitute a search. Under the Fourth Amendment, a seizure is lawful under the plain view doctrine if the officer is lawfully in a position to observe the items and it is immediately apparent to the

officer that the items are evidence of a crime, contraband, or otherwise subject to seizure. *See Horton v. California*, 496 U.S. 128 (1990) (discovery of evidence need not be inadvertent if these two conditions are met). *But see* G.S. 15A-253 (under North Carolina law, discovery of evidence in plain view during execution of search warrant must be inadvertent).

Shining a flashlight into a vehicle that has been lawfully stopped is ordinarily not considered a search, so objects that officers observe thereby are considered to be in plain view. *See Texas v. Brown*, 460 U.S. 730 (1983); *see also* 1 LAFAVE, SEARCH AND SEIZURE § 2.2(b), at 617–18 (discussing limits on this doctrine—for example, officer may not open door to shine flashlight into car unless officer has grounds to open door); *Kyllo v. United States*, 533 U.S. 27 (2001) (use of sense-enhancing technology—in this case, a thermal imager that detected relative amounts of heat within home—constituted search).

A defendant still may have grounds to suppress plain-view observations if the initial stop was invalid or, at the time of the observation, the officer was engaged in activity beyond the scope of the stop.

D. "Plain Feel" and Frisks for Evidence

General prohibition. An officer who stops a person on reasonable suspicion may not frisk the person for evidence. *See Ybarra v. Illinois*, 444 U.S. 85 (1979).

"Plain feel" exception. Under what has come to be known as the "plain feel" doctrine, when an officer conducts a proper weapons frisk and has probable cause to believe that an object is evidence of a crime, then the officer may remove it. But, if an officer does not *immediately* recognize that the object is evidence of a crime, he or she may not manipulate or explore the object further; such action constitutes a search, which is not authorized as part of a weapons frisk. *See Minnesota v. Dickerson*, 508 U.S. 366 (1993) (officer's continued exploration of lump until he developed probable cause to believe it was cocaine was an unlawful search); *In re D.B.*, ___ N.C. App. ___, 714 S.E.2d 522 (2011) (during frisk of juvenile for weapons, officer's removal of credit card, which turned out to be stolen, was not permissible; officer could not seize card on basis that juvenile did not identify himself and officer believed that card was identification card); *State v. Williams*, 195 N.C. App. 554 (2009) (under "plain feel" doctrine, officer must have probable cause to believe object is contraband; reasonable suspicion is insufficient); *State v. Wise*, 117 N.C. App. 105 (1994) (officer lawfully stopped vehicle for speeding and lawfully patted down defendant, but officer lacked probable cause to open non-transparent aspirin bottle that officer found on defendant); *State v. Beveridge*, 112 N.C. App. 688 (1993) (in frisking defendant for weapons, officer noticed cylindrical bulge that felt like plastic baggie; once officer determined that bulge was not weapon, he could not continue to search defendant to determine whether baggie contained illegal drugs), *aff'd per curiam*, 336 N.C. 601 (1994); *see also State v. Graves*, 135 N.C. App. 216 (1999) (warrantless search of wads of brown paper that fell from defendant's clothing not justified under plain view doctrine because it was not immediately apparent that wads contained contraband); *State v. Sapatch*, 108 N.C. App. 321 (1992) (under plain view

doctrine, officers did not have probable cause to believe film canisters contained evidence of crime and, therefore, were not justified in opening canisters); *compare State v. Robinson*, 189 N.C. App. 454 (2008) (it was immediately apparent to officer that film canister contained crack cocaine).

Even if an officer has probable cause to remove an object when frisking a person for weapons, the officer may need a search warrant before inspecting the interior of the object. *See infra* "Containers" in § 15.6D, Probable Cause to Search Person.

E. Nature, Length, and Purpose of Detention

Generally. As a general rule, an investigative detention must be temporary and last no longer than necessary to effectuate the purpose of the stop. *See Florida v. Royer*, 460 U.S. 491 (1983) (officers exceeded limits of *Terry*-stop and required probable cause); *see also* G.S. 15A-1113(b) (an officer who has probable cause to believe a person has committed an infraction may detain the person for a reasonable period of time to issue and serve citation). Whether an officer has exceeded this general limit has been the subject of considerable litigation, discussed below.

Requests for consent and questioning. Numerous cases have addressed whether an officer's questioning of a defendant or request for consent to search are permissible during a stop based on reasonable suspicion. In arguing that questioning or a request for consent were beyond the permissible scope of the stop, and therefore that evidence and information discovered as a result must be suppressed, the defendant is in the strongest position if the following factors are present: (1) the detention had not ended (that is, a reasonable person would not have felt free to leave) at the time of the request for consent or questioning; (2) the request or questions were not related to the basis for the stop; (3) the request or questions unduly prolonged the detention beyond what was necessary to effectuate the purpose of the stop; and (4) the officer had not developed reasonable suspicion of additional criminal activity. *See State v. Jackson*, 199 N.C. App. 236 (2009) (driver and passengers were detained when officers had not yet returned license and registration to driver; request for consent to search after reason for stop had ended unconstitutionally prolonged stop); *State v. Myles*, 188 N.C. App. 42 (2008) (nervousness of defendant and other passenger did not justify continued detention, questioning, and request for consent to search after officer considered traffic stop complete; search of defendant's car was unlawful), *aff'd per curiam*, 362 N.C. 344 (2008); *State v. Parker*, 183 N.C. App. 1, 9 (2007) ("[w]ithout additional reasonable articulable suspicion of additional criminal activity, the officer's request for consent exceeds the scope of the traffic stop and the prolonged detention violates the Fourth Amendment"; in this case, officer had reasonable suspicion to request that passenger consent to search of her purse after discovering what appeared to be a controlled substance in the door of the car next to where passenger was sitting); *State v. Hernandez*, 170 N.C. App. 299 (2005) (trooper expanded scope of stop for seat belt violation by asking defendant about contraband and weapons, but reasonable suspicion of criminal activity supported further detention); *State v. Sutton*, 167 N.C. App. 242 (2004) (questioning of defendant during stop was permissible; questions were brief and directly related to suspicion that gave rise to stop);

State v. Jacobs, 162 N.C. App. 251 (2004) (after traffic stop for erratic driving, officer developed reasonable suspicion that other criminal activity may have been afoot; officer could continue to detain defendant and ask for consent to search for drugs, and officer need not have had specific reasonable suspicion for requesting consent); *State v. Castellon*, 151 N.C. App. 675 (2002) (during traffic stop officer developed reasonable suspicion that defendant was engaged in illegal drug activity and was justified in asking for permission to search vehicle); *State v. Beveridge*, 112 N.C. App. 688 (1993) (once officer had frisked defendant for weapons, officer could not continue to search or question defendant), *aff'd per curiam*, 336 N.C. 601 (1994).

Whether questioning or a request for consent unduly prolongs a detention has become particularly important. This area of law is continuing to develop. In *Muehler v. Mena*, 544 U.S. 93 (2005), the Court held that it was not unconstitutional during the execution of a search warrant for officers to question a lawfully detained person about her immigration status. The Court reasoned that the officers did not require reasonable suspicion to ask the person for identifying information because the questioning did not prolong the detention. In *Arizona v. Johnson*, 555 U.S. 323 (2009), the Court held that an officer's questioning of passengers on matters unrelated to the justification for the traffic stop was constitutionally permissible because it did not measurably extend the duration of the stop. *See also infra* "Drug dog sniff during traffic stop" in § 15.4F, Drug Dogs (discussing cases in which courts have permitted de minimus delay for drug dog sniff during traffic stop).

Applying *Muehler* and *Johnson*, the Fourth Circuit Court of Appeals has recognized an important qualification on the duration of a traffic stop. The lawfulness of a delay in completing a stop depends not only on the length of the delay but also on whether the officer diligently pursued investigation of the purpose of the stop. If an officer abandons pursuit of the justification for the traffic stop and embarks on a sustained course of investigation into unrelated matters, the delay violates the Fourth Amendment and renders inadmissible evidence discovered during the unlawful detention. *United States v. Guijon-Ortiz*, 660 F.3d 757 (4th Cir. 2011); *United States v. Digiovanni*, 650 F.3d 498 (4th Cir. 2011).

The North Carolina appellate courts may treat requests for consent to search differently than questioning during a traffic stop, requiring reasonable suspicion to support a request for consent unrelated to the purpose of the stop. *See State v. Parker*, 183 N.C. App. 1, 9 (2007) (so stating).

The U.S. Supreme Court has declined to impose a time limit on the length of an investigative stop. *See United States v. Sharpe*, 470 U.S. 675 (1985). One writer suggests that, unless circumstances warrant a longer stop, "an officer normally should not detain a suspect the officer has stopped longer than twenty minutes." FARB at 43–44.

Consent after detention has ended. If the detention has ended and the person is free to leave, an officer generally may request consent to search. *See State v. Heien*, ___ N.C. App. ___, 741 S.E.2d 1 (2013) (over a dissent, majority concluded that after return of

documentation by police during traffic stop, defendant was aware that purpose of initial stop had been concluded and that further conversation, including request for and consent to search, was consensual); *State v. Morocco*, 99 N.C. App. 421 (1990) (trooper did not detain defendant in patrol car longer than necessary to write citation, and after detention ended defendant consented to search); *see also State v. Kincaid*, 147 N.C. App. 94 (2001) (questioning unrelated to traffic stop was permissible where defendant consented to being questioned after detention had ended).

In *Ohio v. Robinette*, 519 U.S. 33 (1996), the state supreme court held that officers must clearly inform a motorist that a traffic stop has ended and that the motorist is free to go before requesting consent to search on an unrelated matter. Without this warning, the state court held, the motorist's consent is involuntary. The U.S. Supreme Court rejected such a requirement, holding that the voluntariness of a motorist's consent is evaluated under the totality of circumstances. *Robinette* does not affect the law on the permissible duration of a stop. If an officer detains a person longer than necessary to effectuate the purpose of the stop, a request for consent to search may exceed the scope of the stop and violate the Fourth Amendment. *See, e.g., State v. Robinette*, 685 N.E.2d 762 (Ohio 1997) (on remand from U.S. Supreme Court, state supreme court found that officer exceeded scope of stop and that consent was therefore invalid). Any consent given must also be voluntary. *See infra* § 15.5D, Consent.

The return of paperwork to a driver may signal the end of a traffic stop, but it is not necessarily dispositive. *See* Welty, *Traffic Stops*, at 10 (so stating and reviewing North Carolina decisions and other authorities), *available at* http://nccriminallaw.sog.unc.edu/wp-content/uploads/2013/03/2013-03-Traffic-Stops.pdf.

F. Drug Dogs

When a drug dog sniff is a search. Walking a drug dog around a vehicle during a lawful traffic stop (discussed further below) is generally not considered a search. *See Illinois v. Caballes*, 543 U.S. 405 (2005); *State v. Branch*, 177 N.C. App. 104 (2006) (following *Caballes*); *United States v. Place*, 462 U.S. 696 (1983) (use of a drug dog to sniff luggage in public place was not a search under Fourth Amendment). *But cf. Florida v. Jardines*, 569 U.S. ___, 133 S. Ct. 1409 (2013) (entering homeowner's property and using drug-sniffing dog on homeowner's porch to investigate contents of home is a "search" within the meaning of the Fourth Amendment). These and other cases suggest that a drug dog sniff of a person would generally be subject to Fourth Amendment limitations. *See* Shea Denning, *Dog Sniffs of People and the Fourth Amendment*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Oct. 9, 2012), http://nccriminallaw.sog.unc.edu/?p=3911; 1 LAFAVE, SEARCH AND SEIZURE § 2.2(g), at 703–04 (discussing issue).

Effect of alert. An "alert" by a drug dog to a vehicle may constitute probable cause to search the vehicle if a sufficient showing is made as to the dog's reliability to detect the presence of particular contraband. *See Florida v. Harris*, 568 U.S. ___, 133 S. Ct. 1050 (2013) (holding that dog sniff provided probable cause to search vehicle and refusing to set inflexible evidentiary requirements regarding a dog's reliability; also indicating that

certification of dog by bona fide organization creates presumption of reliability, which defendant may rebut by other evidence); *see also* Jeff Welty, *Supreme Court: Alert by a Trained or Certified Drug Dog Normally Provides Probable Cause*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Feb. 20, 2013), http://nccriminallaw.sog.unc.edu/?p=4111; LeAnn Melton, *Drug Dogs—Reliability Issues and Case Law: How Good is that Doggie's Nose?* (North Carolina Fall Public Defender Seminar, Nov. 29, 2007), *available at* www.ncids.org/Defender%20Training/2007%20Fall%20Conference/DrugDogs.pdf.

A drug dog's positive alert to a vehicle does not give officers probable cause to search recent occupants of the vehicle. *State v. Smith*, ___ N.C. App. ___, 729 S.E.2d 120 (2012). For a discussion of related issues, see *infra* "Drug cases" in § 15.6E, Probable Cause to Search Vehicle.

Drug dog sniff during traffic stop. Although a drug dog sniff of the exterior of a vehicle is generally not considered a search, use of a drug dog is impermissible if it unduly prolongs the stop and the officer does not have reasonable suspicion to justify the delay. *See State v. McClendon*, 350 N.C. 630 (1999) (canine unit did not arrive until 15 to 20 minutes after conclusion of traffic stop, but officer had reasonable suspicion beyond basis for traffic stop); *State v. Sellars*, ___ N.C. App. ___, 730 S.E.2d 208 (2012) (four-minute, 37-second delay to conduct drug dog sniff did not unduly prolong stop); *State v. James Branch*, 194 N.C. App. 173 (2008) (officer did not have grounds to detain defendant for canine unit to arrive after officer finished checking defendant's license and registration); *State v. Brimmer*, 187 N.C. App. 451 (2007) (ninety-second delay for dog sniff was de minimus extension of traffic stop and did not require additional reasonable suspicion); *State v. Euceda-Valle*, 182 N.C. App. 268 (2007) (relying on *McClendon*, court finds that officer had reasonable suspicion to detain defendant for canine sniff of exterior of vehicle after officer handed defendant warning ticket and traffic stop ended); *State v. Monica Branch*, 177 N.C. App. 104, 107 n.1 (2006) (suggesting that if drug dog sniff extends duration of stop, it may be unconstitutional); *State v. Fisher*, 141 N.C. App. 448 (2000) (detaining defendant after traffic stop for drug dog sniff exceeded scope of stop); *State v. Falana*, 129 N.C. App. 813 (1998) (officer exceeded scope of traffic stop by detaining defendant for dog to do drug sniff).

As with questioning and requests for consent during a traffic stop (*see supra* "Requests for consent and questioning" in § 15.4E, Nature, Length, and Purpose of Detention), the length of detention has become a significant factor in evaluating the lawfulness of drug dog sniffs unrelated to the purpose of a traffic stop. This area of law is continuing to develop. The Fourth Circuit Court of Appeals has recognized an important qualification on the duration of a traffic stop. The lawfulness of a delay in completing a stop depends not only on the length of the delay but also on whether the officer diligently pursued investigation of the purpose of the stop. If an officer abandons pursuit of the justification for the traffic stop and embarks on a sustained course of investigation into unrelated matters, the delay violates the Fourth Amendment and renders inadmissible evidence discovered during the unlawful detention. *United States v. Guijon-Ortiz*, 660 F.3d 757 (4th Cir. 2011); *United States v. Digiovanni*, 650 F.3d 498 (4th Cir. 2011).

A drug dog sniff is also impermissible if it intrudes into protected areas—for example, the sniff is of the interior of the vehicle or of an occupant. If conducted at a license checkpoint, a drug dog sniff may indicate that the purpose of the checkpoint is general criminal investigation and thus impermissible. *See supra* § 15.3J, Motor Vehicle Checkpoints; § 15.3K, Drug and Other Checkpoints.

G. Does *Miranda* Apply?

A person generally is not entitled to *Miranda* warnings on a stop. *See Berkemer v. McCarty*, 468 U.S. 420 (1984); *State v. Braswell*, ___ N.C. App. ___, 729 S.E.2d 697 (2012) (traffic stops are typically non-coercive in nature and do not amount to custodial interrogations). Once taken into custody, a person is entitled to *Miranda* warnings before police questioning. *See Pennsylvania v. Muniz*, 496 U.S. 582 (1990) (in case involving allegedly impaired driver who had been taken into custody, *Miranda* warnings were required for police question calling for testimonial response).

Some stops may amount to custody for *Miranda* purposes even though the person may not be under arrest. *See* Mark A. Godsey, *When* Terry *Met* Miranda: *Two Constitutional Doctrines Collide*, 63 FORDHAM L. REV. 715 (1994); *see also State v. Buchanan*, 353 N.C. 332 (2001) (test for custody is whether there was formal arrest or restraint on freedom of movement of degree associated with formal arrest); *State v. Washington*, 330 N.C. 188 (1991) (on facts presented, defendant was in custody for *Miranda* purposes when officer placed him in back seat of patrol car), *rev'g* 102 N.C. App. 535 (1991); *State v. Hemphill*, ___ N.C. App. ___, 723 S.E.2d 142, 147 (2012) (holding that "a reasonable person in Defendant's position, having been forced to the ground by an officer with a taser drawn and in the process of being handcuffed, would have felt his freedom of movement had been restrained to a degree associated with formal arrest"); *State v. Johnston*, 154 N.C. App. 500 (2002) (defendant who was ordered out of his vehicle at gun point, handcuffed, placed in the back of a patrol car, and questioned by detectives was in custody for *Miranda* purposes).

H. Field Sobriety Tests

North Carolina cases have assumed (although have not specifically decided) that during a stop based on reasonable suspicion of impaired driving, field sobriety tests and questioning related to possible impairment are within the scope of the stop. *See generally Blasi v. State*, 893 A.2d 1152 (Md. Ct. Spec. App. 2006) (finding field sobriety tests permissible on traffic stop if officer has reasonable suspicion that driver is under the influence of alcohol); *see also State v. Worwood*, 164 P.3d 397 (Utah 2007) (off-duty officer had reasonable suspicion to stop driver for impaired driving, but stop became de facto arrest and violated Fourth Amendment when off-duty officer transported driver more than a mile away from the scene for on-duty officer to conduct field sobriety tests).

Conversely, if officers do not have reasonable suspicion of impaired driving, field sobriety tests are not within the permissible scope of the stop. *See* Jeff Welty, *Field Sobriety Tests During Traffic Stops*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG **(**Apr. 14, 2009) (reviewing

cases from other jurisdictions), http://nccriminallaw.sog.unc.edu/?p=245.

Once the defendant is considered to be in custody, *Miranda* warnings are required for questions calling for a testimonial response. *See supra* § 15.4G, Does *Miranda* Apply? Field sobriety tests may not require a testimonial response, however. *See State v. Flannery*, 31 N.C. App. 617, 623–24 (1976) ("the physical dexterity tests are not evidence of a testimonial or communicative nature . . . and are not within the scope of the *Miranda* decision"; court therefore holds that admitting evidence of defendant's refusal to do tests did not violate his Fifth Amendment right against self-incrimination; court also notes that *Miranda* warnings are not required for similar reasons before a breath test); *see also State v. White*, 84 N.C. App. 111, 115–16 (1987) (*Miranda* warnings not required before administering a breath test because results not testimonial).

I. Defendant's Name

In *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004), the U.S. Supreme Court upheld a defendant's conviction under a state statute requiring an individual stopped by police on the basis of reasonable suspicion to identify himself or herself. The Court stated, "Although it is well established that an officer may ask a suspect to identify himself in the course of a *Terry* stop, it has been an open question whether the suspect can be arrested and prosecuted for refusal to answer." *Id.* at 186–87. The Court held in this case that the stop was justified and the request for the defendant's name was reasonably related in scope to the circumstances that justified the stop (a suspected assault); therefore, enforcement of the state law requirement that the defendant give his name during the stop did not violate the Fourth Amendment. The Court also found no violation of the defendant's Fifth Amendment privilege against self-incrimination because in this case the defendant's refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him or would furnish a link in the chain of evidence needed to prosecute him.

North Carolina does not have a statute comparable to Nevada's statute requiring a person who is the subject of an investigative stop, other than a person driving a vehicle, to disclose his or her name. *See* G.S. 20-29 (person operating motor vehicle may be required to give his or her name). "Officers who lawfully stop someone for investigation may ask the person a moderate number of questions to determine his identity . . . ." *State v. Steen*, 352 N.C. 227, 239 (2000) (citing *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)). However, a person's mere refusal to disclose his or her name (when the person is not driving a vehicle) would appear insufficient to support a charge of violating G.S. 14-223 (resisting, delaying, or obstructing officer). *See also In re D.B.*, __ N.C. App. __, 714 S.E.2d 522 (2011) (officers may not search person during investigative stop to determine his or her identity).

J. VIN Checks

Officers may make a limited warrantless search of a vehicle when they need to determine its ownership. *See New York v. Class*, 475 U.S. 106 (1986) (check of vehicle

identification number valid); *State v. Green*, 103 N.C. App. 38 (1991) (check invalid on facts of case).

15.5 Did the Officer Have Grounds to Arrest or Search?

A. Probable Cause

Required for arrest or search. Although reasonable suspicion may be sufficient to support an officer's initial stop and certain investigative actions during the stop, an officer must have probable cause to make an arrest or probable cause or consent to search for evidence. *See, e.g.*, *State v. Joe*, ___ N.C. App. ___, 730 S.E.2d 779 (2012) (officers did not have probable cause to arrest, and evidence discovered as a result of illegal arrest suppressed), *review granted*, ___ N.C. ___ , 736 S.E.2d 187 (2013); *State v. Wise*, 117 N.C. App. 105 (1994) (officer lawfully stopped vehicle for speeding and lawfully patted down defendant, but officer lacked probable cause to open non-transparent aspirin bottle that officer found on defendant); *State v. Pittman*, 111 N.C. App. 808 (1993) (initial encounter was consensual and subsequent stop was supported by reasonable suspicion, but officers did not have probable cause to search). *Compare Maryland v. Pringle*, 540 U.S. 366 (2003) (police officer had probable cause to believe that defendant, who was the front-seat passenger in vehicle, committed the crime of possession of cocaine, either solely or jointly with other occupants of vehicle; defendant was one of three men riding in the vehicle at 3:16 a.m., $763 of rolled-up cash was found in the glove compartment directly in front of defendant, five plastic baggies of cocaine were behind the back-seat armrest and accessible to all three vehicle occupants, and the three men failed to offer any information with respect to the ownership of the cocaine or money; defendant's admissions to police after lawful arrest and *Miranda* warnings not subject to suppression).

Scope of search. The permissible scope of a search depends on whether the officers have probable cause to arrest or probable cause to search. For a further discussion of whether officers have probable cause to arrest or search and the permissible scope of the search, including in drug cases, see *infra* § 15.6, Did the Officer Act within the Scope of the Arrest or Search?

B. Circumstances Requiring Arrest Warrant and Other Limits on Arrest Authority

Arrest warrant. Usually, when an officer develops probable cause to arrest during a stop, the officer may make the arrest without a warrant. In some instances, however, a warrant may be required. An officer who has probable cause to arrest for a criminal offense may make an arrest without a warrant in the following circumstances: (a) the crime is committed in the officer's presence; or (b) the crime was not committed by the person in the officer's presence but (i) the crime is a felony; (ii) the crime is one of certain listed misdemeanors; or (iii) the crime is a misdemeanor and, unless arrested immediately, the person will not be apprehended or may cause physical injury or property damage. *See*

G.S. 15A-401(b) (also authorizing warrantless arrest for violation of pretrial release conditions).

Violations not subject to arrest. The U.S. Supreme Court has held that officers do not violate the Fourth Amendment if they have probable cause to make an arrest for a criminal offense even if state law does not authorize an arrest for that offense. *See Virginia v. Moore*, 553 U.S. 164 (2008) (Virginia law enforcement officers who had probable cause to arrest defendant for a misdemeanor did not violate Fourth Amendment when they arrested him and conducted search incident to arrest although state law did not authorize an arrest); *see also Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (Fourth Amendment does not bar officer from making warrantless arrest for criminal offense punishable by fine only, in this case a seat belt violation, a misdemeanor under Texas law).

An arrest permitted by the U.S. Constitution but in violation of North Carolina law may still be subject to suppression under G.S. 15A-974. Under North Carolina law, an officer has no authority to arrest for infractions, such as seat belt violations, which are noncriminal violations of law in North Carolina. *See* G.S. 15A-1113; FARB at 82 (noting limitation). An arrest for a noncriminal infraction also may violate the U.S. Constitution. *See Moore*, 553 U.S. 164 (U.S. Constitution authorizes arrest for minor misdemeanors; Court does not address noncriminal infractions).

An officer has no authority to arrest for a wildlife violation, whether a misdemeanor or infraction, by an out-of-state resident if the other state is a member of the interstate wildlife compact, the person agrees to comply with the terms of any citation, and the person provides adequate identification. *See* G.S. 113-300.6, art. III.

For a further discussion of the effect of state law violations, see *supra* § 14.5, Substantial Violations of Criminal Procedure Act.

C. Circumstances Requiring Search Warrant

For search of person. If officers have probable cause to arrest a person, they may search the person incident to arrest without a warrant. For cases discussing probable cause to arrest and potential limits on a search of a person incident to arrest, see *infra* § 15.6B, Search Incident to Arrest; § 15.6C, Other Limits on Searches Incident to Arrest.

If officers have probable cause to search a person, but not arrest him or her, the officers must have exigent circumstances to conduct the search without a warrant. For a discussion of exigent circumstances and potential limits on searches, see *infra* § 15.6D, Probable Cause to Search Person.

For search of vehicle. Generally, if officers have probable cause to search a vehicle, they may search without a warrant. For a discussion of probable cause to search a vehicle and limits on such searches, see *infra* § 15.6E, Probable Cause to Search Vehicle.

D. Consent

Officers may search without probable cause and without a warrant if they obtain consent. For various reasons a purported consent to search may be invalid or insufficient.

Effect of illegal detention. If a person is detained illegally, a consent to search obtained thereafter is subject to suppression on two potential grounds. First, the consent is generally considered the fruit of the poisonous tree because the consent is obtained as a result of the illegal seizure. *See generally Wong Sun v. United States*, 371 U.S. 471 (1963); *see also supra* § 14.2F, "Fruits" of Illegal Search or Arrest. Second, the consent may be involuntary in the totality of the circumstances, including the circumstances surrounding the illegal detention.

Length of detention. Officers may not unduly detain a person for the purpose of requesting consent to search. *See supra* § 15.4E, Nature, Length, and Purpose of Detention.

Clarity of consent. "There must be a clear and unequivocal consent" to authorize a consent search. *State v. Pearson*, 348 N.C. 272, 277 (1988) (consent to search of car was not consent to search of person; acquiescence to frisk when officer told defendant he was going to frisk him also was not consent to search).

Voluntariness of consent. Consent must be voluntary. *See Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (voluntariness determined from totality of circumstances); *State v. Crenshaw*, 144 N.C. App. 574 (2001) (State has burden of proving voluntariness); *United States v. Guerrero*, 374 F.3d 584 (8th Cir. 2004) (reasonable officer would not have believed that Spanish-speaking driver knowingly and voluntarily consented to search of his car; driver's signature on consent-to-search form written in Spanish was not sufficient); *United States v. Worley*, 193 F.3d 380 (6th Cir. 1999) (defendant did not give voluntary consent when he said, "You've got the badge, I guess you can" in response to officer's request to search); *see also supra* § 14.2H, Invalid Consent.

A threat to obtain a search warrant may affect the voluntariness of consent in some circumstances. *See* Jeff Welty, *Consent to Search under Threat of Search Warrant*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Nov. 10, 2010) (observing that threat alone may not render consent involuntary but may be considered as part of totality of circumstances), http://nccriminallaw.sog.unc.edu/?p=1741; 4 LAFAVE, SEARCH AND SEIZURE § 8.2(c), at 92–100 (indicating circumstances in which such a threat may render a consent involuntary).

Miranda warnings are not required on a request for consent to search. *See State v. Cummings*, 188 N.C. App. 598 (2008) (so holding in reliance on federal cases, in which courts reasoned that request for consent to search does not constitute interrogation for *Miranda* purposes because the giving of consent is not an incriminating statement).

Authority to consent. The person must have authority to consent or, at least, the officer

must reasonably believe the person has authority. *See Illinois v. Rodriguez*, 497 U.S. 177 (1990) (officers must reasonably believe person has authority to give consent); G.S. 15A-222 (to same effect); *compare State v. McLees*, 994 P.2d 683 (Mont. 2000) (rejecting apparent authority doctrine under state constitution; for consent to be valid against defendant, third party must have actual authority to give consent to search); *State v. Lopez*, 896 P.2d 889 (Haw. 1995) (to same effect).

Whether an officer's belief is reasonable depends on the facts of each case. *See State v. Jones*, 161 N.C. App. 615 (2003) (after seeing police, defendant entered car, removed his jacket, put it on back seat, and then exited, wearing t-shirt in freezing winter weather; driver had authority to give consent to search entire car, including jacket left by defendant); *State v. McDaniels*, 103 N.C. App. 175 (1991) (passenger failed to object when driver consented to search of car and contents; search of contents upheld), *aff'd per curiam*, 331 N.C. 112 (1992); *compare United States v. Purcell*, 526 F.3d 953 (6th Cir. 2008) (female's apparent authority to consent to search of luggage dissipated once officers realized that luggage contained only male's effects); *State v. Frank*, 650 N.W.2d 213 (Minn. Ct. App. 2002) (driver lacked authority to consent to search of defendant's suitcase in trunk of driver's car; officer has obligation to ascertain ownership of items not owned by or within control of the person purportedly giving consent when circumstances do not clearly indicate that the person is the owner or controls item to be searched); *State v. Matejka*, 621 N.W.2d 891, 894 n.3 (Wis. 2001) (collecting cases on consent to search passenger's belongings); *People v. James*, 645 N.E.2d 195 (Ill. 1994) (driver consented to search outside of hearing of defendant-passenger; consent did not authorize police to search purse on passenger's seat). *See also* 4 LAFAVE, SEARCH AND SEIZURE § 8.3(g), at 232–52 (discussing significance of reasonable but mistaken belief by police that third party has authority over place searched).

See also infra "Passenger belongings" in § 15.6C, Other Limits on Searches Incident to Arrest; "Passenger belongings" in § 15.6E, Probable Cause to Search Vehicle.

Scope of consent. General consent does not necessarily extend to all places within the area to be searched. *See Florida v. Jimeno*, 500 U.S. 248 (1991) (consent to general search of car would lead reasonable officer to believe that consent extended to unlocked containers that might hold object of search); *State v. Stone*, 362 N.C. 50 (2007) (officer exceeded scope of consent by pulling sweat pants away from defendant's body and shining flashlight on defendant's groin area); *State v. Pearson*, 348 N.C. 272 (1998) (defendant's consent to search of car did not authorize search of his person); *State v. Neal*, 190 N.C. App. 453 (2008) (female defendant knowingly and voluntarily consented to strip search by female officer); *State v. Johnson*, 177 N.C. App. 122 (2006) (consent to search of van did not authorize officer to pry open wall panel of van; general consent did not include intentional infliction of damage to vehicle), *vacated in part on other grounds*, 360 N.C. 541 (2006) (vacating portion of opinion finding that officers lacked probable cause, independent of consent, to pry open wall panel and remanding case to trial court for further findings of fact). *See also* Jeff Welty, *Scope of Consent to Search a Vehicle*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Mar. 15, 2012) (suggesting that consent to search vehicle does not authorize damaging of vehicle), http://nccriminallaw.sog.unc.edu/?p=3402.

Withdrawal of consent. A person may withdraw consent at any time before completion of the search. *See* 4 LAFAVE, SEARCH AND SEIZURE § 8.1(c), at 57–65. Before withdrawal of consent, however, officers may have uncovered sufficient evidence to justify continuing the search regardless of the presence or absence of consent.

15.6 Did the Officer Act within the Scope of the Arrest or Search?

A. Questioning Following Arrest

Following a lawful arrest, officers must give an in-custody defendant *Miranda* warnings before questioning him or her. For a discussion of *Miranda* principles, see *supra* § 14.3B, *Miranda* Violations.

B. Search Incident to Arrest

Of person. Officers may search a person incident to a lawful arrest of that person. *See United States v. Robinson*, 414 U.S. 218 (1973). Whether officers may search containers in the person's possession is discussed further *infra* in "Containers" in § 15.6C, Other Limits on Searches Incident to Arrest.

Of vehicle. Previously, officers could search the passenger compartment of a vehicle, including containers found within, incident to a lawful arrest of an occupant. *See State v. Logner*, 148 N.C. App. 135 (2001) (warrantless search of defendant's vehicle proper incident to arrest of passenger). The stated rationale for this rule was that officers needed a bright-line rule allowing them to search in areas where an arrestee might be able to use a weapon or destroy evidence. *See New York v. Belton*, 453 U.S. 454 (1981) (stating basic rule); *see also State v. Andrews*, 306 N.C. 144 (1982) (applying *Belton* principles to search of vehicle incident to arrest); *State v. Cooper*, 304 N.C. 701 (1982) (to same effect).

In *Arizona v. Gant*, 556 U.S. 332 (2009), the U.S. Supreme Court held that lower courts had read *Belton* too broadly and ruled that the permissible scope of a search of a vehicle incident to the arrest of an occupant of the vehicle was much narrower. The Court ruled that an officer may search the passenger compartment of a vehicle incident to the arrest of an occupant only if (1) the arrestee is within reaching distance of the passenger compartment and thus able to obtain a weapon or destroy evidence or (2) it is reasonable to believe evidence relevant to the crime of arrest may be found. *Gant* overrules North Carolina decisions allowing an unlimited search of the passenger compartment of a vehicle incident to arrest of an occupant of the vehicle. *See State v. Carter*, 191 N.C. App. 152 (2008) (holding that *Belton* does not require that search incident to arrest of occupant of vehicle be only for evidence connected to the crime charged), *vacated and remanded*, ___ U.S. ___, 129 S. Ct. 2158 (2009), *on remand*, 200 N.C. App. 47 (2009) (suppressing evidence in light of *Gant* and lack of any other ground to uphold search).

Generally, once officers have secured an arrestee—by, for example, handcuffing the

arrestee—they may not search the vehicle based on the first ground identified in *Gant.* Most post-*Gant* cases have therefore involved the second ground for a search of a vehicle and focused on whether it was reasonable for the officer to believe evidence of the crime of arrest would be in the vehicle. *See State v. Mbacke*, 365 N.C.403 (2012) (analogizing the "reasonable to believe" standard in the second prong of *Gant* to the "reasonable suspicion" standard of a *Terry* stop).

Typically, an arrest for a motor vehicle offense will not justify a search incident to arrest on the second *Gant* ground because it will not be reasonable for an officer to believe that evidence relevant to the motor vehicle offense may be found in the vehicle. *See* FARB at 225–26 (so stating). A number of cases have reached this result. *See Meister v. Indiana*, ___ U.S. ___, 129 S. Ct. 2155 (2009) (court summarily vacates state court decision allowing search of vehicle incident to arrest of driver for suspended driver's license; case remanded for reconsideration in light of *Gant*); *State v. Johnson*, 204 N.C. App. 259 (2010) (disallowing search following arrest for suspended license); *State v. Carter*, 200 N.C. App. 47 (2009) (disallowing search following arrest for driving with expired registration tag and failing to notify Division of Motor Vehicles of change of address).

It is also unlikely that officers would have grounds to search a vehicle incident to arrest of an occupant for an outstanding arrest warrant. *See* FARB at 226.

In cases involving gun and drug offenses, courts have found that the officers had a reasonable basis to believe evidence of the offense of arrest could be found in the vehicle. The N.C. Supreme Court has cautioned, however, that a search of a vehicle incident to arrest of an occupant may "not routinely be based on the nature or type of the offense of arrest and that the circumstances of each case ordinarily will determine the propriety of any vehicular searches conducted incident to an arrest." *See State v. Mbacke*, 365 N.C. 403 (2012) (upholding search following arrest for carrying concealed weapon); *State v. Watkins*, ___ N.C. App. ___, 725 S.E.2d 400 (2012) (upholding search following arrest for possession of drug paraphernalia); *State v. Foy*, 208 N.C. App. 562 (2010) (upholding search following arrest for carrying concealed weapon); *see also State v. Toledo*, 204 N.C. App. 170 (2010) (holding that officers had probable cause to search vehicle for marijuana; also suggesting that officers may have had grounds to search vehicle incident to arrest of defendant for possession of marijuana).

C. Other Limits on Searches Incident to Arrest

Arizona v. Gant, discussed in subsection B., above, significantly limits the circumstances in which officers may search a vehicle incident to the arrest of a vehicle's occupant. Additional limits on searches of people and vehicles incident to arrest are discussed below, based on additional case law and *Gant.*

Citations. Officers may not search a person or vehicle incident to issuance of a citation if they do not arrest the person. *See Knowles v. Iowa*, 525 U.S. 113 (1998); *State v. Fisher*, 141 N.C. App. 448 (2000) (defendant had been issued citation for driving while license revoked but had not been placed under arrest; search could not be justified as search

incident to arrest); *see also Sibron v. New York*, 392 U.S. 40, 63 (1968) ("It is axiomatic that an incident search may not precede an arrest and serve as part of its justification."); FARB at 223 (search may be made before actual arrest if arrest is made contemporaneously with search, but whatever is found during search before formal arrest cannot be used to support probable cause for the arrest).

Area and people. Cases before *Gant* permitted a search of the passenger compartment of a vehicle incident to arrest of an occupant of a vehicle, but not other areas, such as the vehicle's trunk, and not other occupants of the vehicle.

Gant does not appear to modify these limitations. *See* FARB at 226 (so stating); *see also Owens v. Kentucky*, ___ U.S. ___, 129 S. Ct. 2155 (2009) (court summarily vacates state court decision authorizing automatic pat down of passengers when officers arrest a vehicle occupant and are preparing to conduct search incident to arrest; case remanded for reconsideration in light of *Gant*); *State v. Schiro*, ___ N.C. App. ___, 723 S.E.2d 134 (2012) (search of trunk of vehicle not valid as search incident to arrest of vehicle occupant; however, search was valid based on defendant's consent).

Containers. Before *Gant*, the North Carolina Court of Appeals held that officers may not search locked containers incident to arrest of a person. *See State v. Thomas*, 81 N.C. App. 200 (1986) (officers could not search, incident to arrest, locked suitcase arrestee was carrying); *cf. State v. Brooks*, 337 N.C. 132 (1994) (officers may search locked compartments within vehicle as part of search incident to arrest).

Gant may limit searches of containers, whether locked or unlocked or whether following arrest of a person or arrest of an occupant of a vehicle. If officers cannot satisfy either ground identified in *Gant* for a search incident to arrest—that is, if the arrestee was secured and could not reach the container, and there was not a reasonable basis to believe that the container contained evidence related to the offense of arrest—officers may not be able to search containers incident to arrest. *See* Jeff Welty, *Is Arizona v. Gant Limited to Automobiles?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 2, 2010) (making this point and citing cases from other jurisdictions to that effect), http://nccriminallaw.sog.unc.edu/?p=1565; FARB at 224–25 n.338;

Cell phones. Cell phones are a form of container but, because of the wide range of data they may contain, may present tricky issues about the permissible scope of a search incident to arrest. The N.C. Supreme Court has upheld the search of a cell phone found on a person incident to arrest of the person, but did not specifically consider the impact of *Arizona v. Gant* or other potential issues. *State v. Wilkerson*, 363 N.C. 382, 432–34 (2009); *see also* Jeff Welty, *Warrantless Searches of Computers and Other Electronic Devices*, at 7–8 (UNC School of Government, Apr. 2011) (listing cases from around the country on this issue), *available at* http://nccriminallaw.sog.unc.edu//wp-content/uploads/2011/05/2011-05-PDF-of-Handout-re-Warrantless-Searches.pdf; Jeff Welty, *Georgia Case on Searching Cell Phones Incident to Arrest*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Dec. 20, 2010)

(discussing potential issues), http://nccriminallaw.sog.unc.edu/?p=1835; FARB at 189–90.

Non-contemporaneous search of vehicle. Before *Gant*, some courts precluded a non-contemporaneous search of a vehicle following arrest of an occupant. *See Preston v. United States*, 376 U.S. 364 (1964) (where vehicle had been towed to garage, search of vehicle was not contemporaneous with arrest and was disallowed); *United States v. Vasey*, 834 F.2d 782 (9th Cir. 1987) (search of vehicle was not contemporaneous with arrest where search took place 30 to 45 minutes after occupant had been arrested, handcuffed, and placed in back of patrol car).

This limitation is implicit in the first ground for a search permitted by *Gant* because in virtually all instances the arrestee will not be within reaching distance of the vehicle at the time of a non-contemporaneous search. The courts also may be unwilling to allow vehicle searches long after arrest based on the "reasonable to believe" standard described in *Gant* and may require full probable cause or other grounds for non-contemporaneous searches. *See infra* § 15.6E, Probable Cause to Search Vehicle; § 15.6F, Inventory Search.

Strip search during search incident to arrest. A roadside strip search incident to arrest of a person may be impermissible unless probable cause to search and exigent circumstances exist. *See State v. Battle*, 202 N.C. App. 376, 387–88 (2010) (opinion for court so states); *accord State v. Fowler*, ___ N.C. App. ___, 725 S.E.2d 624, 628 (2012) (adopting language from *Battle*). For a discussion of the validity of strip searches based on probable cause, see *infra* "Strip searches based on probable cause" in § 15.6D, Probable Cause to Search Person.

Recent occupancy. In *Thornton v. United States*, 541 U.S. 615 (2004), a majority of the Court held that the *Belton* doctrine allowed a search of the passenger compartment of a vehicle after arrest of an "occupant" or "recent occupant." In *Thornton*, the Court found that the defendant was a recent occupant when he parked his car and exited right before the officer could pull the car over. *Thornton* appears to remain good law after *Gant.* Thus, if a person is not a "recent occupant" of the vehicle in question when approached by officers, a search of the vehicle incident to arrest of the person remains impermissible. *See State v. Dean*, 76 P.3d 429 (Ariz. 2003) (officers could not search defendant's car incident to arrest; defendant was not "recent occupant" of car when he had not occupied car for some two-and-one-half hours and his arrest occurred not in close proximity to automobile, which was parked in his driveway, but inside his residence). If a person is a recent occupant, officers still must meet one of the two grounds identified in *Gant* for a search of a vehicle incident to arrest of the person.

Passenger belongings. A passenger has standing to contest a search of his or her belongings within a vehicle, such as a purse, incident to arrest of an occupant of the vehicle. *See State v. Mackey*, 209 N.C. App. 116 (2011) (recognizing principle but holding that passenger asserted no possessory interest in vehicle or contents and did not have standing to contest search of vehicle resulting in discovery of weapon under seat).

Pretext. Before *Whren* (discussed *supra* § 15.3I, Pretext), it could be argued that a search incident to arrest violates the Fourth Amendment if the officers arrest the person, rather than issue a citation, as a pretext to search the person incident to arrest. In *Arkansas v. Sullivan*, 532 U.S. 769 (2001), the Court extended the rule in *Whren* to arrests, holding that an officer's decision to arrest a person for a traffic violation, if supported by probable cause, is not invalid even though the arrest is a pretext for a narcotics search incident to arrest. (On remand, the Arkansas Supreme Court held that a pretextual arrest violates the state constitution. *See State v. Sullivan*, 74 S.W.3d 215 (Ark. 2002).)

D. Probable Cause to Search Person

Person. Officers may conduct a warrantless search of a person whom they have not arrested if both probable cause to search and exigent circumstances exist. *See, e.g.*, *State v. Williams*, 209 N.C. App. 255 (2011) (probable cause existed to believe defendant possessed illegal drugs and exigent circumstances existed based on belief that defendant was attempting to swallow them; permissible for officer to conduct warrantless search of the defendant's mouth by grabbing him around the throat, pushing him onto the hood of a vehicle, and demanding that he spit out whatever he was trying to swallow); *State v. Yates*, 162 N.C. App. 118 (2004) (officer had probable cause to search defendant based on strong odor of marijuana about defendant's person; exigent circumstances justified immediate warrantless search); *State v. Smith*, 118 N.C. App. 106, *rev'd on other grounds*, 342 N.C. 407 (1995); *State v. Watson*, 119 N.C. App. 395 (1995).

Containers. Officers may conduct a warrantless search of a container found on a person whom they have not arrested if both probable cause to search *and* exigent circumstances exist. If exigent circumstances do not exist, they must obtain a search warrant. *See State v. Simmons*, 201 N.C. App. 698 (2010) (officers did not have probable cause to search bag or vehicle based on defendant's statements that bag contained cigar guts); FARB at 216–17 (discussing rule and exceptions); *State v. Gilkey*, 18 P.3d 402 (Or. Ct. App. 2001) (officers could seize chapstick container found during frisk but could not open it without a warrant).

Strip searches based on probable cause. Because of their intrusiveness, roadside strip searches require a greater justification than other warrantless searches based on probable cause. Officers must have specific probable cause that the defendant is hiding the items (usually, drugs) on his or her person. Further, there must be "exigent circumstances that show some significant government or public interest would be endangered were the police to wait until they could conduct the search in a more discreet location." *State v. Fowler*, ___ N.C. App. ___, 725 S.E.2d 624, 628 (2012) (citation omitted). The strip search also must be conducted in a reasonable manner. *See also supra* "Strip search during search incident to arrest" in § 15.6C, Other Limits on Searches Incident to Arrest (applying similar standard).

Appellate judges have divided over whether strip searches meet these higher standards. *Compare State v. Battle*, 202 N.C. App. 376 (2010) (finding strip search unconstitutional), *with State v. Robinson*, ___ N.C. App. ___, 727 S.E.2d 712 (2012)

(stating that showing of exigent circumstances was not required where officer had specific basis for believing weapons or contraband were under defendant's clothing) *and Fowler*, ___ N.C. App. ___, 725 S.E.2d 624 (finding exigent circumstances and upholding strip search). *See also State v. Smith*, 118 N.C. App. 106 (1995) (court of appeals holds that although officers' warrantless search was supported by probable cause and exigent circumstances, search was unreasonable where officers required defendant to pull down his pants on public street, shined a flashlight on his scrotum, and reached underneath his scrotum to remove paper towel), *rev'd in pertinent part*, 342 N.C. 407 (1995) (court adopts dissenting opinion, which found that search was not unreasonable under circumstances).

E. Probable Cause to Search Vehicle

Generally. Officers may conduct a warrantless search of an automobile, including the trunk and closed containers, if they have probable cause to believe the objects of the search may be located there. The rationale for what is known as the automobile exception to the warrant requirement is that cars are capable of being moved quickly and people have a reduced expectation of privacy in cars. *See California v. Acevedo*, 500 U.S. 565 (1991) (stating general standard); *State v. Holmes*, 109 N.C. App. 615 (1993) (to same effect); *State v. Corpening*, 109 N.C. App. 586 (1993) (to same effect); *see also Florida v. White*, 526 U.S. 559 (1999) (police do not need warrant to seize vehicle from public place when they have probable cause to believe that vehicle itself is forfeitable contraband). If probable cause exists to search an automobile, officers may conduct an immediate search at the scene, or a later search at the police station, without a warrant. *See Acevedo*, 500 U.S. at 570.

The scope of a warrantless search of a vehicle based on probable cause is broad but not unlimited. "The scope of a warrantless search of an automobile . . . is defined by the object of the search and the places in which there is probable cause to believe that it may be found." *See United States v. Ross*, 456 U.S. 798, 824–25 (1982) (holding that "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search; also observing that "[p]robable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab").

Passenger belongings. In *Wyoming v. Houghton*, 526 U.S. 295 (1999), the Court held that officers with probable cause to search a car may search passengers' belongings found in the car that are capable of concealing the object of the search. *Compare State v. Boyd*, 64 P.3d 419 (Kan. 2003) (distinguishing *Houghton*, the court held that officers could not search a passenger's purse as part of their search of a car when they had ordered her to leave her purse in the car and they did not have probable cause to search the car or passenger at the time they gave the order).

Probable cause to search a car and its contents does not necessarily authorize officers to search passengers themselves. Nor does it necessarily authorize searches of passengers'

belongings in other contexts—for example, when the driver but not the passenger consents to a search. *See supra* § 15.5D, Consent.

Seizure of object. Before seizing an object found during a search of a vehicle, officers must have probable cause to believe that the object constitutes evidence of a crime. *See State v. Bartlett*, 130 N.C. App. 79 (1998) (no probable cause to seize plastic-like substance found in car, which upon later laboratory analysis turned out to be controlled substance, because officers admitted that they did not know what substance was at time of seizure).

Drug cases. In *Maryland v. Dyson*, 527 U.S. 465 (1999), the Court reaffirmed that a finding of probable cause that a vehicle contains contraband satisfies the automobile exception to the search warrant requirement. At issue in such cases are what circumstances amount to probable cause to search and where officers may search. *See generally State v. Poczontek*, 90 N.C. App. 455 (1988) (officer lacked probable cause to search car for drugs based on informant's tip and officer's observations after stop).

When an officer detects the odor of marijuana emanating from a vehicle, probable cause exists for a warrantless search of the vehicle for marijuana. *See State v. Smith*, 192 N.C. App. 690 (2008) (so holding). Officers may search in areas of the car where they reasonably believe marijuana may be found. *See State v. Toledo*, 204 N.C. App. 170 (2010) (officer noted odor of marijuana from spare tire in the luggage area after defendant had validly consented to a search of the vehicle; after conducting a "ping test" by pressing the tire valve of the spare tire and noting a very strong odor of marijuana, officer searched second spare tire located under the vehicle; court finds that after first ping test, officer had probable cause to search second tire); *compare Commonwealth v. Garden*, 883 N.E.2d 905 (Mass. 2008) (odor of burnt marijuana on clothes of vehicle's occupant gave officer probable cause to search passenger compartment of vehicle; officer did not have probable cause, however, to search vehicle's trunk because officer could not reasonably believe that source of smell of burnt marijuana would be found in trunk), *abrogated on other grounds, Commonwealth v. Lobo*, 978 N.E.2d 807 (Mass. App. Ct. 2012).

Probable cause to search a vehicle for drugs does not necessarily give officers probable cause to search recent occupants of the vehicle. *See State v. Smith*, ___ N.C. App. ___, 729 S.E.2d 120 (2012) (drug dog's positive alert to a vehicle does not give officers probable cause to search recent occupants of the vehicle); *see also Bailey v. United States*, 568 U.S. ___, 133 S. Ct. 1031 (2013) (search warrant does not justify the detention of occupants beyond the immediate vicinity of the premises covered by a search warrant; in this case, the defendant left the premises before the search began and officers waited to detain him until he had driven about one mile away, which was impermissible in absence of other grounds for detention). *But cf. State v. Mitchell*, ___ N.C. App. ___, 735 S.E.2d 438 (2012) (possession of marijuana blunt by passenger gave officer probable cause to search car in which passenger was riding).

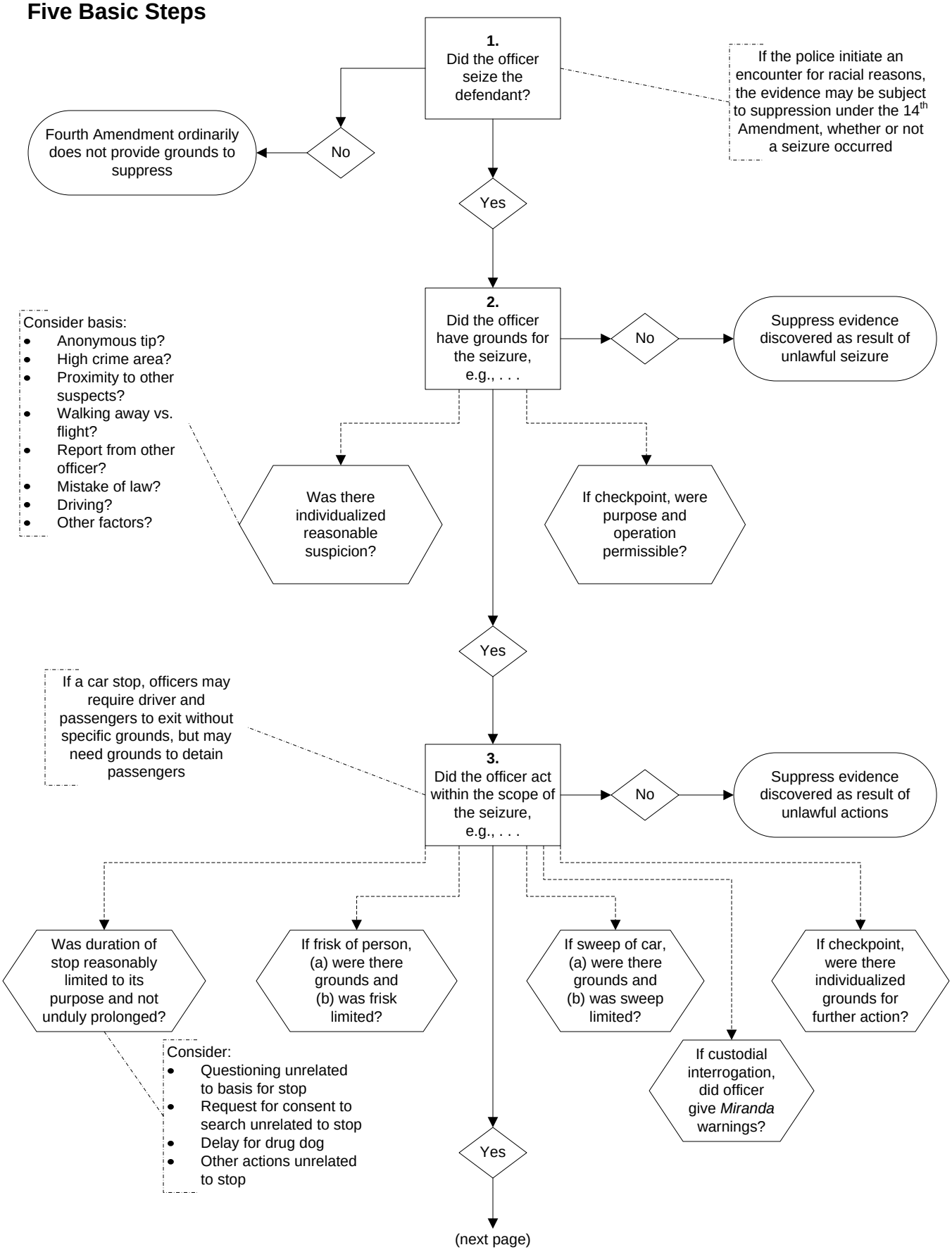
F. Inventory Search

Arrestees. Officers may search and inventory possessions of arrestee. *See* FARB at 229.

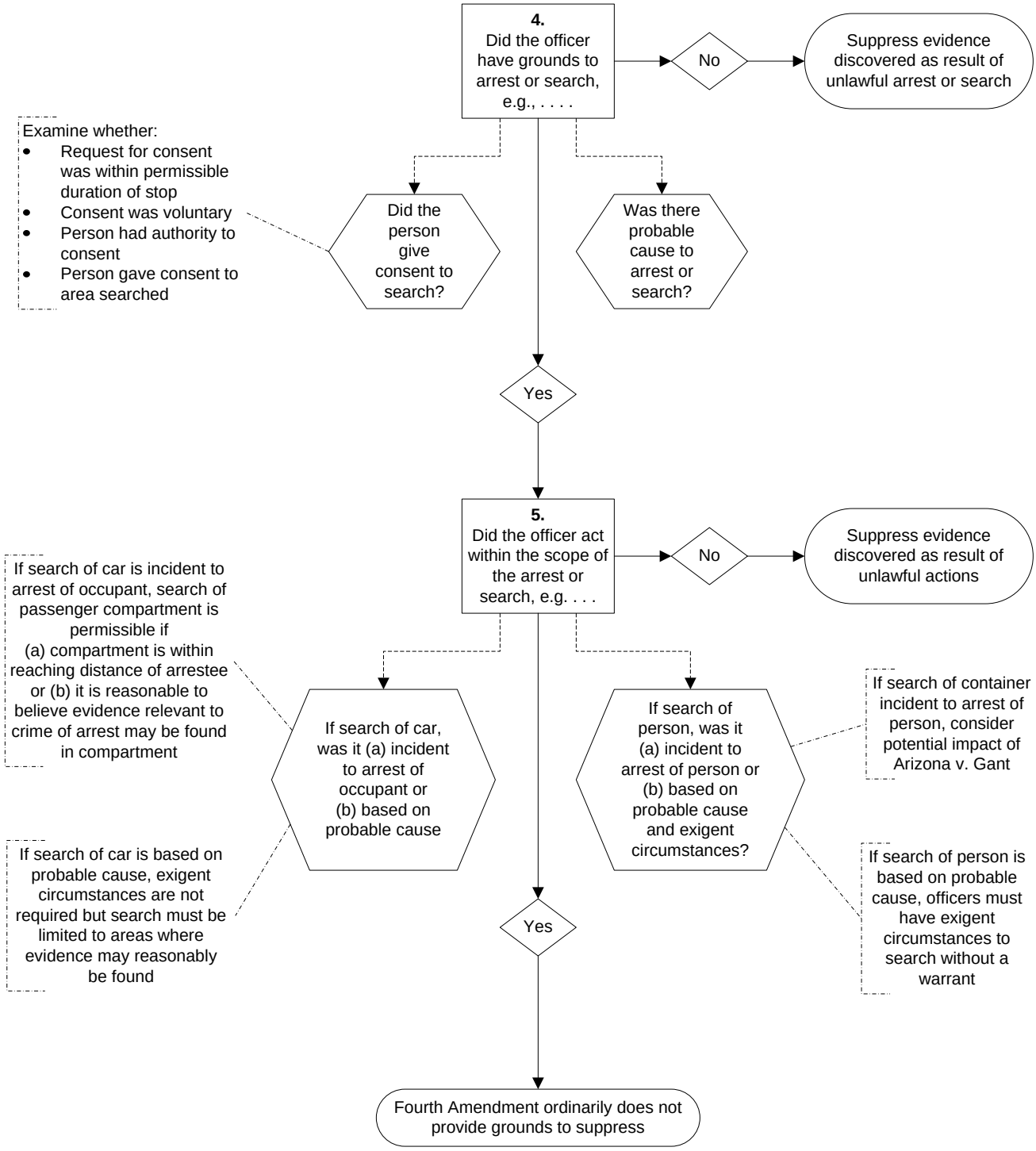
Vehicles. Officers may *impound* a vehicle if pursuant to departmental policy and grounds for impoundment exist, such as the need to safeguard the vehicle and its contents. Officers may *inventory* the vehicle and its contents if pursuant to departmental policy. *See State v. Phifer*, 297 N.C. 216 (1979) (failure to follow standardized procedure; inventory search suppressed); *State v. Peaten*, 110 N.C. App. 749 (1993) (inadequate grounds to impound vehicle; inventory search suppressed); FARB at 233–34 (discussing impoundment and inventory of vehicles).

Pretext. Inventory searches may be challenged as pretextual. *See supra* § 15.3I, Pretext.

Appendix 15-1
Stops and Warrantless Searches: Five Basic Steps



Five Basic Steps (cont'd)



Traffic Stops

Jeff Welty
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INTRODUCTION

This paper is intended to serve as a reference regarding the Fourth Amendment issues that arise in connection with traffic stops. It begins by addressing officers' conduct before a stop, proceeds to discuss making the stop itself, then considers investigation during traffic stops, and finally covers the termination of traffic stops.[1]

BEFORE THE STOP

"RUNNING TAGS"

Sometimes, an officer will decide to "run" a vehicle's "tag" – that is, run a computer check to determine whether the license plate on the vehicle is current and matches the vehicle, and perhaps whether the vehicle is registered to a person with outstanding warrants or who is not permitted to drive. When this is done randomly, without individualized suspicion, defendants sometimes argue that the officer has conducted an illegal search by running the tag. Courts have uniformly rejected this argument, finding that license plates are open to public view. See, e.g., State v. Chambers, 2010 WL 1287068 (N.C. Ct. App. April 6, 2010) (unpublished) ("Defendant's license tag was displayed, as required by North Carolina law, on the back of his vehicle for all of society to view. Therefore, defendant did not have a subjective or objective reasonable expectation of privacy in his license tag. As such, the officer's actions did not constitute a search under the Fourth Amendment."); Jones v. Town of Woodworth, __ So.3d __, 2013 WL 6834783 (La. Ct. App. 3rd Cir. Dec. 26, 2013) ("[A] survey of federal and state cases addressing this issue have concluded that a license plate is an object which is constantly exposed to public view and in which a person, thus, has no reasonable expectation of privacy, and that consequently, conducting a random license plate check is legal."); State v. Setinich, 822 N.W.2d 9 (Minn. Ct. App. 2012) (rejecting a defendant's challenge to an officer's suspicionless license plate check because "[a] driver does not have a reasonable expectation of privacy in a license plate number which is required to be openly displayed"); State v. Davis, 239 P.3d 1002 (Or. Ct. App. 2010) (upholding a random license check and stating that "[t]he state can access a person's driving records by observing a driver's registration plate that is displayed in plain view and looking up that registration plate number in the state's own records"); State v. Donis, 723 A.2d 35 (N.J. 1998) (holding that there is no reasonable expectation of privacy in the exterior of a vehicle, including the license plate, so an officer's ability to run a tag "should not be limited only to those instances when [the officer] actually witness[es] a violation of motor vehicle laws"). Cf. New York v. Class, 475 U.S. 106 (1986) (finding no reasonable expectation of privacy in a vehicle's VIN number because "it is unreasonable to have an expectation of privacy in an object required by law to be located in a place ordinarily in plain view from the exterior of the automobile"). See also infra p. 8 (discussion under heading "Driver's Identity" and cases cited therein).

[1] The organization of this paper was inspired in part by Wayne R. LaFave, The "Routine Traffic Stop" From Start to Finish: Too Much "Routine," Not Enough Fourth Amendment, 102 Mich. L. Rev. 1843 (2004).

MAKING THE STOP

LEGAL STANDARD

"Reasonable suspicion [is] the necessary standard for stops based on traffic violations." State v. Styles, 362 N.C. 412 (2008) (rejecting the argument that full probable cause is required for stops based on readily observable traffic violations). That is the same standard that applies to investigative stops in connection with more serious offenses. Terry v. Ohio, 392 U.S. 1 (1968). An officer may have reasonable suspicion of a traffic violation if a law is "genuinely ambiguous," and the officer reasonably interprets it to prohibit conduct that the officer has observed, even if the officer's interpretation of the law turns out to be mistaken.[2]

PRETEXTUAL STOPS

If an officer has reasonable suspicion that a driver has committed a crime or an infraction, the officer may stop the driver's vehicle. This is so even if the officer is not interested in pursuing the crime or infraction for which reasonable suspicion exists, but rather is hoping to observe or gather evidence of another offense. Whren v. United States, 517 U.S. 806 (1996) (emphasizing that the "[s]ubjective intentions" of the officer are irrelevant); State v. McClendon, 350 N.C. 630 (1999) (adopting Whren under the state constitution).[3] However, if an officer makes a pretextual traffic stop and then engages in extensive investigative activity that is directed not at the traffic offense but at another offense for which reasonable suspicion is absent, the officer may exceed the permitted scope of the traffic stop. This issue is addressed below, in the section of this paper entitled Investigation During the Stop.

Because the officer's subjective intentions regarding the purpose of the stop are immaterial, whether "an officer conducting a traffic stop [did or] did not subsequently issue a citation is also irrelevant to the validity of the stop." State v. Parker, 183 N.C. App. 1 (2007).

WHEN REASONABLE SUSPICION MUST EXIST

[2] Heien v. North Carolina, __ U.S. __, ___, 135 S.Ct. 530, 541 (2014) (Kagan, J., concurring). In Heien, an officer stopped a motorist for having one burned-out brake light. The court of appeals ruled that the applicable statute required only one working brake light and that the stop was therefore unreasonable. The Supreme Court reviewed the case and ruled that the brake light statute was sufficiently difficult to parse that the officer's interpretation was reasonable even if mistaken, rendering the stop reasonable also. The majority opinion does not set forth a standard for when an officer's mistaken interpretation of law is reasonable, but Justice Kagan's concurrence argues that such an interpretation is reasonable only when the law itself is "genuinely ambiguous."

[3] Indeed, a stop may be legally justified even where the officer is completely unaware of the offense for which reasonable suspicion exists and makes the stop based entirely on the officer's incorrect belief that reasonable suspicion exists for another offense. See, e.g., Devenpeck v. Alford, 543 U.S. 146 (2004) ("[A]n arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. . . .That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause."); State v. Osterhoudt, __ N.C. App. __, 731 S.E.2d 454 (2012) (an officer stopped the defendant based on the officer's mistaken belief that the defendant's driving violated a particular traffic law; the court of appeals concluded that the law in question had no application to the defendant's driving, but upheld the stop because the facts observed by the officer provided reasonable suspicion that the defendant's driving violated a different traffic law, notwithstanding the fact that the officer did not act on that basis).

Normally, a law enforcement officer will attempt to develop reasonable suspicion before instructing a person to stop. But what if the officer does not have reasonable suspicion at that point, yet develops reasonable suspicion prior to the suspect's compliance with the officer's instruction? In California v. Hodari D., 499 U.S. 621 (1991), the United States Supreme Court held that a show of authority is not a seizure until the subject complies. Because the propriety of a seizure depends on the facts known at the time of the seizure, it appears that events after an officer's show of authority, but before a driver's submission to it, may be used to justify the stop. For example, an officer who activates his blue lights after observing a driver traveling 45 m.p.h. in a 55 m.p.h. zone may be without reasonable suspicion. But if the driver initially ignores the blue lights, continues driving, and weaves severely before stopping, the seizure may be upheld based on the driver's weaving in addition to his slow rate of speed. State v. Atwater, 2012 WL 1333416 (N.C. Ct. App. Apr. 17, 2012) (unpublished) (adopting the foregoing analysis and concluding that "[r]egardless of whether [the officer] had a reasonable suspicion that defendant was involved in criminal activity prior to turning on his blue lights, defendant's subsequent actions [erratic driving and running two stop signs] gave [the officer] reasonable suspicion to stop defendant for traffic violations"); United States v. Swindle, 407 F.3d 562 (2d Cir. 2005) (reluctantly concluding that a court may "consider[] events that occur[] after [a driver is] ordered to pull over" but before he complies in determining the constitutionality of a seizure); United States v. Smith, 217 F.3d 746 (9th Cir. 2000) (relying on Hodari D. to reject the argument that "only the factors present up to the point when [the officer] turned on the lights of his patrol car can be considered in analyzing the validity of the stop"). Cf. United States v. McCauley, 548 F.3d 440 (6th Cir. 2008) ("We determine whether reasonable suspicion existed at the point of seizure – not . . . at the point of attempted seizure."); United States v. Johnson, 212 F.3d 1212 (D.C. Cir. 2000) (similar). Cf. generally 4 Wayne R. LaFave, Search and Seizure § 9.4(d) n. 170 (4th ed. 2004) (collecting cases) (hereinafter, LaFave, Search and Seizure).

COMMON ISSUES

SPEEDING

Many traffic stops based on speeding are supported by radar or other technological means. However, an officer's visual estimate of a vehicle's speed is generally also sufficient to support a traffic stop for speeding. State v. Barnhill, 166 N.C. App. 228 (2004) (upholding a traffic stop based on the estimate of an officer without any special training that the defendant was speeding 40 m.p.h. in a 25 m.p.h. zone, and stating that "it is well established in this State, that any person of ordinary intelligence, who had a reasonable opportunity to observe a vehicle in motion and judge its speed may testify as to his estimation of the speed of that vehicle"). However, if a vehicle is speeding only slightly, an officer's visual estimate of speed may be insufficiently reliable and accurate to support a traffic stop. Compare United States v. Sowards, 690 F.3d 583 (4th Cir. 2012) (officer's visual estimate that the defendant was speeding 75 m.p.h. in a 70 m.p.h. zone was insufficient to support a traffic stop; the officer also expressed some difficulty with units of measurement), with United States v. Mubdi, 691 F.3d 334 (4th Cir. 2012) (traffic stop was justified when two officers independently estimated that the defendant was speeding between 63 m.p.h. and 65 m.p.h. in a 55 m.p.h. zone), vacated on other grounds, __ U.S. __, 133 S. Ct. 2851 (2013).

DRIVING SLOWLY

Driving substantially under the posted speed limit is not itself necessarily unlawful. In fact, it is sometimes required by G.S. 20-141(a), which states that "[n]o person shall drive a vehicle on a highway or in a public vehicular area at a speed greater than is reasonable and prudent under the conditions then existing." On the other hand, in some circumstances, driving slowly may constitute obstruction of traffic under G.S. 20-141(h) ("No person shall operate

a motor vehicle on the highway at such a slow speed as to impede the normal and reasonable movement of traffic."), or may violate posted minimum speed limits under G.S. 20-141(c) (unlawful to operate passenger vehicle at less than certain minimum speeds indicated by appropriate signs). Furthermore, the fact that a driver is proceeding unusually slowly may contribute to reasonable suspicion that the driver is impaired. See, e.g., State v. Bonds, 139 N.C. App. 627 (2000) (driver's blank look, slow speed, and the fact that he had his window down in cold weather provided reasonable suspicion; opinion quotes NHTSA regarding the connection between slow speeds, blank looks, and DWI); State v. Aubin, 100 N.C. App. 628 (1990) (fact that defendant slowed to 45 mph on I-95 and weaved within his lane supported reasonable suspicion of DWI); State v. Jones, 96 N.C. App. 389 (1989) (although the defendant did not commit a traffic infraction, "his driving 20 miles per hour below the speed limit and weaving within his lane were actions sufficient to raise a suspicion of an impaired driver in a reasonable and experienced [officer's] mind").

Whether slow speed alone is sufficient to provide reasonable suspicion of impairment is not completely settled in North Carolina. The state supreme court seemed to suggest that it might be in State v. Styles, 362 N.C. 412 (2008) ("For instance, law enforcement may observe certain facts that would, in the totality of the circumstances, lead a reasonable officer to believe a driver is impaired, such as weaving within the lane of travel or driving significantly slower than the speed limit."), but the court of appeals stated that it is not in a subsequent unpublished decision, State v. Brown, 2010 WL 3860440 (N.C. Ct. App. Oct. 5, 2010) (unpublished) (stating that traveling 10 m.p.h. below the speed limit is not alone enough to create reasonable suspicion, but finding reasonable suspicion based on speed, weaving, and the late hour). The weight of authority in other states is that it is not. See, e.g., State v. Bacher, 867 N.E.2d 864 (Ohio Ct. App. 1 Dist. 2007) (holding that "slow travel alone [in that case, 23 m.p.h. below the speed limit on the highway] does not create a reasonable suspicion," and collecting cases from across the country).

It is also unclear just how slowly a driver must be travelling in order to raise suspicions. Of course, driving a few miles per hour under the posted limit is not suspicious. State v. Canty, __ N.C. App. __, 736 S.E.2d 532 (2012) (fact that vehicle slowed to 59 m.p.h. in a 65 m.p.h. zone upon seeing officers did not provide reasonable suspicion). Ten miles per hour under the limit, however, may be enough to contribute to suspicion. State v. Brown, supra (finding reasonable suspicion where defendant was driving 10 m.p.h. under the speed limit and weaving within a lane); State v. Bradshaw, 2009 WL 2369281 (N.C. Ct. App. Aug. 4, 2009) (unpublished) (late hour, driving 10 m.p.h. below the limit, and abrupt turns provided reasonable suspicion). Certainly, the more sustained and the more pronounced the slow driving, the greater the suspicion.

WEAVING

G.S. 20-146 requires that "[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

ACROSS LANES

Weaving across lanes of traffic generally violates this provision and supports a traffic stop. See, e.g., State v. Osterhoudt, __ N.C. App. __, 731 S.E.2d 454 (2012) (where the "defendant crossed [a] double yellow line . . . he failed to stay in his lane and violated" G.S. 20-146); State v. Simmons, 205 N.C. App. 509 (2010) (finding that a stop was supported by reasonable suspicion where the defendant "was not only weaving within his lane, but was also weaving across and outside the lanes of travel, and at one point actually ran off the road"). But see State v. Kochuk, 366 N.C. 549 (2013) (analyzing the existence of reasonable suspicion under the weaving plus framework

discussed below, even though the defendant "crossed over the dotted white line [separating freeway lanes], causing both wheels on the passenger side of the vehicle to cross into the right lane for [several] seconds, and then move[d] back into the middle lane"); State v. Derbyshire, __ N.C. App. __, 745 S.E.2d 886 (2013), temporary stay allowed, __ N.C. __, 747 S.E.2d 524 (2013) (holding that a stop was not supported by reasonable suspicion because it was based on only "one instance of weaving," even though "the right side of Defendant's tires crossed into the right-hand lane" during the weaving).

WITHIN A LANE

Weaving within a single lane, by contrast, does not violate G.S. 20-146 and so is not itself a crime or an infraction. In some circumstances, however, weaving within a single lane may provide, or contribute to, reasonable suspicion that a driver is impaired or is driving carelessly.

- *Moderate Weaving within a Lane: Weaving Plus.* In State v. Fields, 195 N.C. App. 740 (2009), the court of appeals held that an officer did not have reasonable suspicion that a driver was impaired where the driver "swerve[d] to the white line on the right side of the traffic lane" three times over a mile and a half. However, the court stated that weaving, "coupled with additional . . . facts," may provide reasonable suspicion. The court cited cases involving additional facts such as driving "significantly below the speed limit," driving at an unusually late hour, and driving in the proximity of drinking establishments. Thus, Fields stands for the proposition that moderate weaving within a single lane does not provide reasonable suspicion, but that 'weaving plus' may do so. Fields has been applied in cases such as State v. Kochuk, 366 N.C. 549 (2013) (ruling that reasonable suspicion supported a stop where the defendant was weaving and it was 1:10 a.m.); State v. Derbyshire, __ N.C. App. __, 745 S.E.2d 886 (2013) (holding that weaving alone did not provide reasonable suspicion to support a stop, that driving at 10:05 p.m. on a Wednesday is "utterly ordinary" and insufficient to render weaving suspicious, and that having "very bright" headlights also was not suspicious); and State v. Peele, 196 N.C. App. 668 (2009) (finding no reasonable suspicion of DWI where an officer received an anonymous tip that defendant was "possibl[y]" driving while impaired, then saw the defendant "weave within his lane once").

- *Severe Weaving within a Lane.* While moderate weaving within a single lane is insufficient by itself to support a traffic stop, severe weaving may suffice. In State v. Fields, __ N.C. App. __, 723 S.E.2d 777 (2012), the court of appeals upheld a traffic stop conducted by an officer who followed the defendant for three quarters of a mile and saw him "weaving in his own lane . . . sufficiently frequent[ly] and erratic[ly] to prompt evasive maneuvers from other drivers." The officer compared the defendant's vehicle to a "ball bouncing in a small room." The extensive weaving enabled the court of appeals to distinguish the precedents discussed in the preceding paragraph. See also State v. Otto, 366 N.C. 134 (2012) (traffic stop justified by the defendant's "constant and continual" weaving at 11:00 p.m. on a Friday night).

SITTING AT A STOPLIGHT

Like weaving within a single lane, remaining at a stoplight after the light turns green is not, in itself, a violation of the law. But also like weaving, it may provide or contribute to reasonable suspicion that the driver is impaired. An important factor in such cases is the length of the delay. Compare State v. Barnard, 362 N.C. 244 (2008) (determining that reasonable suspicion supported an officer's decision to stop the defendant where the defendant was waiting at a traffic light in a high-crime area, near several bars, at 12:15 a.m., and "[w]hen the light turned

green, defendant remained stopped for approximately thirty seconds" before proceeding), with State v. Roberson, 163 N.C. App. 129 (2004) (finding no reasonable suspicion where the defendant sat at a green light at 4:30 a.m., near several bars, for 8 to 10 seconds, and stating that "[a] motorist waiting at a traffic light can have her attention diverted for any number of reasons. . . . [so] a time lapse of eight to ten seconds does not appear so unusual as to give rise to suspicion justifying a stop").

UNSAFE MOVEMENT/LACK OF TURN SIGNAL

Under G.S. 20-154(a), "before starting, stopping or turning from a direct line[, a driver] shall first see that such movement can be made in safety . . . and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required." Litigation under this statute has focused on the phrase "the operation of any other vehicle may be affected." Generally, the appellate courts have held that a driver need not signal when making a mandatory turn, but must if the turn is optional and there is another vehicle following closely. Compare State v. Ivey, 360 N.C. 562 (2006) (the defendant was not required to signal at what amounted to a right-turn-only intersection; a right turn was the "only legal movement he could make," and the vehicle behind him was likewise required to stop, then turn right, so the defendant's turn did not affect the trailing vehicle), and State v. Watkins, __ N.C. App. __, 725 S.E.2d 400 (2012) (suggesting that there was insufficient evidence of unsafe movement where the defendant changed lanes without signaling while driving three to four car lengths in front of a police vehicle on a road with heavy traffic, because it was not clear that another vehicle was affected), with State v. Styles, 362 N.C. 412 (2008) (where the defendant changed lanes "immediately in front of" an officer, he violated the statute; "changing lanes immediately in front of another vehicle may affect the operation of the trailing vehicle"), and State v. McRae, 203 N.C. App. 319 (2010) (similar).

LATE HOUR, HIGH-CRIME AREA

The United States Supreme Court has held that presence in a high-crime area, "standing alone, is not a basis for concluding that [a suspect is] engaged in criminal conduct." Brown v. Texas, 443 U.S. 47 (1979). Although the stop in Brown took place at noon, presence in a high-crime area at an unusually late hour is also alone insufficient to provide reasonable suspicion. State v. Murray, 192 N.C. App. 684 (2008) (no reasonable suspicion to stop defendant, who was driving in a commercial area with a high incidence of property crimes at 3:41 a.m.). But the incidence of crime in the area and the hour of night are factors that, combined with others such as nervousness or evasive action, may contribute to reasonable suspicion. Cf. In re I.R.T., 184 N.C. App. 579 (2007) (listing factors); State v. Mello, 200 N.C. App. 437 (2009) (holding that the defendant's presence in a high-drug area, coupled with evasive action on the part of individuals seen interacting with defendant, provided reasonable suspicion supporting a stop).

COMMUNITY CARETAKING

The court of appeals recognized the community caretaking doctrine as a basis for a vehicle stop in State v. Smathers, __ N.C. App. __, 753 S.E.2d 380 (2014). In Smathers, an officer stopped the defendant to make sure that she was OK after her car hit a large animal that ran in front of her. The court ruled that the stop was justified, finding an objectively reasonable basis for the caretaking stop that outweighed the intrusion of the stop on the driver's privacy. The court set out a flexible test for community caretaking, yet cautioned that the doctrine should be applied narrowly, so its precise scope remains uncertain.

TIPS

Whether information from a tipster provides reasonable suspicion to stop a vehicle depends on the totality of the circumstances. Whether the tipster is identified is a critical factor, so this paper treats anonymous tips separately from other tips.

ANONYMOUS TIPS

Historically, information from an anonymous tipster has been viewed as insufficient to support a stop, at least without unusual indicia of reliability, such as very detailed information or meaningful corroboration of the tip by the police. State v. Coleman, __ N.C. App. __, 743 S.E.2d 62 (2013) (a tip that the court treated as anonymous did not provide reasonable suspicion, in part because it "did not provide any way for [the investigating officer] to assess [the tipster's] credibility, failed to explain her basis of knowledge, and did not include any information concerning defendant's future actions"); State v. Blankenship, __ N.C. App. __, 748 S.E.2d 616 (2013) (taxi driver's anonymous call to 911, reporting that a specific red Ford Mustang, headed in a specific direction, was "driving erratically [and] running over traffic cones," was insufficient to support a stop of a red Mustang located less than two minutes later headed in the described direction; officers did not corroborate the bad driving and the tip had "limited but insufficient indicia of reliability"); State v. Johnson, 204 N.C. App. 259 (2010) (stating that "[c]ourts have repeatedly recognized, as a general rule, the inherent unreliability of anonymous tips standing on their own" unless such a tip "itself possess[es] sufficient indicia of reliability, or [is] corroborated by [an] officer's investigation or observations"); State v. Peele, 96 N.C. App. 668 (2009) (an anonymous tip that the defendant was driving recklessly, combined with an officer's observation of a single instance of weaving, was insufficient to give rise to reasonable suspicion). This skepticism was rooted in part in Florida v. J.L., 529 U.S. 266 (2000), a non-traffic stop case in which the Court stated that "[u]nlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated . . . an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity," and so rarely provides reasonable suspicion. (Internal quotation marks and citation omitted.)

However, the Supreme Court recently decided Navarette v. California, 572 U.S. __, 134 S.Ct. 1683 (2014), ruling that a motorist's 911 call, reporting that a specific vehicle had just run the caller off the road, was an anonymous tip that provided reasonable suspicion to stop the described vehicle 15 minutes later. The Court first ruled that the tip was reliable. It reasoned that the caller effectively claimed first-hand knowledge of the other vehicle's dangerous driving; that the call was "especially reliable" because it was contemporaneous with the dangerous driving; and that the call was made to 911, which "has some features [like recording and caller ID] that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity." Then the Court held that running another vehicle off the road "suggests lane-positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues," and so provided reasonable suspicion of DWI. Because the Court found reasonable suspicion based on a garden-variety anonymous 911 call that the officers did little to corroborate, Navarette almost certainly changes the law in North Carolina regarding anonymous tips and reasonable suspicion.[4] However, it is unclear how far Navarette will

[4] North Carolina's appellate courts could adhere to the previous line of authority by ruling that the North Carolina Constitution provides greater protection than the Fourth Amendment, but that is unlikely given the courts' repeated statements that the state and federal constitutions provide coextensive protection from unreasonable

extend. Will it apply when the tip is received through a means other than 911? When it concerns a completed traffic offense rather than an ongoing one like DWI? These issues will need to be decided in future cases.

OTHER TIPS

Where an informant "willingly place[s] her anonymity at risk," by identifying herself or by speaking to an officer face to face, courts more readily conclude that the information provides reasonable suspicion. State v. Maready, 362 N.C. 614 (2008) (court gave significant weight to information provided by a driver who approached officers in person, thereby allowing officers to see her, her vehicle, and her license plate, notwithstanding the fact that the officers did not in fact make note of any identifying information about her). See also State v. Hudgins, 195 N.C. App. 430 (2009) (a driver called the police to report that he was being followed, then complied with the dispatcher's instructions to go to a specific location to allow an officer to intercept the trailing vehicle; when the officer stopped the second vehicle, the caller also stopped briefly; the defendant, who was driving the second vehicle, was impaired; the stop was proper, in part because "by calling on a cell phone and remaining at the scene, [the] caller placed his anonymity at risk").[5]

DRIVER'S IDENTITY

"[W]hen a police officer becomes aware that a vehicle being operated is registered to an owner with a suspended or revoked driver's license, and there is no evidence appearing to the officer that the owner is not the individual driving the automobile, reasonable suspicion exists to warrant an investigatory stop." State v. Hess, 185 N.C. App. 530 (2007). See also State v. Johnson, 204 N.C. App. 259 (2010) ("[T]he officers did lawfully stop the vehicle after discovering that the registered owner's driver's license was suspended."). Presumably, an officer would also be justified in stopping a vehicle if he determined that the registered owner was the subject of an outstanding arrest warrant or other criminal process and if the officer could not rule out the possibility that the owner of the vehicle was driving.[6]

INVESTIGATION DURING THE STOP

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searches and seizures. State v. Verkerk, __ N.C. App. __, 747 S.E.2d 658 (2013) (stating that "this Court and the [state] Supreme Court have clearly held that, as far as the substantive protections against unreasonable searches and seizures are concerned, the federal and state constitutions provide the same rights," and citing multiple cases holding that the two constitutions are coextensive in this regard).

[5] The Hudgins court emphasized that the caller remained at the scene of the stop, thereby relinquishing his anonymity. By contrast, in State v. Blankenship, __ N.C. App. __, 748 S.E.2d 616 (2013), a taxi driver called 911 on his cell phone to report an erratic driver. The taxi driver did not give his name, but "when an individual calls 911, the 911 operator can determine the phone number used to make the call. Therefore, the 911 operator was later able to identify the taxicab driver." Nonetheless, the court treated the call as an anonymous tip because "the officers did not meet [the taxi driver] face-to-face," and found that the tip failed to provide reasonable suspicion to support a stop of the other driver. See also State v. Coleman, __ N.C. App. __, 743 S.E.2d 62 (2013) (treating a telephone tip as anonymous even though "the communications center obtained the caller's name . . . and phone number").

[6] In State v. Watkins, __ N.C. App. __, 725 S.E.2d 400 (2012), the court of appeals upheld a stop based in part on the fact that the registered owner of a vehicle had outstanding warrants even though the officers involved in the case were "pretty sure" that the driver was not the owner. The court noted that the defendant "was driving a car registered to another person," that the registered owner had outstanding warrants, and that there was a passenger in the vehicle who could have been the registered owner.

ORDERING OCCUPANTS OUT OF THE VEHICLE

In the interest of officer safety, an officer may order any or all of a vehicle's occupants out of the vehicle during a traffic stop. Pennsylvania v. Mimms, 434 U.S. 106 (1977) (driver); Maryland v. Wilson, 519 U.S. 408 (1997) (passengers). Likewise, an officer may order the vehicle's occupants to remain in the vehicle. State v. Shearin, 170 N.C. App. 222 (2005); Robert L. Farb, Arrest, Search, and Investigation in North Carolina 45 & n.191 (4th ed. 2011) (collecting cases). Whether, and under what circumstances, an officer can order a driver or passenger into the back seat of the officer's cruiser is an open question in North Carolina and is the subject of a split of authority nationally. Jeff Welty, Traffic Stops, Part II, http://sogweb.sog.unc.edu/blogs/ncclaw/?p=811 (October 28, 2009).

FRISKING OCCUPANTS

A frisk does not follow automatically from a valid stop. It is justified only if the officer reasonably suspects that the person or people to be frisked are armed and dangerous. Terry v. Ohio, 392 U.S. 1 (1968). For example, a frisk was justified when a driver "had prior convictions for drug offenses, [an officer] observed [the driver's] nervous behavior inside his vehicle, and [the officer] saw him deliberately conceal his right hand and refuse to open it despite repeated requests." State v. Henry, __ N.C. App. __, 765 S.E.2d 94 (2014). An officer may frisk a passenger based on reasonable suspicion that the passenger is armed and dangerous, even if the officer does not suspect the passenger of criminal activity. Arizona v. Johnson, 555 U.S. 323 (2009).

"CAR FRISKS"

In Michigan v. Long, 463 U.S. 1032 (1983), the Supreme Court held that "the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses [reasonable suspicion] that the suspect is dangerous and the suspect may gain immediate control of weapons." Although Long was decided in the context of what might be described as a Terry stop rather than a routine traffic stop, the two types of stops are similar if not identical,[7] and the concept of a car frisk applies with equal force to traffic stops. State v. Hudson, 103 N.C. App. 708 (1991) (upholding car frisk arising out of a traffic stop).

Whether there is reasonable suspicion that a person is dangerous is similar to the inquiry that must be made in the Terry frisk context. Factors that courts have mentioned in the car frisk context include: furtive movements by the occupants of the vehicle; lack of compliance with police instructions; belligerence; reports that the suspect is armed; and visible indications that a weapon may be present in the car. See, e.g., State v. Edwards, 164 N.C. App. 130 (2004) (finding a car frisk justified where a sexual assault suspect was reported to have a gun; was noncompliant; and appeared to have reached under the seat of his vehicle); State v. Minor, 132 N.C. App. 478 (1999) (holding a car frisk not justified where a suspect appeared to access the center console of the vehicle and later rubbed his hand on his thigh near his pocket; these movements were not "clearly furtive"); State v. Clyburn, 120 N.C. App. 377 (1995) (ruling a car frisk justified where officers suspected that the defendant was involved in the drug trade and the defendant was belligerent during the stop).

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[7] Berkemer v. McCarty, 468 U.S. 420 (1984) ("[T]he usual traffic stop is more analogous to a so-called 'Terry stop' than to a formal arrest."); State v. Styles, 362 N.C. 412 (2008) ("Traffic stops have 'been historically reviewed under the investigatory detention framework first articulated in Terry.'").

Whether an officer's belief that a suspect may gain immediate control of a weapon is reasonable depends on the particular circumstances of a given traffic stop including the suspect's location relative to the vehicle and whether the suspect has been handcuffed. Compare Edwards, supra, (defendant suspected of possessing handgun who was handcuffed and sitting on the curb was in sufficiently "close proximity to the interior of the vehicle" to gain access to a weapon), and State v. Parker, 183 N.C. App. 1 (2007) (defendant was handcuffed in the backseat of his own car when he disclosed that there was a gun in the car; two other passengers were also in the car; "these circumstances were sufficient to create a reasonable belief that defendant was dangerous and had immediate access to a weapon"), with State v. Braxton, 90 N.C. App. 204 (1988) (it was "uncontroverted that defendant [stopped for speeding] could not obtain any weapon . . . from the car" where he was not in the car and detective testified that defendant could not have reached the area searched).

As to the proper scope of a car frisk, there is little North Carolina law on point. In Parker, supra, the court held that an officer properly searched "a drawstring bag located underneath a piece of newspaper that fell to the ground" as he assisted an occupant out of the vehicle. The court noted that the bag was located near a firearm and "was at least large enough to contain methamphetamine and a 'smoking device," perhaps suggesting a willingness to err on the side of officer safety when confronted with ambiguous facts.

LICENSE, WARRANT, AND RECORD CHECKS

Officers will often check the validity of a driver's license during a traffic stop, and may also check the driver's criminal record, including a check for outstanding arrest warrants. The courts have generally viewed these checks, and the associated brief delays, as permissible. State v. Velazquez-Perez, __ N.C. App. __, 756 S.E.2d 869 (2014) (finding "no . . . authority" for the defendant's claim that a document check exceeded the scope of a speeding stop, and noting that "officers routinely check relevant documentation while conducting traffic stops"); State v. Hernandez, 170 N.C. App. 299 (2005) (holding that "running checks on Defendant's license and registration" was "reasonably related to the stop based on the seat belt infraction"); State v. Castellon, 151 N.C. App. 675 (2002) (twenty-five minute "detention for the purpose of determining the validity of defendant's license was not unreasonable" when officer's computer was working slowly). See also, e.g., United States v. Villa, 589 F.3d 1334 (10th Cir. 2009) ("It is well-established that [a] law enforcement officer conducting a routine traffic stop may request a driver's license and vehicle registration, run a computer check, and issue a citation."); See generally Wayne R. LaFave, The "Routine Traffic Stop" From Start to Finish: Too Much "Routine," Not Enough Fourth Amendment, 102 Mich. L. Rev. 1843, 1874-85 (2004) (noting that most courts have permitted license, warrant, and record checks incident to traffic stops, though criticizing some of these conclusions) (hereinafter LaFave, "Routine").

QUESTIONS ABOUT UNRELATED MATTERS

The United States Supreme Court held in Muehler v. Mena, 544 U.S. 93 (2005), that questioning is not a seizure, so the police may question a person who has been detained about matters unrelated to the justification for the detention, even without any individualized suspicion supporting the questions. Although Muehler involved a person who was detained during the execution of a search warrant, not the subject of a traffic stop, its reasoning applies equally in the traffic stop setting. The Court has recognized as much. Arizona v. Johnson, 555 U.S. 323 (2009) ("An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."). See also e.g., United States v. Olivera-Mendez, 484 F.3d 505 (8th Cir. 2007); United States v. Stewart, 473 F.3d 1265 (10th Cir. 2007). It should be emphasized that the questioning in

Muehler did not extend the subject's detention; whether a traffic stop may be prolonged for additional questioning is discussed below.

USE OF DRUG-SNIFFING DOGS

Having a dog sniff a car is not a search and so requires no quantum of suspicion. Illinois v. Caballes, 543 U.S. 405 (2005). Therefore, a dog sniff is permitted during any traffic stop, so long as the sniff does not extend the stop. (Again, whether a traffic stop may be prolonged for a dog sniff is discussed below.)

ASKING FOR CONSENT TO SEARCH

Requests to search made during a traffic stop probably should be analyzed just like any other inquiry about matters unrelated to the purpose of the stop: because such a request is not, in itself, a seizure, most courts find such requests to be permissible if they do not significantly extend the duration of the stop. 4 LaFave, Search and Seizure § 9.3(e). See also United States v. Turvin, 517 F.3d 1097 (9th Cir. 2008) (because "officers do not need reasonable suspicion to ask questions unrelated to the purpose of an initially lawful stop," a request for consent to search that did not substantially prolong a traffic stop was permissible). However, at least one North Carolina Court of Appeals case has stated that "[i]f the officer's request for consent to search is unrelated to the initial purpose for the stop, then the request must be supported by reasonable articulable suspicion of additional criminal activity." State v. Parker, 183 N.C. App. 1 (2007). The court's reasoning appears to have been that such a request inherently involves at least a minimal extension of the stop and is therefore unreasonable.[8] But cf. State v. Jacobs, 162 N.C. App. 251 (2004) ("Defendant argues alternatively that the State failed to establish that Officer Smith had sufficient reasonable suspicion to request defendant's consent for the search [during an investigative stop]. No such showing is required.").

PROLONGING THE STOP TO INVESTIGATE UNRELATED MATTERS

A lengthy extension of a traffic stop in order to engage in the investigative activities described above plainly would violate the Fourth Amendment unless the officer had developed reasonable suspicion to support the continued detention. Whether an officer may briefly extend a stop in order to deploy the described investigative techniques, however, is less clear. The United States Supreme Court has recently granted certiorari in United States v. Rodriguez, No. 13-9772, a case that may result in a ruling that clarifies the law in this area.

For now, the case law in North Carolina is inconsistent. Brief delays in order to conduct dog sniffs were permitted in State v. Sellars, __ N.C. App. __, 730 S.E.2d 208 (2012) (delay of four minutes and 37 seconds was de minimis and did not violate the Fourth Amendment), and State v. Brimmer, 187 N.C. App. 451 (2007) (delay of approximately four minutes to allow a dog sniff to take place was de minimis), but prohibited in State v. Cottrell, __ N.C. App. __, 760 S.E.2d 274 (2014), where the court stated that it did "not believe that the de minimis analysis applied in Brimmer and Sellars should be extended to situations when, as here, a drug dog was not already on the scene."

Brief delays associated with requests for consent to search arguably are prohibited by Parker, and brief delays for questions unrelated to the stop may be barred by State v. Jackson, 199 N.C. App. 236 (2009) (finding

[8] This may not be so in some cases, as when one officer asks for consent to search while another is writing a citation. The issue of delays is addressed later in this manuscript.

that an officer unreasonably extended a traffic stop when she asked just a handful of drug-related questions). However, it should be noted that Sellars describes Jackson and the similar case of State v. Myles, 188 N.C. 42 (2008), as being part of a line of cases that predated and/or failed to consider the de minimis analysis of Brimmer. The implication, of course, is that a brief extension of a traffic stop for any reason is de minimis and does not run afoul of the Fourth Amendment.[9] Sellars and Cottrell represent quite different approaches to the issue of extensions of stops.

Most post-Muehler federal cases have allowed short delays for any of the investigative techniques discussed above. Compare United States v. Rodriguez, 741 F.3d 905 (8th Cir. 2014) (a seven- or eight-minute delay to deploy a drug-sniffing dog was "a de minimis intrusion" that did not implicate the Fourth Amendment), United States v. Green, 740 F.3d 275 (4th Cir. 2014) (running a "criminal history check added just four minutes to the traffic stop" and "at most, amounted to a de minimis intrusion . . . [that] did not constitute a violation of [the defendant's] Fourth Amendment rights"), United States v. Mason, 628 F.3d 123 (4th Cir. 2010) ("The one to two of the 11 minutes [that the stop took] devoted to questioning on matters not directly related to the traffic stop constituted only a slight delay that raises no Fourth Amendment concern."), United States v. Harrison, 606 F.3d 42 (2d Cir. 2010) (per curiam) (five to six minutes of questioning unrelated to the purpose of the traffic stop "did not prolong the stop so as to render it unconstitutional"), and Turvin, supra, (asking a "few questions" unrelated to the stop that prolonged the stop by a "few moments" was not unreasonable, and collecting cases), with United States v. Digiovanni, 650 F.3d 498 (4th Cir. 2011) (unreasonable to spend ten minutes of a fifteen-minute traffic stop asking drug-related questions); United States v. Peralez, 526 F.3d 1115 (8th Cir.2008) (extending a traffic stop by ten minutes to ask drug-related questions was unreasonable). See generally United States v. Everett, 601 F.3d 484 (6th Cir. 2010) (collecting cases and concluding that whether a delay is de minimis depends on all the circumstances, including whether the officer is diligently moving toward a conclusion of the stop, and the ratio of stop-related questions to non-stop-related questions).[10]

TOTAL DURATION

There is no bright-line rule regarding the length of traffic stops. As a rule of thumb, "routine" stops that exceed twenty minutes may deserve closer scrutiny. See Robert L. Farb, Arrest, Search, and Investigation in North Carolina 43 (4th ed. 2011). Stops of various lengths have been upheld by the courts. See, e.g., State v. Heien, __ N.C. __, 741 S.E.2d 1 (2013) (thirteen minutes was "not unduly prolonged); Castellon, supra (twenty-five minutes); United

[9] As to how long a delay is de minimis, see the cases cited in the next paragraph of the main text, plus State v. Branch, 194 N.C. App. 173 (2008) (ten-minute delay "beyond the time it took to check [the driver's] license and registration was unlawful"), and United States v. Blair, 524 F.3d 740 (6th Cir. 2008) (unreasonable to extend traffic stop by thirteen minutes to allow drug dog to arrive and sniff).

[10] The de minimis doctrine may not apply to stops where reasonable suspicion is quickly dispelled rather than confirmed. For example, if an officer makes a stop because the officer suspects that a driver is a specific individual whose license is suspended or who is the subject of an outstanding arrest warrant, and the officer determines upon stopping the driver that he or she is not the person in question, any further detention, no matter how brief, may be unreasonable. See United States v. de la Cruz, 703 F.3d 1193 (10th Cir. 2013) (considering a case of this kind and concluding that "[o]nce reasonable suspicion has been dispelled, even a very brief extension of the detention without consent or reasonable suspicion violates the Fourth Amendment") (internal quotation marks and citation omitted); 4 Wayne R. LaFave, Search and Seizure 510 n. 162 (5th ed. 2012) (collecting cases) In North Carolina, this issue was raised by not decided in State v. Hernandez, __ N.C. App. __, 742 S.E.2d 825 (2013) (issue not considered on appeal because not preserved below).

States v. Rivera, 570 F.3d 1009 (8th Cir. 2009) (seventeen minutes); United States v. Eckhart, 569 F.3d 1263 (10th Cir. 2009) (twenty-seven minutes); United States v. Muriel, 418 F.3d 720 (7th Cir. 2005) (thirteen minutes).

TERMINATION OF THE STOP

WHEN TERMINATION TAKES PLACE

"Generally, an initial traffic stop concludes . . . after an officer returns the detainee's license and registration." Jackson, supra; State v. Heien, __ N.C. App. __, 741 S.E.2d 1 (2013) ("Generally, the return of the driver's license or other documents to those who have been detained indicates the investigatory detention has ended."), aff'd per curiam, __ N.C. __, 749 S.E.2d 278 (2013). When an officer takes other documents from the driver, such as registration and insurance documents, these, too must be returned before the stop ends. State v. Velazquez-Perez, __ N.C. App. __, 756 S.E.2d 869 (2014) (even though an officer had returned a driver's license and issued a warning citation, "[t]he purpose of the stop was not completed until [the officer] finished a proper document check [of registration, insurance, and other documents the officer had taken] and returned the documents"). As the Fourth Circuit explains, when an officer returns a driver's documents, it "indicate[s] that all business with [the driver is] completed and that he [is] free to leave." United States v. Lattimore, 87 F.3d 647 (4th Cir. 1996). The United States Supreme Court has rejected the idea that drivers must be told that they are free to go before a stop terminates. Ohio v. Robinette, 519 U.S. 33 (1996) (adopting a totality of the circumstances approach). However, while returning the driver's paperwork is a strong signal that a stop has terminated, it is not always dispositive. Some commentators have argued that many motorists will not, in fact, feel free to depart until they are expressly permitted to do so. LaFave, Routine at 1899-1902. And the North Carolina Court of Appeals has held, in at least one case, that under the totality of the circumstances, the occupants of a vehicle remained seized even after the return of the driver's paperwork, in part because the officer "never told [the driver] he was free to leave." State v. Myles, 188 N.C. App. 42 (2008). See also State v. Kincaid, 147 N.C. App. 94 (2001) (suggesting that the return of a driver's license and registration is a necessary, but not invariably a sufficient, condition for the termination of a stop).

EFFECT OF TERMINATION

Once a stop has ended, the driver and any other occupants of the vehicle may depart. Any further interaction between the officer and the occupants of the vehicle is, therefore, consensual. The officer may ask questions about any subject at all, at any length; may request consent to search; and so on. In other words, the "time and scope limitations" that apply to a traffic stop cease to be relevant. LaFave, "Routine Traffic Stop," supra.

IDS Resources and Policies

IDS' Mission, Resources & Policies

2015 New Misdemeanor Defender Program

Presented By:
Danielle Carman
IDS Assistant Director/General Counsel

Overview

- IDS' Mission
- Relationship Between IDS and AOC
- Some Things IDS Does to Enhance Quality & Efficiency
- What IDS Needs from PD Offices
- Upcoming Legislative Study of IDS
- What do PD Offices, PAC, and Contract Attorneys Need from IDS?

IDS' Mission

Effective July 2001, IDS was created to:

- Enhance oversight of delivery of counsel and related services
- Improve quality of representation and ensure independence of counsel
- Establish uniform policies and procedures for delivery of services
- Generate reliable statistical information to evaluate services provided and funds expended
- Deliver services in most efficient and cost-effective manner without sacrificing quality representation

In "Short" …..

- IDS' statutory mission is to enhance quality, uniformity, efficiency, accountability, and cost-effectiveness of indigent defense services in North Carolina
- IDS' policies are all aimed at fulfilling one or more aspect of that statutory mission

Relationship Between IDS and AOC

(See G.S. 7A-498.2)

IDS Independence

- In many ways, IDS is independent of AOC:
  - IDS' budget is separate from AOC's budget, and AOC has no authority to modify IDS' budget
  - IDS exercises its powers independently of AOC
  - AOC budget policies—such as limitations on hiring and travel, mileage reimbursement rate, etc.—do not apply to IDS unless IDS Director chooses to apply them

Continuing AOC Support

- But AOC has continuing statutory obligation to provide general administrative support to IDS, including purchasing, payroll, human resources, and similar services
- AOC Human Resources is there to serve PD offices along with the rest of the Judicial Branch
  - AOC's workplace harassment policies apply to your offices
  - If you have any concerns about workplace harassment, please notify AOC HR and IDS immediately

Some Things IDS Does to Enhance Quality & Efficiency

1. Legislative Advocacy and a Seat at the Table for Indigent Defense

- IDS regularly advocates for indigent defense at the General Assembly
- IDS makes one appointment to NC Judicial Council, in addition to the public defender appointment (G.S. 7A-409)
- IDS worked to get two defense attorneys appointed to AOC Criminal Forms Committee
- IDS works closely with NC Advocates for Justice and other groups on various initiatives impacting defense function

2. Systemic Reform Efforts

- IDS regularly engages in studies and initiatives that are designed to prompt reforms that would enhance quality and/or efficiency
- In prior years, General Assembly has directed IDS to, e.g.:
  - Consult with AOC, DA's Conference, Sentencing Commission, and others about proposals to reduce future costs, including reclassification of minor misdemeanors as infractions
  - Explore pilot tests of more efficient scheduling practices that would minimize defense attorney wait time

Class 3 Misdemeanors

- Of course, after IDS recommended reclassifying MDs as infractions, the 2013 General Assembly reclassified a number of MDs as Class 3 and then eliminated the right to counsel for Class 3 MD cases involving defendants who have no more than 3 prior convictions
- General Assembly also cut IDS' budget by $2 million each year of biennium based on this change
- We understand that judges often do not know defendants' prior record levels at the time they are determining entitlement to counsel, and that this change has caused a lot of confusion and errors
- We have worked to educate legislators about the problems this has caused but, so far, they have not been receptive to reclassifying MDs as infractions

We're Interested in Your Thoughts

- Even if there is not a legislative directive for IDS to investigate and propose reforms in a specific area, we are always interested in systemic reforms that would enhance quality and efficiency
- If you have ideas based on your work on the front lines, please let us know!

3. Improved Defender Training

- IDS has a standing contract with the School of Government ("SOG") to provide defender education programs for PDs and for private assigned counsel ("PAC") and contract attorneys who do a significant amount of indigent work
- Thanks to the hard work of SOG faculty and staff, IDS has developed a number of new and innovative training programs

Some Examples of Programs

- 5-day trial advocacy school for public defenders and PAC
- Hands-on training program for appellate attorneys
- Specialized programs for attorneys who handle involuntary commitment cases, juvenile delinquency cases, and abuse/neglect/dependency and TPR cases
- Regional training for contractors
- Training for public defender staff investigators

On-Line Training

- In response to continuing budget limitations, SOG has also concentrated on new on-line training programs, such as:
  - "Webinars on demand"
  - "Virtual CLEs:" Self-paced on-line presentations that may be accessed from any computer with an Internet connection

NCAJ Membership

- IDS has a contract with the NC Advocates for Justice, which entitles APDs to some benefits of NCAJ membership, including
  - Subscription to NCAJ criminal defense listserv
  - 70 free CLEs, with IDS paying for additional CLEs at public service rate
  - Each APD receives CD-ROM of NCAJ's DWI Trial Notebook
- We hope this benefit is helpful to your practices

Non-IDS Programs

- IDS sometimes approves requests for APDs to attend specialized training programs that are sponsored by groups other than IDS and SOG, especially if they address topics that are not covered by the IDS-SOG calendar and the attendee is willing to serve as a future trainer on the topic
- IDS probably will not be in a position to approve special training requests this fiscal year because of budget restrictions

Special Training

- But to seek approval to attend such a program, you need to complete form AOC-A-182 ("Request for Special Travel and Training") and submit it to the IDS Office **in advance**
  - *Note: You do NOT need to get advance approval to register for one of the prepaid NCAJ CLEs*
  - *If we exceed 70 CLEs, you will have to seek advance approval*

4. Additional Resources Available on IDS Website (www.ncids.org)

- In addition to the training schedule and materials from past programs, IDS website includes a wealth of materials that are helpful to public defenders, PAC, and contract attorneys
- Examples include:
  - Orientation Notebook for new APDs
  - North Carolina Indigent Defense Manual Series
  - Motions and brief banks
  - Forensic Resources page that includes a searchable expert database and State Crime Lab procedures and protocols

5. IDS Listservs

- IDS has created a number of listservs to facilitate communication with and between attorneys across the state who handle various types of cases
- Listservs have proven to be a great way to enhance communication and resource-sharing

IDS Listservs

- Chief public defenders and assistant public defenders
- Investigators in public defender offices and private investigators
- Public defender support staff
- Capital trial attorneys
- Capital post-conviction attorneys
- Appellate attorneys
- Attorneys who represent parent-respondents in A/N/D and TPR cases
- Attorneys who handle juvenile delinquency cases
- Attorneys who handle involuntary commitment cases
- Attorneys who handle child-support contempt cases
- IDS contract attorneys

6. Performance Guidelines

- IDS has developed performance guidelines for:
  - non-capital criminal cases at trial level
  - juveniles delinquency proceedings
  - abuse/neglect/dependency and termination of parental rights cases
- All guidelines are posted on IDS website

What Guidelines Are and Are Not

- Guidelines *are*:
  - Checklist of best practices and things counsel should consider at each stage of a proceeding
  - Training tool
  - Resource for new and experienced attorneys
  - Tool for legislative advocacy and systemic reform
- Guidelines are *not* absolute standards or mandates

Relationship Between Caseloads & Performance Guidelines

- We understand that performance guidelines are related to caseloads, and will continue to work with public defenders and legislators to address caseloads and resources
- We welcome constructive feedback from defenders about the obstacles you all face, and the resources you need to incorporate the guidelines into your practices

What IDS Needs From PD Offices

IDS Needs PD Offices to:

1. Provide Quality Legal Services for Clients
2. Report Data Accurately & Reliably
3. Submit Fee Applications to Judges in Cases that End in Conviction

1. Quality Legal Services for Clients

- Most importantly, IDS wants PD offices . . . and PAC . . . and contract attorneys to provide quality legal representation for indigent clients
- We hope the resources we provide help you do your jobs better
- If we can provide other resources that would assist you, please let us know

2. Accurate & Reliable PD Data Reporting

It all hinges on your fee applications …

- After a PD office completes a case, a fee application is prepared
- Each fee application is then compiled into an on-line disposition reporting system that documents the number of cases disposed by highest charge and attorney
  - Rules for counting closed cases are posted on IDS website

We Collect this Data Because it is Required by Law

G.S. 7A-498.9:

The IDS Office must report to the General Assembly by March 1 of each year about the following matters:

(1) **The volume and cost of cases handled in each district by assigned counsel or public defenders;**

(2) Actions taken by the Office to improve the cost-effectiveness and quality of indigent defense, including the capital case program;

(3) Plans for changes in rules, standards, or regulations in the upcoming year; and

(4) Any recommended changes in law or funding procedures that would assist the Office in improving the management of funds expended for indigent defense services.

It's Also in Our Interests

- To justify our budget requests, IDS needs data that shows why we need more money
- Overall court data alone would suggest that IDS' budget should not be increased, because the total number of court dispositions over the past several years has remained relatively flat
- But percentage of cases funded out of IDS' budget has steadily increased over same time period

Creates More Resources for Your Offices

- Until this fiscal year, the Legislature has routinely approved new attorney and support positions for IDS to allocate across all defender offices
  - IDS does not have that authority this fiscal year for reasons that will be discussed later
- IDS has authorized new contracts in PD counties to relieve overburdened PD offices
- IDS has upgraded several administrative positions in PD offices

Your Chief PD Needs this Data:

- To assess APD caseloads
- To assess demands on support staff
- To demonstrate with hard data the needs of your office
- To support a request for a new attorney or support staff position when authorized by the Legislature

You Need this Data:

- To assess your own caseload
- To help you demonstrate your performance and value to your supervisor
  - House version of budget for this fiscal year includes 2% salary increase for state employees, but Senate version does not
  - Neither version prohibits merit increases, but IDS is still carrying significant debt from prior years (despite dramatic cuts to PAC rates)

Grass is Not Greener on the "Other Side"

- Private bar took a huge hit with the rate reductions in May 2011, especially for district court cases, and contract rates are designed to generate even more savings

	Old PAC Rate	Current PAC Rate
District CT	$75	$55
Superior Court	$75	$60
High-Level Felonies	$75	$70

APD Salaries vs. PAC Rate Cuts

- IDS Commission focused needed reductions on PAC rates and did not cut APD salaries for 3 primary reasons:
  - General Assembly appeared to direct that all reductions be focused on PAC
  - Commission did not want to inject a lack of pay parity between full-time prosecutors and full-time defense attorneys
  - APDs cannot supplement their income with retained cases the way PAC can

3. Recoupment: Fee Applications in Cases that End in Conviction

- G.S. 7A-455 provides that, in all cases that end in a conviction, the court shall direct entry of a civil judgment against the indigent person for the money value of services rendered by a public defender
- Thus, in all such cases, public defenders are required by statute to complete a fee application and submit it to the Court

Recoupment Strengthens the Indigent Defense System

- All funds collected through recoupment go back to the indigent defense fund to pay for services to future clients, and IDS' projected receipts from recoupment are added into our budget each year
- In FY14, IDS collected a total of $12.9 million in recoupment revenues
- In FY15, IDS' recoupment revenues declined by almost $3 million due to changes to the state tax code and withholding tables
  - May lead to renewed legislative focus on indigency screening/verification
- Recoupment is even more important in these fiscal times
- If we fall short on our collections, we fall short on our ability to serve our clients

Upcoming Legislative Study

Study Directive

- Both House and Senate versions of 2015 Appropriations Act direct a study of IDS to "determine whether changes should be made to the ways in which appropriated funds are used to provide legal assistance and representation to indigent persons"
- Senate version also directs a study of "creation and implementation of fee schedules" to compensate PAC
  - Legislators appear to continue to be opposed to hourly PAC rosters
- Findings and recommendations are to be reported when General Assembly reconvenes for 2016 short session in May 2016

Regional Meeting Series

- In preparation for that study, IDS Commission is holding a series of meetings with defense attorneys across the State during September, October, and November
- One meeting in each Judicial Division
- Dates, times, and locations are on IDS website
- We encourage you to attend one or more meetings!

Maintaining Status Quo

- Legislators want to maintain status quo during study
- So, unlike past budget bills, the current one:
  - Does not give IDS authority to create new positions in defender offices
  - Does not direct IDS to issue RFPs and expand contract system

Maintaining Status Quo

- We expect study to look at effectiveness of all service delivery systems—including PAC, PDs, and contracts—and to result in some legislative directive about how best to use various systems
- In the meantime, IDS plans to continue all existing systems where they are now, including honoring existing contracts
- So the contract system will continue to exist in many counties, at least for some time

Requests for Proposals & Contracts

- Contract attorneys handle "caseload units"
- Each "unit" represents a group of cases that will take roughly 20% of one attorney's billable time (or approximately 360 billable hours per year)
  - Based on 3 fiscal years of data on PAC time claims
- Actual amount of time will depend on actual case assignments and efficiency of contractors and courts
- RFPs specify number of units available for each contract category, such as high- and low-level felonies, in each county

Number of Cases and Monthly Compensation

- Each unit represents range of annual disposed cases
  - E.g., for low-level felonies, 56-68 cases per year
- For most case types, IDS seeks qualifying offers only and pays a set monthly fee per unit
  - Monthly pay covers attorney time and routine expenses
  - Amount of monthly pay per unit is in RFPs
  - Per unit pay is uniform throughout state

Unit Compensation

- Contracts allow for adjustments to amount of monthly pay if actual number of disposed cases is significantly higher/lower than projected
- Contract attorneys are permitted to seek extraordinary pay for extraordinary cases and extraordinary expenses
- IDS continues to fund interpreters and pre-approved expert services outside of the contracts

Staggered by Geography

- First three RFPs sought offers for adult non-capital criminal cases and treatment courts in:
  - District 3A: Pitt
  - District 8: Greene, Lenoir, Wayne
  - District 9: Franklin, Granville, Vance, Warren
  - District 9A: Caswell, Person
  - District 10: Wake
  - District 11: Harnett, Johnston, Lee
  - District 14: Durham
  - District 15A: Alamance
  - District 15B: Chatham, Orange

Different than PAC Roster System

- Unlike case-by-case system of appointing from rotational roster, contract attorneys:
  - Cannot go on and off indigent lists
  - Are expected to handle their percentage of covered cases during contract period
  - Are being paid up front for an expected number of dispositions and must complete all assigned cases at conclusion of contract
    - *Should not file motions to withdraw at end of contract!!*

Case Assignments

- Judges, Clerks, and PD Offices still assign individual cases, but assignments are from lists of contract attorneys
- IDS staff work with local system actors to ensure that each contractor receives contracted-for percentage of local caseload
- IDS monitors attorney caseloads via on-line reporting system and contacts local actors if numbers get too far out of alignment

New Resources

- Shift to contract system has required new infrastructure and IDS staff, which also provides new resources for contractors, courts, and clients
- Two new Regional Defenders:
  - Provide support, training, and oversight to contract attorneys in their areas
  - Help local officials address problems that may arise
  - Resource for client complaints

What do PD Offices, PAC, and Contract Attorneys Need from IDS?

How Can IDS Help You?

- We want to know how IDS can help you, and welcome all feedback and suggestions
- Contact information for some IDS staff members is listed on the next screen
- Do you have any questions or comments to share at this time?

Contact Information for Some IDS Staff

- Tom Maher, Executive Director
  Thomas.K.Maher@nccourts.org
- Danielle Carman, Assistant Director/General Counsel
  Danielle.M.Carman@nccourts.org
- Elisa Wolper, Chief Financial Officer
  Elisa.Wolper@nccourts.org
- Susan Brooks, Public Defender Administrator
  Susan.E.Brooks@nccourts.org
- Beverly McJunkin, Office Manager
  Beverly.M.McJunkin@nccourts.org

OFFICE OF LANGUAGE ACCESS SERVICES

GUIDELINES FOR ACCOMMODATING PERSONS
WHO ARE DEAF OR HARD OF HEARING IN THE COURTS
(Revised March 2014)

I. Basic Legal Requirements and Definitions

General: The legal requirements governing accommodations for persons who are deaf or hard of hearing arise from two primary sources:

1. Chapter 8B of the North Carolina General Statutes, and
2. Title II of the federal Americans with Disabilities Act (ADA).

Chapter 8B: Chapter 8B requires the court to appoint a qualified (licensed) interpreter for any deaf or hard of hearing party or witness in any civil or criminal proceeding, including juvenile proceedings, special proceedings, and proceedings before a magistrate. Thus, Chapter 8B focuses on providing interpreters for *parties and witnesses*, in all court *proceedings*.

ADA: Title II of the ADA is much broader than Chapter 8B. It requires the Judicial Branch to provide accommodations for all court *services, programs and activities*. Accordingly, the ADA

- extends to persons in addition to just parties and witnesses (for example, jurors);
- applies to court activities in addition to just court hearings or proceedings (for example, filing documents in the clerk's office); and
- contemplates an accommodation that best meets the person's needs, which may mean an accommodation other than a sign language interpreter (for example, a realtime court reporter).

Rule of Thumb for Compliance: To ensure compliance with Chapter 8B and the ADA, court officials should, to the extent possible, provide the same services to a deaf or hard of hearing person that they would provide to any other person. Court officials should not restrict the services they would normally provide simply because one of the persons involved is deaf or hard of hearing. A practical approach is, first, to consider what would be done for or with respect to a person who does *not* have a disability. Then, for a person with a disability, the question is what reasonable accommodation can be provided to enable equal participation. For example, consider an assistant district attorney who is prosecuting a case involving a child victim. Under normal circumstances, the district attorney would meet with the victim and her parents prior to trial to discuss the nature of the proceeding and what to expect. If the parents are deaf or hard of hearing, the district attorney should still involve them in the meeting. In this instance, however, the court system will provide an interpreter or other appropriate accommodation for the parents.

Definitions: The Division of Services for the Deaf and the Hard of Hearing (DSDHH) of the NC Department of Health and Human Services (DHHS) has explained that an individual is **deaf** if he or she has a "complete or partial loss of the sense of hearing." This loss may be congenital or acquired later in life, and may be permanent or temporary. A person is **hard of hearing** if he or she has a hearing loss that "interferes with but does not totally preclude auditory and vocal communication." (Note: N.C.G.S. § 8B-1(2) defines a "deaf person" as "a person whose hearing impairment is so significant that the individual is impaired in processing linguistic information through hearing, with or without amplification." The basic definition of a disability for the ADA is "a physical or mental impairment that substantially limits one or more of the major life activities." 35 C.F.R. 35.104. Hearing is just one example of a "major life activity.")

II. Accommodations for Deaf or Hard of Hearing Persons

General Rule: The National Center for State Courts has explained that "[t]he type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with [1] the length and complexity of the communication involved and [2] the individual's specific disability and preferred mode of communication."

Nature of the Activity: As noted above, the appropriate accommodation for a deaf or hard of hearing person will vary with "the length and complexity of the communication involved." For a relatively short, non-complex matter (for example, paying a fine to the cashier), using handwritten notes may suffice. However, for more complex matters (for example, a formal court appearance), a sign language interpreter may be necessary.

Needs of the Deaf or Hard of Hearing Person: Also as noted above, the appropriate accommodation will vary depending on the needs of the person who is deaf or hard of hearing. For example, a sign language interpreter will not be helpful if the person does not understand American Sign Language. Accordingly, ADA regulations and commentary (35 C.F.R. 35.160) explain that "[i]n determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities" and "shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required [under the ADA]." (A specific accommodation would not be required if it would result in a fundamental alteration in the nature of the activity or an undue financial or administrative burden. An available alternative accommodation would still be required.)

Sign Language Interpreting Services: Where the proper accommodation is a sign language interpreter, Chapter 8B requires that the court appoint a "qualified interpreter." N.C.G.S. § 8B-1(3) defines a "qualified interpreter" as one who is licensed by the North Carolina Interpreter and Transliterator Licensing Board under Chapter 90D of the General Statutes. **Accordingly, court officials should, if at all possible, appoint a sign language interpreter who is licensed by the North Carolina Interpreter and Transliterator Licensing Board.** Ideally, this should be a licensed interpreter who has the "SC:L" legal certification, indicating specialized knowledge for interpreting in a legal environment (but there are few interpreters with that certification at present). (Note: Chapter 90D provides for a "provisional license." The certifications that qualify an interpreter to hold a provisional license are not on a par with the certifications traditionally viewed as necessary for court interpreting. Accordingly, a "provisional licensee" under Chapter 90D ordinarily should not be used by the courts.)

DSDHH Directory: To assist with locating licensed sign language interpreters, DSDHH has prepared a statewide interpreter directory. Pursuant to N.C.G.S. § 8B-6, DSDHH must distribute a copy of this directory to all 100 clerks' offices. Any clerk's office that does not have a copy of the directory may contact the AOC or DSDHH to obtain a copy. The directory is also available on the DSDHH website: http://www.ncdhhs.gov/dsdhh/
(This web page has three principal links: "Tips," with useful information; a link to the Sign Language Interpreter/Transliterator Directory, explained below; and a link to Interpreter Service Agencies which hold themselves out as employing licensed interpreters.)

Content of the DSDHH Directory: The interpreter directory is divided into regions of the state that correspond to the areas covered by the DSDHH Regional Resource Centers (see Section VI below). There is also a directory of Legal Certified Interpreters statewide (but there are few of these at present). Within each region, the directory lists licensed interpreters by the type of certification they hold, with those who have the legal certification listed first. Please try to choose an interpreter with the SC:L (legal) certification, and try to choose an interpreter within the closest proximity to the courthouse. Avoid contacting agencies that send interpreters from far away, thereby incurring unnecessary travel expenses, when a closer and possibly more qualified interpreter is available if contacted directly.

Realtime Court Reporters (CART or CAN): For deaf or hard of hearing persons who are proficient in, and comfortable reading, written English, an appropriate accommodation may be a realtime court reporter who in effect close-captions the proceeding for the person. "CART" refers to realtime, verbatim reporting. "CAN" refers to computer assisted note taking, which is similar, but where just key points (notes) are typed and displayed, as opposed to verbatim captioning. *Court reporters employed by the courts can provide these services at much less cost than a private individual or firm.* To arrange for a realtime court reporter, please contact the NCAOC Court Reporting Manager at (919) 831-5974.

Sound Systems: Each county has the duty to provide an adequate court facility, which includes making it accessible to people with disabilities. This includes the duty to make courtrooms accessible to persons with hearing disabilities, and that may mean installing a sound system for persons who are hard of hearing. When a courtroom is not equipped, portable systems --such as FM or infrared-- may be an adequate accommodation for persons who are hard of hearing. These systems broadcast signals from microphones positioned around the courtroom to a receiver held by the person who is hard of hearing. The person listens to the proceeding using earphones that are plugged into the receiver. Your county may have a portable system available, perhaps one used for various county functions, like Commissioner meetings.

Oral Interpreters: A deaf or hard of hearing person who prefers to read lips may need an “oral interpreter” who is licensed under Chapter 90D. This is an individual who has been trained to use clear mouth movements to make it easier for the person to read lips. Contact the DSDHH Regional Resource Center serving your county for assistance with locating an oral interpreter (for contact information, see Section VI below).

Cued Speech Transliterators: Cued speech transliterators are trained in the use of hand signals that assist persons who read lips. These individuals should be licensed under Chapter 90D. The DSDHH Directory contains a list of licensed cued speech transliterators.

Signed English Interpreters/Transliterators: Some deaf or hard of hearing persons may communicate through signed English rather than American Sign Language. These persons will need the assistance of a trained individual who transliterates between signed English and spoken English. This individual should be licensed under Chapter 90D. The DSDHH Directory contains a list of licensed transliterators.

III. Arranging and Paying for Services

Contacting an Interpreter: Local court officials should contact the interpreter directly to arrange for services. If possible, the court official should contact the interpreter at least one week prior to the proceeding. The court official should be prepared to discuss (1) the date, time and nature of the proceeding and (2) approximately how long the interpreter will be needed. The interpreter likely will raise a number of issues including hourly rate, travel reimbursement, cancellation notice and a guaranteed minimum payment. These matters are discussed below. Before finalizing the arrangements, the court official may want to contact more than one interpreter in order to compare rates.

Hourly Rate for a Sign Language Interpreter: The appointing judicial official determines the compensation for the interpreter (using form AOC-G-116, discussed below). N.C.G.S. § 8B-8(a) provides that the interpreter "is entitled to a reasonable fee for services, including waiting time, time reserved by the courts for the assignment, and reimbursement for necessary travel and subsistence expenses." Rates are negotiable. Interpreters may charge higher rates for short-notice requests and after-hour assignments. Interpreters with higher skill levels may charge more per hour. As of 2010, a nationally recognized expert who holds the preferred legal certification (SC:L) charges $65 per hour. Rates typically vary from between $35 to $75 per hour in NC. In negotiating rates, keep in mind that interpreters who do not have licenses indicating an advanced level of skill should not be allowed to charge a higher hourly rate for court work. The higher rate would be justified (or not) depending on the interpreter's skill level, not the nature of the assignment. Also, avoid emergency fees whenever possible. The person in need of services must give the court reasonable advance notice of the need for an accommodation. There are exceptions, of course, such as when a defendant must be brought before the magistrate on a criminal charge, but for scheduled court appearances, the court should be given reasonable time and opportunity to arrange an accommodation without having to incur unnecessary emergency rates.

Travel Charges: N.C.G.S. 8B-8(a) provides that interpreters are entitled to reimbursement for "necessary travel and subsistence expenses . . . at [the] rates provided by law for State employees generally." Many interpreters will designate a "service area" within which they will not charge for their travel expenses. Outside this service area, interpreters will charge either their hourly rate for their travel time or will seek reimbursement for mileage. Interpreters should be reimbursed using the same mileage rate that applies to Judicial Branch employees. If it is necessary for an interpreter to remain overnight, he or she will be reimbursed for lodging and meals at the rates that apply to Judicial Branch employees.

Guaranteed Minimum Payment and Cancellation Notice: Some interpreters will require a guaranteed minimum payment. For example, an interpreter may request payment for at least two hours of work even if he or she is actually used only for one-half hour. Similarly, an interpreter might request that a particular lump sum amount be paid if the proceeding is cancelled on short notice. This is because the interpreter may have turned down other work offered to him or her that conflicted with the date and time of the work for the court system and therefore is left without any work when the court proceeding is cancelled. Most interpreters have a 24-hour cancellation policy (some may say 48 hours -- it is negotiable). Always notify the interpreter promptly if the proceeding is continued. Even within the 24-hour cancellation period, notifying the interpreter can save at least unnecessary travel expenses.

Court Calendar Placement: If possible, court officials should place the case involving an interpreter first on the court's calendar. Or, if you know that the case will be called later in the calendar, it may be possible to schedule the interpreter for a later time than the 9:00 a.m. time when court starts. This will help reduce costs since interpreters typically charge for the time they spend waiting in the courtroom as well as the time they are actually interpreting.

Appointing Multiple Interpreters: For trials or any other matters of more than two hours, it may be necessary to arrange for two interpreters who can periodically relieve each other. This is due to the fatigue that may result from the extensive physical activity and mental concentration associated with sign language interpreting.

Form AOC-G-116: Court officials should use form AOC-G-116 ("Motion, Appointment And Order Authorizing Payment Of Deaf Interpreter Or Other Accommodation") to appoint and compensate the interpreter. Once the appropriate judicial official has signed the payment section of the completed form, a certified copy must be sent to the AOC Financial Services Division for payment.

The motion for an accommodation can be made by the person with the disability or that person's attorney, or as indicated on the form, by the district attorney, public defender, clerk, magistrate or "other" person. For example, it could be most efficient for the motion to be made by a trial court administrator who arranges ADA accommodations for the court, and who has gathered all the relevant information. The form has a place for the judicial official to appoint a specific interpreter (or designate some other accommodation). Therefore, the leg work to identify the person to be appointed should be done in advance.

The judicial official who rules on the motion may be a judge, clerk/assistant clerk or magistrate. Usually, there is no real question about the reasonable accommodation that is needed. However, the judicial official should be given enough factual information to make that finding. If there is doubt, court officials may ask the person with the disability to provide medical documentation relevant to the need for the requested accommodation.

Taxing Costs: The court must not tax the cost of a sign language interpreter or other accommodation to the deaf or hard of hearing person. The State must bear the cost. (Note however: N.C.G.S. § 8B-3 provides that a deaf or hard of hearing person may waive the services of the interpreter offered by the court and provide his or her own interpreter at his or her own expense. This statute requires the waiver to be approved in writing by the person's attorney, or if the person does not have an attorney, by the judicial official who would have appointed an interpreter. The NCAOC recommends that the written approval include a statement that the person has been informed of and waives the right to a state-paid interpreter under both Chapter 8B and the ADA. Also, costs may be assessed against a person who fails to appear without good cause for his or her absence, causing a court to incur unnecessary expense. So long as this rule is applied neutrally to everyone --not just people with disabilities-- costs the court must pay an interpreter for showing up unnecessarily may be charged to the person who requested the accommodation and then failed to appear.)

Different Rules Apply to Foreign Language Interpreters: The legal requirements and the policies and procedures for providing Spanish and other foreign language interpreters are much different from the requirements and procedures summarized here, for interpreters for people who are deaf or hard of hearing. The NCAOC has a program for the registry and certification of foreign language interpreters, and pursuant to statutory authority, has promulgated policies and procedures governing their appointment, compensation and other matters. The policies governing *foreign* language interpreters are on the court web site:

http://www.nccourts.org/LanguageAccess/Documents/guidelines.doc

Those policies do *not* apply to interpreters for the deaf or hard of hearing.

IV. Other Issues

Correction and Law Enforcement Matters: The Judicial Branch does not bear the cost of sign language interpreters and other accommodations for Department of Correction, Department of Juvenile Justice and Delinquency Prevention, or law enforcement activities such as a meeting with a probation officer or the administration of a chemical analysis to a person suspected of impaired driving.

Depositions Involving a Deaf or Hard of Hearing Party or Witness: A deposition is neither (1) a court proceeding within the meaning of Chapter 8B nor (2) a service, program or activity of the courts within the meaning of the ADA. Accordingly, the party must bear the cost of any sign language interpreter or other accommodation needed for a deposition. (Note however: Where the Judicial Branch is bearing the cost of the representation, such as for the District Attorney or an indigent defendant in a criminal case, the Judicial Branch will bear the cost of a sign language interpreter or other accommodation for a deposition. Costs for the expenses of defense counsel for an indigent person are paid by the Office of Indigent Defense Services, not the NCAOC.)

Other Non-Court Agencies: As indicated above, the Judicial Branch provides interpreters and other accommodations only with respect to court programs, services and activities. Private attorneys and non-court agencies must provide and pay for the accommodations they need, even when their activities are court-related. For example, accommodations for the out of court services and activities of such agencies as the Department of Juvenile Justice and Delinquency Prevention, Department of Correction, sheriffs and other law enforcement agencies, and state or county social service offices must be provided by those agencies.

Ethics and Professionalism: Persons appointed by the court to assist a deaf or hard of hearing person should

- conduct themselves in a courteous, professional and responsible manner,
- provide a complete and accurate interpretation,
- not attempt to provide additional services such as legal advice,
- remain impartial and notify the court of any possible conflict of interest,
- preserve the confidentiality of any confidential or privileged information, and
- refrain from publicly discussing the matters for which they provided services.

Indigency: The Judicial Branch bears the cost for the accommodation for the deaf or hard of hearing person regardless of whether the proceeding is civil or criminal, and regardless of whether the person is indigent. (Note: Indigency may be relevant, however, where a party is seeking an interpreter for a deposition, as noted above.)

Jurors in Need of Sign Language Interpreters: In light of the ADA, the court may not categorically exclude deaf or hard of hearing jurors from service. Where the court provides an interpreter for a juror, it may be good practice to confirm for the record the parties' agreement to having the non-juror in the deliberation room. The court may also want to instruct the interpreter that he or she must maintain strict confidentiality about and not participate in the deliberations and is present in the jury room only to assist the deaf or hard of hearing juror. The court may want to require the interpreter to take an oath to that effect.

Body Language Restrictions: In addition to hand gestures, sign language interpreting involves the use of facial expressions and other body movements to convey meaning. As a result, the presiding court official should be cautious about limiting the use of body language by the interpreter or the deaf or hard of hearing person.

"Minimally Language Competent" (MLC) Individuals: "Minimally language competent" (MLC) individuals are persons with significant communication deficits. They do not know sign language, cannot read lips and are unable to read or write. The person often is a deaf or hard of hearing person who was born outside the United States. The typical accommodations will likely not be helpful. This is because MLC persons often communicate by using gestures they have created and that only their families and close friends understand. As a result, MLC persons often require the combined assistance of both a licensed hearing interpreter and licensed Certified Deaf Interpreter. If you encounter an MLC individual, contact the DSDHH Regional Resource Center serving your county for assistance with accommodating the person (for contact information see Section VI below).

Non-Licensed Interpreters: N.C.G.S. § 8B-1(3) permits the court to appoint a non-licensed interpreter when the court determines that (1) a licensed interpreter is "not available," (2) the non-licensed interpreter's qualifications are "adequate for the present need" and (3) the non-licensed interpreter is able "to communicate effectively with and simultaneously and accurately interpret for the deaf person." (Note: The person may waive the licensed interpreter offered by the court and retain his or her own interpreter, who need not be licensed. See N.C.G.S. § 8B-3, discussed below.)

Oath for Sign Language Interpreters: Each interpreter must "take an oath or affirmation that he will make a true interpretation in an understandable manner . . . to the person for whom he is appointed and that he will convey the statements of the [deaf or hard of hearing] person in the English language to the best of his skill and judgment." See N.C.G.S. § 8B-7.

Parents of a Juvenile: N.C.G.S. § 8B-2(e) requires the court to appoint a licensed interpreter for a deaf or hard of hearing parent of a juvenile when the juvenile "is brought before a court for any reason whatsoever."

Privileged Communications: "If a communication made by the deaf [or hard of hearing] person through an interpreter is privileged, the privilege extends also to the interpreter." N.C.G.S. § 8B-5.

Removal of an Interpreter: The court "may, on its own motion or on the request of the deaf [or hard of hearing] person, remove an interpreter for inability to communicate." See N.C.G.S. § 8B-2(g).

Waiver of Offered Accommodation by the Deaf or Hard of Hearing Person: N.C.G.S. § 8B-3 allows the deaf or hard of hearing person to waive the services of the interpreter offered by the court and instead retain his or her own interpreter at his or her own expense. This waiver "must be approved in writing by the person's attorney." If the person is acting pro se, then "approval must be made in writing by the appointing authority [court official]." The interpreter retained by the deaf or hard of hearing person need not be licensed. The NCAOC recommends that the written approval include a statement that the person has been informed of and waives the right to a state-paid interpreter under both Chapter 8B and the ADA.

V. NCAOC Contact Information, and Some Other Resources	
For General Information on Accommodating Deaf or Hard of Hearing Persons	Office of Language Access Services (919) 890-1407 OLAS@nccourts.org
For Information on ADA Legal Compliance Issues	Teresa (Terry) L. White (919) 890-1308 Teresa.L.White@nccourts.org
To Arrange for a Realtime Court Reporter	NCAOC Court Reporting Manager (919) 831-5974
AOC Form, AOC-G-116	http://www.nccourts.org/Forms/Documents/1020.pdf
Disabilities Training Video: prepared in cooperation with the NCAOC for the N.C. court system, describes various disabilities and accommodations.	*available on the court web site -- http://www.nccourts.org/Citizens/SRPlanning/Disability.asp* *Copies of the DVD are available, contact Terry White at the number or email above*
DHHS Division of Services for the Deaf and the Hard of Hearing: links to the regional interpreter directories, and general information (contact information is on the next page).	http://www.ncdhhs.gov/dsdhh/index.htm
North Carolina Interpreters and Transliterators Licensing Board	http://www.ncitlb.org/
National Center for State Courts: court-specific FAQs and articles, links to federal and other ADA sites, and other resources.	http://www.ncsconline.org/wc/CourTopics/overview.asp?topic=AmeDis
Report of the U.S. Access Board, Courthouse Access Advisory Committee (2006): A description of listening systems for courtrooms begins on page 83. Appendix A describes various accommodations, and differences between the various styles of interpreting or transliterating. (The Access Board is an independent, non-regulatory federal agency devoted to accessibility for people with disabilities.)	http://www.access-board.gov/caac/report.pdf

	VI. DHHS Contact Information	
DHHS Division of Services for the Deaf and the Hard of Hearing	Providing general information statewide.	(800) 851-6099 voice/TTY http://www.ncdhhs.gov/dsdhh/index.htm
Asheville Regional Resource Center	Serving Buncombe, Cherokee, Clay, Graham, Haywood, Henderson, Jackson, Macon, Madison, Mitchell, Polk, Swain, Transylvania and Yancey Counties.	(800) 681-7998 voice (800) 681-8035 TTY
Charlotte Regional Resource Center	Serving Anson, Cabarrus, Gaston, Lincoln, Mecklenburg, Montgomery, Richmond, Rowan, Stanley and Union Counties.	(800) 835-5302 voice (800) 835-5306 TTY
Greensboro Regional Resource Center	Serving Alamance, Davidson, Davie, Forsyth, Guilford, Randolph, Rockingham, Stokes, Surry and Yadkin Counties.	(888) 467-3413 voice/TTY
Morganton Regional Resource Center	Serving Alexander, Alleghany, Ashe, Avery, Burke, Caldwell, Catawba, Cleveland, Iredell, McDowell, Rutherford, Watauga and Wilkes Counties.	(800) 999-8915 voice (800) 205-9920 TTY
Raleigh Regional Resource Center	Serving Caswell, Chatham, Cumberland, Durham, Franklin, Granville, Harnett, Hoke, Johnston, Lee, Moore, Nash, Orange, Person, Vance, Wake and Warren Counties.	(800) 851-6099 voice/TTY
Wilmington Regional Resource Center	Serving Bladen, Brunswick, Carteret, Columbus, Duplin, Jones, New Hanover, Onslow, Pender, Robeson, Sampson and Scotland Counties.	(800) 205-9915 voice (800) 205-9916 TTY
Wilson Regional Resource Center	Serving Beaufort, Bertie, Camden, Chowan, Craven, Currituck, Dare, Edgecombe, Gates, Greene, Halifax, Hertford, Hyde, Lenoir, Martin, Northampton, Pamlico, Pasquotank, Perquimans, Pitt, Tyrrell, Washington, Wayne and Wilson Counties.	(800) 999-6828 voice (800) 205-9925 TTY

4

FIVE HABITS FOR CROSS-CULTURAL LAWYERING[1]

SUE BRYANT
CUNY School of Law

JEAN KOH PETERS
Yale Law School

Practicing law is often a cross-cultural experience. The law, as well as the legal system in which it operates, is a culture with strong professional norms that give meaning to and reinforce behaviors. The communication style of argument predominates, and competition is highly valued. Even when a lawyer and a non-law-trained client share a common culture, the client and the lawyer will likely experience the lawyer–client interaction as a cross-cultural experience because of the cultural differences that arise from the legal culture.

In addition to these cultural differences, we know that the global movement of people, as well as the multicultural nature of the United States, creates many situations where lawyers and clients will work in cross-cultural situations. To meet the challenges of cross-cultural representation, lawyers need to develop awareness, knowledge, and skills that enhance the lawyers' and clients' capacities to form meaningful relationships and to communicate accurately.

This chapter, and the habits it introduces, prepares lawyers to engage in effective, accurate cross-cultural communication and to build trust and understanding between themselves and their clients. Section 1 identifies some ways that culture influences lawyering and the potential issues that may arise in cross-cultural lawyer–client interactions. Section 2 identifies the principles and habits that are skills and perspectives that can be used to identify our own cultural norms and those of our clients and to communicate effectively, knowing these differences. As one anthropologist has recognized, there is "a great distance between knowing that my gaze transforms and becoming aware of the ways that my gaze transforms."[2] To help lawyers identify the ways their gaze transforms and the cultural bridges that are needed for joint work between lawyers and clients, we have developed five habits for cross-cultural lawyering.

Culture and the Role It Plays in Lawyers' Work

To become good cross-cultural lawyers, we must first become aware of the significance of culture in the ways in which we make sense out of the world. Culture is like the air we breathe; it is largely invisible, and yet we are dependent on it for our very being. Culture is the logic through which we give meaning to the world.[3] Our culture is learned from our experiences, sights, books, songs, language, gestures, rewards, punishments, and relationships that come to us in our homes, schools, religious organizations, and communities.[4] We learn our culture from what we are fed and how we are touched and judged by our families and significant others in our communities. Our culture gives us our values, attitudes, and norms of behavior.

Through our cultural lens, we make judgments about people based on what they are doing and saying. We may judge people to be truthful, rude, intelligent, or superstitious based on the attributions we make about the meaning of their behavior. Because culture gives us the tools to interpret meaning from behavior and words, we are constantly attaching culturally based meaning to what we see and hear, often without being aware that we are doing so.[5]

In this chapter, when we talk about cross-cultural lawyering, we are referring to lawyering where the lawyer's and the client's ethnic or cultural heritage comes from different countries, as well as where their cultural heritage comes from socialization and identity in different groups within the same country. By this definition, everyone is multicultural to some degree.[6] Cultural groups and cultural norms can be based on ethnicity, race, gender, nationality, age, economic status, social status, language, sexual orientation, physical characteristics, marital status, role in family, birth order, immigration status, religion, accent, skin color, or a variety of other characteristics.

This broad definition of culture is essential for effective cross-cultural lawyering because it teaches us that no one characteristic will completely define the lawyer's or the client's culture.[7] For example, if we think about birth order alone as a cultural characteristic, we may not see any significance to this factor. Yet if the client (or lawyer) comes from a society where "oldest son" has special meaning in terms of responsibility and privilege, identification of the ethnicity, gender, or birth order alone will not be enough to alert the lawyer to the set of norms and expectations for how the oldest son ought to behave. Instead, the lawyer needs to appreciate the significance of all three characteristics to fully understand this aspect of the client's culture.

A broad definition of culture recognizes that no two people have had the exact same experiences and thus no two people will interpret or predict in precisely the same ways. People can be part of the same culture and make different decisions while rejecting norms and values from their culture. Understanding that culture develops shared meaning and, at the same time, allows for significant differences helps us to avoid stereotyping or assuming that we know that which we have not explored with the client. At the same time that we recognize these individual differences, we also know that if we share a common cultural heritage with a client, we are often better able to predict or interpret, and our mistakes are likely to be smaller misunderstandings.

When lawyers and clients come from different cultures, several aspects of the attorney–client interaction may be implicated. The capacities to form trusting relationships, to evaluate credibility, to develop client-centered case strategies and solutions, to gather information, and to attribute the intended meaning from behavior and expressions are all affected by cultural experiences. By using the framework of cross-cultural interaction, lawyers can learn to anticipate and name some of the difficulties they or their clients may be experiencing. By asking ourselves as part of the cross-cultural analysis to identify ways in which we are similar to clients, we identify the strengths of connection. Focusing on similarities also alerts us to pay special attention when we see ourselves as "the same" as the client so that we do not substitute our own judgment for the client's through overidentification and transference.

Establishing Trust

Lawyers and clients who do not share the same culture face special challenges in developing a

trusting relationship where genuine, accurate communication occurs. Especially where the culture of the client is one with a significant distrust of outsiders[8] or of the particular culture of the lawyer, the lawyer must work hard to earn trust in a culturally sensitive way. Similarly, cultural difference may cause the lawyer to mistrust the client. For example, when we find the client's story changing or new information coming to light as we investigate, we may experience the client as "lying" or "being unhelpful." Often this causes us to feel betrayed by our client's sanctions.

Sometimes when a client is reacting negatively to a lawyer or a lawyer's suggestions, lawyers label clients as "difficult." Professor Michelle Jacobs has warned that white lawyers interpreting clients' behavior may fail to understand the significance of racial differences, thereby erroneously labeling African American clients as "difficult." Instead, the lawyer may be sending signals to the client that reinforce racial stereotypes, may be interpreting behavior incorrectly, and therefore may be unconsciously failing to provide full advocacy.[9]

In these situations, lawyers should assess whether the concept of insider-outsider status helps explain client reactions. Where insider-outsider status is implicated, lawyers must be patient and try to understand the complexities of the relationship and their communication while building trust slowly.

Accurate Understanding

Even in situations where trust is established, lawyers may still experience cultural differences that significantly interfere with lawyers' and clients' capacities to understand one another's goals, behaviors, and communications. Cultural differences often cause us to attribute different meanings to the same set of facts. Thus one important goal of cross-cultural competence is for lawyers to attribute to behavior and communication that which the actor or speaker intends.

Inaccurate attributions can cause lawyers to make significant errors in their representation of clients. Imagine a lawyer saying to a client, "If there is anything that you do not understand, please just ask me to explain" or "If I am not being clear, please just ask me any questions." Many cultural differences may explain a client's reluctance to either blame the lawyer for poor communication (the second question) or blame himself or herself for lack of understanding (the first question). Indeed clients from some cultures might find one or the other of these results to be rude and therefore be reluctant to ask for clarification for fear of offending the lawyer or embarrassing themselves.

Cultural differences may also cause lawyers and clients to misperceive body language and judge each other incorrectly. For an everyday example, take nodding while someone is speaking. In some cultures, the nodding indicates agreement with the speaker, whereas in others it simply indicates that the listener is hearing the speaker. Another common example involves eye contact. In some cultures, looking someone straight in the eye is a statement of open and honest communication, whereas a diversion of eyes signals dishonesty. In other cultures, however, a diversion of eyes is a sign of respect. Lawyers need to recognize these differences and plan for a representation strategy that takes them into account.

Organizing and Assessing Facts

More generally, our concepts of credibility are very culturally determined. In examining the credibility of a story, lawyers and judges often ask whether the story makes "sense" as if "sense" were neutral. Consider, for example, a client who explains that the reason she left her native country was that God appeared to her in a dream and told her it was time to leave. If the time of leaving is a critical element to the credibility of her story, how will the fact finder evaluate the credibility of that client's story? Does the fact finder come from a culture where dreams are valued, where an interventionist God is expected, or where major life decisions would be based on these expectations or values? Will the fact finder, as a result of differences, find the story incredible or evidence of a disturbed thought process or, alternatively, as a result of similarities, find the client credible?

The way different cultures conceptualize facts may cause lawyers and clients to see

different information as relevant. Lawyers who experience clients as "wandering all over the place" may be working with clients who categorize information differently than the lawyer or the legal system. If a lawyer whose culture is oriented to hour, day, month, and year tries to get a time line from a client whose culture is not oriented that way, she may incorrectly interpret the client's failure to provide the information as uncooperative, lacking intelligence, or, worse, lying.[10] A client who is unable to tell a linear time-related story may also experience the same reaction from courts and juries if the client's culture is unknown to the fact finders.

Individual and Collective

In other settings, the distinction between individual and collective cultures has been called the most important concept to grasp in cross-cultural encounters.[11] Understanding the differences between individual and collective cultures will help lawyers see how they and clients define problems, identify solutions, and determine who important players are in a decision.[12]

Lawyers who explore differences in individual and collective cultures may see different communication styles, values, and views of the roles of the lawyer and client. In an individualistic culture, people are socialized to have individual goals and are praised for achieving these goals. They are encouraged to make their own plans and "do their own thing."[13] Individualists need to assert themselves and do not find competition threatening. By contrast, in a collective culture, people are socialized to think in terms of the group, to work for the betterment of the group, and to integrate individual and group goals. Collectivists use group membership to predict behavior. Because collectivists are accepted for who they are and feel less need to talk, silence plays a more important role in their communication style.

Majority culture in the United States has been identified as the most individualistic culture in the world.[14] Our legal culture reflects this commitment to individualism. For example, ethical rules of confidentiality often require a lawyer to communicate with an individual client in private if confidentiality is to be maintained and may prohibit the lawyer from representing the group or taking group concerns into account to avoid potential conflicts.[15] Many client-empowerment models and client-centered models of practice are based on individualistic cultural values.

Here is an example of how a result that appeared successful to the lawyers can nevertheless be unacceptable when taken in the context of the client's collective culture. In this case, lawyers negotiated a plea to a misdemeanor assault with probation for a battered Chinese woman who had killed her husband and who faced a 25-year sentence if convicted of murder. The client, who had a strong self-defense claim, refused to plead to the misdemeanor charge because she did not want to humiliate herself, her ancestors, her children, and their children by acknowledging responsibility for the killing. Her attorneys did not fully comprehend the concept of shame that the client would experience until the client was able to explain that the possibility of 25 years in jail was far less offensive than the certain shame that would be experienced by her family (past, present, and future) if she pled guilty. These negative reactions to what the lawyers thought was an excellent result allowed the lawyers to examine the meaning of pleas, family, responsibility, and consequences within a collective cultural context that was far different than their own.[16]

Legal Strategy and Decision Making

In another case, attorneys—whose client was a Somalian refugee seeking political asylum—had to change their strategy for presenting evidence in order to respect the client's cultural and religious norms. Soldiers had bayoneted her when she resisted rape, and she was scarred on a breast and an ankle. To show evidence of persecution, the plaintiff would have had to reveal parts of her body that she was committed, by religion and culture, to keeping private. Ultimately the client developed a strategy of showing the injury to the INS lawyer who was also female.[17] This strategy, challenging conventional legal advocacy and violating cultural norms of the adversarial system, allowed the client to present a case that honored her values and norms.[18]

Immigrant clients often bring with them prior experiences with courts or interactions with governments from their countries of origin that influence the choices they make in their cases. Strategies that worked in their country of origin may not be successful here. For example, clients from cultures that punish those challenging governmental action may be resistant to a lawyer's suggestion that a Supplemental Security Income (SSI) benefits appeal be taken, challenging the government's decision to deny a claim. Conversely, those who come from societies where refusal to follow government requirements is a successful strategy may be labeled as belligerent by the court when they consistently resist or challenge the court.

Finally, cultural differences may cause us to misjudge a client or to provide differential representation based on stereotype or bias. Few lawyers engage in explicit open racial or cultural hostility toward a client. However, if recent studies in the medical field have relevance for lawyers, we need to recognize that even lawyers of goodwill may engage in unconscious stereotyping that results in inferior representation. Studies in the medical field show that doctors are less likely to explain diagnoses to patients of color and less likely to gather significant information from them or to refer them for needed treatment.[19] Although no studies of lawyers to our knowledge have focused on studying whether lawyers engage in discriminatory treatment, two recent studies have identified differential treatment by the legal system based on race. One study done by Child Welfare Watch shows that African American children are far more likely to be removed from their home, put in foster care, and left there longer than similarly situated white children.[20] Another study showed that African American juveniles received disproportionate sentences when compared with similarly situated white youths. In each of these legal studies, lawyers—as prosecutors, representatives, and judges—were deeply implicated in the work that led to the differential treatment.

Once a cultural difference surfaces, we can see stark cultural contrasts with clear connections to lawyering choices. In hindsight, it is easy to see the cultural contrasts and their effect on the clients' and lawyers' challenges to find acceptable accommodations to the legal system. In the moment, however, cases are more difficult, and the differences and similarities are more subtle and, at times, invisible. The following sections give you some insights into how to make this more visible.

Culture-General and Culture-Specific Knowledge

In addition to developing awareness of the role that culture plays in attributing meaning to behaviors and communication, a competent cross-cultural lawyer also studies the specific culture and language of the client group the lawyer represents. Culture-specific knowledge, politics, geography, and history, especially information that might shed light on the client's legal issues, relationship with the lawyer, and process of decision making will assist the lawyer in representing the client better. As the lawyer develops culture-specific knowledge, he or she should apply this knowledge carefully and examine it on a case-by-case basis. Finally, a lawyer will have a greater capacity to build trust and connection if he or she speaks the client's language even if they do not share a common culture.

If the lawyer represents clients from a multitude of cultures, the lawyer can improve cross-cultural interactions by acquiring culture-general knowledge and skills. This culture-general information is also helpful to lawyers who are beginning to learn about a specific culture. Because learning any new culture is a complex endeavor (remember the number of years that we spent learning our own), the lawyer can use culture-general knowledge and skills while learning specifics about a new culture.

Habit 1: Degrees of Separation and Connection

The first part of Habit 1 encourages lawyers to consciously identify the similarities and differences between their clients and themselves and to assess their impact on the attorney–client relationship. The framework of similarities and differences helps assess lawyer–client interaction, professional distance, and information gathering.

The second part of the habit asks the lawyer to assess the significance of these similarities and differences. By identifying differences, we focus consciously on the possibility that cultural misunderstanding, bias, and stereotyping may occur. By focusing on similarities, we become conscious of the connections that we have with clients as well as the possibility that we may substitute our own judgment for the client's.

Pinpointing and Recording Similarities and Differences

To perform Habit 1, the lawyer brainstorms, as quickly as possible, as many similarities and differences between the client and himself as he can generate. This habit is rewarded for numerosity—the more differences and similarities the better. A typical list of similarities and differences might include the following:

Ethnicity	Economic Status	Marital Status
Race	Social Status	Role in Family
Gender	Language	Immigration Nationality
Sexual Orientation	Religion	Education
Age	Physical Characteristic	Time
Individualistic/ Collective	Direct or Indirect Communication	

With each client and case, you may identify different categories that will influence the case and your relationship. These lists will change as the relationship with the client and the client's case changes. Exhaustive lists help the lawyer make conscious the less obvious similarities and differences that may enhance or interfere with understanding.

Consciously identifying a long list of similarities and differences allows lawyers to see clients as individuals with personal, cultural, and social experiences that shape the clients' behavior and communications. In asking you to create long lists, we do not mean to suggest that all similarities and differences have the same order of importance for you or your client. For example, in interactions involving people of color and whites, race will likely play a significant role in the interaction given the discriminatory role that race plays in our society.[21] In some cases, such as rape or domestic violence, gender differences may also play a greater role than in others. The connections that cause a lawyer to feel connected to a client may be insignificant to a client.

The most important thing is to make this list honestly and nonjudgmentally, thinking about what similarities and differences you perceive and suspect might affect your ability to hear and understand your client's story and your client's ability to tell it.

Another way to illustrate the degrees of connection and separation between client and lawyer is through the use of a simple Venn diagram. Draw two circles, overlapping broadly if the worlds of the client and of the lawyer largely coincide, or narrowly if they largely diverge. By creating a graphical representation of Habit 1, the lawyer can gain insight into the significance of the similarities and differences. For example, the list of similarities may be small, and yet the lawyer may feel "the same" as the client because of one shared similarity, or the lawyer may have many similarities and yet find herself feeling very distant from the client.

Analyzing the Effect of Similarities and Differences on Professional Distance and Judgment

After creating the lists and diagrams, the lawyer can identify where the cross-cultural challenges might occur. By naming the things that unite and distance us from our clients, we are able to identify relationships that need more or less professional distance because they are "too close" or "too far." No perfect degree of separation or connection exists between lawyer and client. However, where the list of similarities is long, the lawyer may usefully ask, "Are there differences that I am overlooking? Am I developing solutions to problems that may work for me but not for my client?" By pondering these questions, we recognize that even though similarities promote understanding, misunderstanding may flow from an assumption of precise congruence. Thus, in situations where lawyers and clients have circles that overlap, the lawyer should ask herself, "How do I develop proper professional distance with a client who is so similar to me?"

In other cases, where the list of differences is long, the question for the lawyer is "Are there any similarities that I am missing?" We know that negative judgments are more likely to occur when the client and lawyer see the other as an "outsider." Thus the lawyer who identifies significant cultural differences between the client and herself will be less likely to judge the client if she also sees herself as similar to the client. Where large differences exist, the lawyer needs to consciously address the question "How do I bridge the huge gap between the client's experiences and mine?"

What does the analysis of connection and difference indicate about what we ought to share with clients about ourselves? Lawyers usually know far more about their clients than the clients know about the lawyers. Some information of similarity and difference will be obvious to a client, and other significant information will be known only if the lawyer chooses to tell the client. In thinking about establishing rapport with clients, lawyers often think about revealing information that will reveal similarities and establish connections to clients. Of course, exactly what information will cause the client to bond with the lawyer is difficult to know, as the significance of specific similarities and differences may be very different for the lawyer and the client.

Analyzing the Effect of Similarities and Differences on Gathering and Presenting Information

Differences and similarities or assumptions of similarity will significantly influence questioning and case theory. One example of how differences and similarities in the lawyer–client dyad may influence information gathering can be seen in the way lawyers probe for clarification in interviews. Lawyers usually ask questions based on differences that they perceive between their clients and themselves. Thus a lawyer, especially one with a direct communication style, tends to ask questions when a client makes choices that the lawyer would not have made or when he perceives an inconsistency between what the client is saying and the client's actions. A lawyer tends not to ask questions about choices that a client has made when the lawyer would have made the same choices; in such a situation, the lawyer usually assumes that the client's thought processes and reasoning are the same as his own.

For example, in working with a client who has fled her home because of spousal abuse and is living with extended family members, a lawyer might not explore the issue of family support. In contrast, had the client explained that she could not go to her family for support, the same lawyer might have explored that and developed housing alternatives. The probing occurs when the lawyer perceives the client's choices as different from the ones the lawyer might make, and therefore she tries to understand in this case why the client has failed to involve her family. The same lawyer might ask few questions about family support when she assumes that a client living with family had family support, because the lawyer would expect her own family to support her in a decision to leave an abusive spouse.

In her failure to ask questions of the first client, the lawyer is probably making a host of assumptions about cultural values that relate to the client's and the lawyer's family values. Assumptions of similarities that mask differences can lead the lawyer to solutions and legal theories that may not ultimately work for the client. For example, in assuming that the first client has family support, the lawyer in the previous example may neglect to explore other housing arrangements or supportive environments that the client needs. Family relationships are incredibly rich areas for cultural misunderstanding, and thus assumptions of similarity are perhaps even more problematic when issues of family are involved.

To identify the unexplored cultural assumptions that the lawyer may be making, the lawyer should ask what she has explored and what she has left unexplored. Reflection on the attorney–client interview allows the lawyer to identify areas where the lawyer may have missed relevant explanations of behavior.

Habit 2: Rings in Motion

If the key to Habit 1 is "identifying and analyzing the distance between me and my client," the key to Habit 2 is identifying and analyzing how cultural differences and similarities influence

the interactions between the client, the legal decision makers, the opponents, and the lawyer.

Lawyers interview clients to gain an understanding of the client's problem from the client's perspective and to gather information that will help the lawyer identify potential solutions, particularly those that are available within the legal system or those that opponents will assent to. What information is considered relevant and important is a mixture of the client's, opponent's, lawyer's, and legal system's perspectives.

If these perspectives are different in material ways, information will likely be presented, gathered, and weighed differently. Habit 2 examines these perspectives explicitly by asking the lawyer to identify and analyze the similarities and differences in different dyads and triads to assess the various cultural lenses that may affect the outcome of a client's case.

Like Habit 1, the lawyer is encouraged to name and/or diagram the differences and similarities first and then to analyze their effect on the case.

Pinpoint and Record Similarities and Differences in the Legal System–Client Dyad

The lawyer should identify the similarities and differences that may exist between client–law and legal decision maker–law. As in Habit 1, the similarities and differences can be listed or can be put on a Venn diagram. In many cases, multiple players will influence the outcome and should be included when identifying the similarities and differences. For example, a prosecutor, a prospective jury, a presentence probation officer, and a judge may all make decisions that influence how the client charged with a crime will be judged and sentenced. Or a forensic evaluator in a custody case may play a significant role in deciding the outcome of a case. Therefore, at various points in the representation, different, important players should be included in the diagram of similarities and differences.

For example, a forensic evaluator in examining a capacity to parent may look for signs of the parent's encouragement of separation of parent and child. In cultures that do not see this kind of separation as healthy for the child, the evaluator may find little that is positive to report. For example, the parent may be criticized for overinvolvement, for practices such as sharing beds with children, or for failing to tolerate "normal" disagreements between child and parent. Lawyers should identify the potential differences that exist between the client and decision makers and focus on how to explain the client's choices where they differ from the evaluator's norms.

In thinking about how differences and similarities might influence the decision makers, lawyers often try to help clients make connections to decision makers to lessen the negative judgments or stereotyping that may result from difference. To the extent that lawyers have choices, they may hire or suggest that the court use expert evaluators that share a common culture or language with the client. Cross-cultural misunderstandings and ethnocentric judgments are less likely to occur in these situations. By checking with others that have used this expert, lawyers can confirm that, despite their professional education, the expert has retained an understanding and acceptance of the cultural values of the client. When the client and decision makers come from different cultures, the lawyer should think creatively about similarities that the client shares with the decision makers. By encouraging clients and decision makers to see similarities in each other, connections can be made cross-culturally.

In addition to focusing on the decision makers, the lawyer should identify the cultural values and norms implicit in the law that will be applied to the client. Does the client share these values and norms, or do differences exist?

Pinpoint and Record Similarities and Differences in the Legal System–Lawyer Dyad

The lawyer should also focus on the legal system–lawyer dyad and assess the similarities and differences between herself and the legal system. To what extent does the lawyer adopt the values and norms of the law and legal decision makers? How acculturated to the law and legal culture has the lawyer become? In what ways does the lawyer see the "successful" client the same as the law and legal decision makers.

and to what extent does the lawyer have different values and evaluations? Understanding the differences and similarities between the lawyer and the legal system players will help the lawyer assess whether her evaluation of the case is likely to match the legal decision maker.

Again the lawyer can list or create a diagram that indicates the similarities and differences. By studying these, the lawyer can develop strategies for translation between the client and the legal system that keeps the client and her concerns central to the case.

Pinpoint and Record Similarities and Differences of Opponents to Legal Decision Makers/Clients/Lawyers

The cultural background of an opposing party may also influence the outcome of a case. By listing or diagramming similarities and differences of the opponent with the various other players involved in a case, the lawyer can assess a case and design creative solutions. Often in settling cases, lawyers look for win-win solutions that meet the needs of clients and their adversaries. For example, in assessing the possibility of resolving a custody case, a lawyer may want to know what the norms of custody are in the opposing party's culture and the extent to which the opposing party still embraces these values. How might gender norms about who should have custody influence the opponent's capacity or willingness to settle the case? Will the opponent be the only decision maker in resolving the case, or might the extended family, especially the grandparents, be the people who need to be consulted for the settlement to take place. All these factors and more should be included in a lawyer's plan for negotiation.

Reading the Rings: Analyze the Effect of Similarities and Differences

After filling in the diagrams and/or making the lists of the different dyads, the lawyer can interpret the information to look for insights about the impact of culture on the case and potential successful strategies. The lawyer's goal in reading the rings is to consciously examine influences on the case that may be invisible but will nonetheless affect the case.

The following questions may help identify some of those insights:

Assessing the legal claim: How large is the area of overlap between the client and the law?

Assessing cultural differences that result in negative judgments: What are the cultural differences that may lead to different values or biases, causing decision makers to negatively judge the client or the opponent?

Identifying similarities that may establish connections and understanding: What does a successful client look like to this decision maker? How similar or different is the client from this successful client?

Assessing credibility: How credible is my client's story? Does it make "sense"? To what extent is knowledge of the client, her values, and her culture necessary for the sense of the story? How credible is my client? Are there cultural factors influencing the way the client tells the story that will affect her credibility?

Identifying legal strategies: Can I shift the law's perspective to encompass more of the client's claim and desired relief? Do my current strategies in the client's case require the law, the legal decision maker, or the client to adjust perspectives?

Identifying bones to pick with the law: How large is the area of overlap between the law and myself?

Identifying how my biases shape the inquiry: How large is the area of overlap between the lawyer–client, lawyer–law, and client–legal system circles? Notice that the overlap is now divided into two parts: the characteristics relevant to the legal case that the lawyer shares with the client and those relevant characteristics that the lawyer does not share with the client. Does my client have a plausible claim that is difficult for me to see because of these differences or similarities? Am I probing for clarity using multiple frames of reference—the client's, the legal system's, the opponent's, and mine? Or am I focused mostly on my own frame of reference?

Identifying hot-button issues: Of all the characteristics and perspectives listed on the rings, which loom largest for me? Are they the same ones that loom largest for the client? For the law?

Habit 2 is more cumbersome than Habit 1 and requires looking at multiple frames of reference at once.[22] However, lawyers who have used Habit 2 find that it helps them to focus when a case or client is troubling them. The lawyer can identify why she has been focusing on a particular aspect of a case even when that aspect is not critical to the success of the case. She may gain insight into why a judge is bothered by a particular issue that is presented in the case. In addition, lawyers might gain insight into why clients are resisting the lawyer's advice or the court's directive and are "uncooperative." Lawyers might also begin to understand why clients often see the lawyer as part of a hostile legal system when a high degree of overlap between the lawyer and the legal system is identified.

What can the lawyer do with the insights gained from reading the rings or lists? Lawyers can ask whether the law and legal culture can be changed to legitimate the client, her perspective, and her claim. Can the lawyer push the law or should she persuade the client to adapt? Hopefully, by discovering some of these insights, the lawyer may be better able to explain the client to the legal system and the legal system to the client.

Habit 3: Parallel Universes

Habit 3 helps a lawyer identify alternative explanations for her client's behavior. The habit of parallel universes invites the lawyer to explore multiple alternative interpretations of any client behavior. Although the lawyer can never exhaust the parallel universes that explain a client's behavior, in a matter of minutes the lawyer can explore multiple parallel universes to explain a client's behavior at a given moment.

For example, if a lawyer has a client in a custody dispute who has consistently failed to follow a court order to take her child for a psychiatric evaluation, the lawyer might assume that her client has something to hide. Although the client tells the lawyer she will do it, it remains undone. A lawyer using parallel universe thinking can imagine many different explanations for the client's behavior: the client has never gone to a psychiatrist and is frightened; in the client's experience, only people who are crazy see psychiatrists; going to a psychiatrist carries a lot of shame; the client has no insurance and is unable to pay for the evaluation; the client cannot accept that the court will ever give the child to her husband, who was not the primary child caretaker; the client may fear that she will be misinterpreted by the psychiatrist; or the client simply did not think that she needed to get it done so quickly.

Using parallel universe thinking, the lawyer for a client who fails to keep appointments can explore parallel universe explanations for her initial judgment that "she does not care about the case." The behavior may have occurred because the client lacked carfare, failed to receive the letter setting up the appointment, lost her way to the office, had not done what she promised the lawyer she would do before their next appointment, or simply forgot about her appointment because of a busy life.

The point of parallel universe thinking is to get used to challenging oneself to identify the many alternatives to the interpretations to which we may be tempted to leap on insufficient information. By doing so, we remind ourselves that we lack the facts to make the interpretation, and we identify the assumptions we are using. The process need not take a lot of time; it takes only a minute to generate a number of parallel universe explanations to the interpretation to which the lawyer is immediately drawn.

Parallel universe thinking would cause the lawyer in the introductory example to try to explore with the client why she is resistant or to talk to people who share the client's culture to explore possible cultural barriers to her following the court's order.

Parallel universe thinking is especially important when the lawyer is feeling judgmental about her client. If we are attributing negative inferences to a client's behavior, we should identify other reasons for the behavior. Knowledge about specific cultures may enlarge the number of explanations that we can develop for behavior. Parallel universe thinking lets us know that we may be relying on assumptions rather than facts to explain the client's behavior and allows the lawyer to explore further with the client or others the reasons for the behavior. This exploration may also be helpful in explaining the client's behavior to others.

By engaging in parallel universe thinking, lawyers are less likely to assume that they know why clients are doing what they are doing when they lack critical facts. Parallel universe thinking also allows the lawyer to follow the advice of a cross-cultural trainer who suggests that one way to reduce the stress in cross-cultural interactions is to ask, "I wonder if there is another piece of information that, if I had it, would help me interpret what is going on."[23]

Habit 4: Red Flags and Remedies

The first three habits focus on ways to think like a lawyer, incorporating cross-cultural knowledge into analyzing how we think about cases, our clients, and the usefulness of the legal system. Habit 4 focuses on cross-cultural communication, identifying some tasks in normal attorney–client interaction that may be particularly problematic in cross-cultural encounters as well as alerting lawyers to signs of communication problems.

Good cross-cultural interaction requires mindful communication where the lawyer remains cognitively aware of the communication process and avoids using routine responses to clients. In cross-cultural communication, the lawyer must listen deeply, carefully attuned to the client and continuously monitoring whether the interaction is working and whether adjustments need to be made.

Habit 4 is accomplished in the moment and requires little planning for the experienced lawyer. The lawyer can identify ahead of time what she will look for to spot good communication and "red flags" that will tell her that accurate, genuine communication is probably not occurring.

In addition to paying attention to red flags and corrective measures, culturally sensitive exchanges with clients should pay special attention to four areas: (1) scripts, especially those describing the legal process; (2) introductory rituals; (3) client's understanding; and (4) culturally specific information about the client's problem.

Use Scripts Carefully

The more we do a particular activity, the more likely we are to have a "script." Lawyers often have scripts for the opening of interviews, explaining confidentiality, building rapport, explaining the legal system, and other topics common to the lawyer's practice. However, a mindful lawyer uses scripts carefully, especially in cross-cultural encounters, and instead develops a variety of communication strategies to replace scripts and explore understanding.

Pay Special Attention to Beginnings

A lawyer working with a client from another culture must pay special attention to the beginnings of communications with the client. Each culture has introduction rituals or scripts as well as trust-building exchanges that promote rapport and conversation. A lawyer who is unaware of the client's rituals must pay careful attention to the verbal and nonverbal signals the client is giving to the lawyer. How will the lawyer greet the client? What information will be exchanged before they "get down to business"? How do the client and lawyer define "getting down to business"? For one, the exchange of information about self, family, status, or background is an integral part of the business; for another, it may be introductory chitchat before the real conversation takes place. If an interpreter who is familiar with the client's culture will be involved with the interview, the lawyer can consult with the interpreter on appropriate introductory behavior.

Use Techniques That Confirm Understanding

Both clients and lawyers in cross-cultural exchanges will likely have high degrees of uncertainty and anxiety when they interact with someone they perceive to be different. The lack of predictability about how they will be received and their capacity to understand each other often leads to this uncertainty and anxiety. To lessen uncertainty and anxiety, both the lawyer and the client will be assisted by using techniques that consciously demonstrate that genuine understanding is occurring. Active listening techniques, including feedback to the client rephrasing his or her information, may be used to communicate to the client that the lawyer understands what the client is saying.[24]

In addition to giving the client feedback, the lawyer should look for feedback from the client that she understands the lawyer or is willing to ask questions if she does not understand. Until the lawyer knows that the client is very comfortable with a direct style of communication, the lawyer should refrain from asking the client if she understands and instead probe for exactly what the client does understand.

Gather Culture-Sensitive Information

How do we gather information that helps us interpret the client within her cultural context? In the first instance, the lawyer should engage in "deep listening" to the client's story and voice. For reasons identified in Habit 1, the lawyer, in question mode, will often be too focused on his or her own context and perspective. When exploration of the client's values, perspective, and cultural context is the goal, the lawyer needs to reorient the conversation to the client's world, the client's understandings, the client's priorities, and the client's narrative. Questions that get the client in narrative mode are usually the most helpful.

Questions that ask the client how or what she thinks about the problem she is encountering may also expose differences that will be helpful for the lawyer to understand the client's worldview. What are the client's ideas about the problem? Who else has the client talked to and what advice did they give? What would a good solution look like? What are the most important results? Who else besides the client will be affected? Consulted? Are there other problems caused by the current problem? Does the client know anybody else who had this problem? How did they solve it? Does the client consider that effective?

If the client has come from another country, the lawyer should ask the client how this problem would be handled in the client's country of origin. For example, in many legal cultures, the lawyer is the "fixer" or the person in charge. In contrast, most law students in the United States are taught client-centered lawyering, which sees the lawyer as partner, and our professional code puts the client in charge of major decisions about resolving the case.

Look for Red Flags That the Interaction Is Not Working

What are the red flags that mindful lawyers pay attention to in assessing whether the conversation is working for the client and lawyer? Red flags that the lawyer can look for include the following:

- The client appears bored, disengaged, or even actively uncomfortable;
- the client has not spoken for many minutes, and the lawyer is dominating the conversation;
- the lawyer has not taken any notes for many minutes;
- the client is using the lawyer's terminology instead of the lawyer using the client's words;
- the lawyer is judging the client negatively;
- the client appears angry; or
- the lawyer is distracted and bored.

Each lawyer and client and each lawyer–client pair will have their own red flags.

The first step is to see the red flag and be shaken out of complacency. "Uh-oh, something must be done." The next step is the corrective one. This must be done on the spot, as soon as the red flag is seen. The general corrective is to do anything possible to return to the search for the client's voice and story.

Explore Corrective Measures

In creating a corrective, the lawyer should be careful to use a different approach than the one that has led to the red flag. For example, if the client is not responding to a direct approach, try an indirect approach. If the call for narrative is not working, ask the client some specific questions or ask for narrative on a different topic.

Other suggested correctives include

- turning the conversation back to the client's stated priority;
- seeking greater detail about the client's priority;
- giving the client a chance to explain in greater depth her concerns;
- asking for examples of critical encounters in the client's life that illustrate the problem area;

exploring one example in some depth;

asking the client to describe in some detail what a solution would look like; and

using the client's words.

Again, these are only a few examples of many correctives that can be fashioned. Encounter by encounter, the lawyer can build a sense of the red flags in this relationship and the correctives that "work" for this client. Client by client, the lawyer can gain self-understanding about her own emblematic red flags and correctives that specifically target those flags. Red flags can remind the lawyer to be aware of the client and to be focused on the client in the moment. With reflection, the red flags can help the lawyer avoid further problems in the future.

Habit 5: The Camel's Back

Like the proverbial straw that breaks the camel's back, Habit 5 recognizes that, in addition to bias and stereotype, there are innumerable factors that may negatively influence an attorney–client interaction. A lawyer who proactively addresses some of these other factors may limit the effect of the bias and stereotyping and prevent the interaction from reaching the breaking point. Once the breaking point has been reached, the lawyer should try to identify why the lawyer–client interaction derailed and take corrective actions or plan for future corrective action.

Consider the case of a woman client with a horrible story of torture, whom the lawyer had very limited time to prepare for in an asylum trial (she lived out of town). During their conversation, the woman spoke in a rambling fashion. The lawyer, just back from vacation, was thinking angry thoughts toward the client. In the extreme stress caused by time pressure and by listening to the client tell about some horrible rapes that she had suffered, the lawyer fell back on some awful, old conditioning: against people who are of a different race, people who are overweight, and people who "talk too much."

In the midst of these feelings, which were causing the lawyer shame, what can the lawyer do to put the interview back on track and prevent a collision? This lawyer, like all lawyers, had biases and stereotypes that he brought to this attorney–client interaction. Research on stereotypes indicates that we are more likely to stereotype when we are feeling stress and unable to monitor ourselves for bias. By identifying the factors contributing to the negative reactions and changing some of them, the lawyer could prevent himself, at least sometimes, from acting on the basis of his assumptions and biases.

For example, the lawyer in the previous situation can take a break, have some food and drink, and identify what is interfering with his capacity to be present with the client before he resumes the interview. This, however, requires that the lawyer accept his every thought, including the ugly ones, and find a way to investigate and control those factors that are simply unacceptable in the context of lawyering. Knowing oneself as a cultural being and identifying biases and preventing them from controlling the interview or case are keys to Habit 5 thinking.

Over time, lawyers can learn to incorporate the analysis that they are doing to explore bias and stereotype into the analysis done as part of Habit 1. In addition to biases and stereotypes, straws that break the lawyer's back frequently include stress, lack of control, poor self-care, and a nonresponsive legal system. Final factor analysis identifies the straws that break the lawyer's back in the particular case and corrective steps that may work to prevent this from happening.

For example, assume that a lawyer, after working with a few Russian clients, begins to stereotype Russians as people who intentionally communicate with a lack of candor with lawyers. Habit 5 encourages this lawyer to be extra mindful when interviewing a Russian client. Given her biases, there is a higher likelihood that the lawyer will not find herself fully present with this client. In addition to using the other habits, the lawyer can improve the communication by controlling other factors (hunger, thirst, time constraints, and resource constraints), knowing that she is at greater risk of misunderstanding this client.

The prudent lawyer identifies proactively factors that may impede full communication with the client. Some she cannot control: pressure from the court, lack of resources, bad

timing, excessive caseload. But some she can: the language barrier (through a competent interpreter), her own stress (through self-care and adequate sleep, food, and water), and the amount of time spent with the client (increase as needed).

Habit 5 thinking asks the lawyer to engage in self-analysis rather than self-judgment. A lawyer who has noticed a red flag that recurs in interactions with clients can brainstorm ways to address it. Likewise, a lawyer who has noticed factors that tend to be present at particularly smooth encounters with clients can brainstorm ways to make more use of these advantages. By engaging in this reflective process, the lawyer is more likely to respond to and respect the individual clients.

NOTES

1. This work grows out of a joint collaborative process that was conceived in conversations in the early 1990s and began as a project in fall 1998 with a concrete goal of developing a teaching module about cross-cultural lawyering. Ultimately that project resulted in these materials for use in clinical courses, which we first presented at the 1999 CUNY Conference, "Enriching Legal Education for the 21st Century, Integrating Immigrant Perspectives Throughout the Curriculum and Connecting With Immigrant Communities." This work has also contributed to a chapter written by Jean Koh Peters in the supplement to her book, *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions.*

Many wonderful colleagues, students, and staff from CUNY and Yale aided us in the development of this work. The Open Society Institute, Emma Lazarus Fund, provided support for the conference, our work, and the publication of these materials.

2. R. Carroll, *Cultural Misunderstandings* 3 (University of Chicago Press 1988). Others have referred to this as "conscious incompetence," where the individual recognizes that cross-cultural competence is needed, but the person has not yet acquired the skills for this work. See W. S. Howell, *The Empathetic Communicator* 30–35 (1982).

3. Carroll, *Cultural Misunderstandings* 2. Objective culture includes that which we observe including artifacts, food, clothing, and names. It is relatively easy to analyze and identify its use. Subjective culture refers to the invisible, less tangible aspects of behavior. People's values, attitudes, and beliefs are kept in people's minds. Most cross-cultural misunderstandings occur at the subjective culture level. See K. Cushner & R. Brislin, *Intercultural Interactions* 6 (Sage Publications 1996), p. 6.

4. Those who grew up in cultures in the United States that prized individualism and self-reliance can identify specific experiences from their childhood that helped them develop these traits, such as paper routes and baby-sitting jobs and proverbs such as "God helps them who help themselves" and "The early bird catches the worm." Cushner & Brislin, *Intercultural Interactions,* p. 7. Not all who grew up in the United States share this commitment to individualism; significant cultural groups in the United States prize commitment to community. They might have heard "Blood is thicker than water."

5. Ethnocentrism occurs when a person uses his own value system and experiences as the only reference point from which to interpret and judge behavior.

6. Cushner & Brislin, *Intercultural Interactions,* p. 10.

7. Critical feminist race theorists have established the importance of intersectionality in recognizing, for example, that women of color have different issues than white women or men of color. The intersectionality of race and gender gives women of color different vantage points and life experiences. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581 (1990); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1249 n. 29 (1991); see also Melissa Harrison and Margaret E. Montoya, *Voices/Voces in the Borderlands: A Colloquy on Re/Constructing Identities in Re/Constructed Legal Spaces*, Columbia Journal Of Gender and Law (1996), 387, 403. Professors Montoya and Harrison discuss the importance of seeing multiple and changing identities.

8. The insider/outsider group distinction is one of the core themes in cross-cultural interactions. K. Cushner & D. Landis, The Intercultural Sensitizer, in *Handbook of Intercultural Training* 189 (2d ed.; D. Landis and R. Bhagat eds., 1996). Historical struggles between native countries of the lawyer and client or situations where lawyer's or client's native country has dominated the other's country can create difficult power dynamics between lawyer and client.

For example, racial discrimination both historical and current by Anglo-Americans against African Americans can have significant influences on the lawyer–client relationship. *Infra*, note 32.

9. Michelle Jacobs, *People From the Footnotes: The Missing Element in Client-Centered Counseling*, 27 Golden Gate U.L. Rev. 345, 372 (1997).

10. Harrison and Montoya, *supra* note 4, at 160. For example, after discussing the scholarship on lawyer as translator or ethnographer, Professor Zuni Cruz invited Esther Yazzie, a federally certified Navajo translator, to describe and enact the skills necessary to work successfully with language interpreters. "Ms. Yazzie's presentation debunked for all of us the idea that languages are transparent or that representations of reality somehow exist apart from language. One of several examples cited by Ms. Yazzie involved different conceptualizations of time: 'February' translated into Navajo as 'the time when the baby eagles are born.' Certainly, this is a temporal concept more connected to nature and to place than a word such as 'February' and, as such, is a different construct."

11. Cushner & Brislin, Intercultural Interactions, *supra* note 14, at 302.

12. Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 5 Clin. L. Rev. 557, 580–584 (1999), *supra* note 5, at 580–584, tells a number of stories illustrating difference in individualistic and community-focused lawyering and how culture influences the choices that lawyers make.

13. Cushner & Brislin, *Intercultural Interactions*, *supra* note 4 at 302.

14. Hofstede 1980 and 1991 as cited in Cushner & Brislin, Intercultural Interactions, *supra* note 4, at 302. Other nations that rank high on this dimension are Australia, Canada, Great Britain, the Netherlands, and New Zealand. Nations that score high on collectivism are primarily those in Asia and South America.

15. See also Kimberly O'Leary, Using "Difference Analysis" to Teach Problem-Solving, Clin. L. Rev. 65, 72 (1997), at 72. Professor O'Leary points to both the ethical rules and concepts of standing as limiting lawyers' conceptions about who is involved in a dispute. Following our presentation at the 2000 AALS Clinical Teacher's conference, Peter Joy alerted us to a contemplated change in California professional responsibility rules on confidentiality, allowing the privilege to be maintained when family members or others were part of the interview process.

16. This scenario was told to me by Professor Holly Maguigan, who for years has represented a number of battered women in criminal cases. In this case, her students worked with a lawyer from the Legal Aid Society. These lawyers were significantly aided by the advocates of the New York Asian Women's Center who perform both language and cultural translations. The New York Asian Women's Center is a community-based organization that works with a diverse group of Asian women in assisting them to deal with issues of intimate violence. For a more detailed analysis of the difference between individualism and collectivism, see Cushner & Landis, *Handbook of Intercultural Training*, note 11 *supra*, at 19.

17. Peter Margulies, *Re-framing Empathy in Clinical Legal Education*, 5 Clin. L. Rev. 605 (Spring 1999). Margulies also presented this case at the 1999 CUNY Conference, "Enriching Legal Education for the 21st Century, Integrating Immigrant Perspectives Throughout the Curriculum and Connecting With Immigrant Communities."

18. The classic fact finder, the judge, never saw the evidence. The adversary learned about the evidence not from the lawyer, but from the client, and the adversary, not the advocate, presented the evidence to the court.

19. See Jacobs, *People From the Footnotes*.

20. *Race, Bias & Power in Child Welfare*, Child Welfare Watch, Spring/Summer 1998, Number 3. Child Welfare Watch is funded by the Child Welfare Fund and produced by City Limits Community Information Services, Inc.

21. The legal system's focus on the protection of individual rights and personal liberties reflects the essential and pervasive cultural value of individualism. The American values of free-market competition, decentralized and minimized government intervention, and laissez-faire economics are mirrored in the adversarial process. The American legal model, including the "rules of the game," fosters competition between largely autonomous and self-interested, zealous advocates in a winner-take-all scheme.

22. Because Habit 2 requires the exploration of multiple frames of reference, Jean came up with the rings as a way to assess the perspectives and analyze where there was overlap of all three perspectives and where there were differences. Not everyone comfortably uses the diagrams or thinks in the visual

ways that diagramming encourages. Habit 2 can be done with lists, filled-in Venn diagrams, or other imaginative ways that help the lawyer concretely examine the cultural differences and similarities that are involved in a case.

23. R. Brislin and T. Yoshida, *Intercultural Communication Training: An Introduction* (Sage Publications, 1994).

24. I do not know how the recommendation that we engage in active listening by identifying the emotional content of the client's communication works for clients from more indirect cultures. One might hypothesize that a client who would be reluctant to directly name the way she is feeling may feel uncomfortable with the lawyer giving feedback of the emotional content of the message.

Triangle Residential Option for Substances Abuse

(TROSA)

'Y'all got your Daddy back'

How an innovative community in an old tobacco town is rebuilding shattered lives

By Claire Campbell | The Upbeat – Wed, May 29, 2013


Elisha Gahagan

For Elisha Gahagan, it was the day she lost custody of her kids. She'd been using since she was 12 years old — first wine coolers and pot, then cocaine, eventually heroin — but she had always promised herself that she would not turn out like this, just like her own mother, an opiate addict who spent her days chasing pain pills. Gahagan was supposed to be the June Cleaver mom she'd always wanted in her own life, but when the time came she found that she could not pull her head above water. The physical addiction had her in its grasp, and every move she tried to make toward a normal life was thwarted by a need she could not control.

Her quest to get clean took her through rehab and methadone clinics and a string of ever more desperate situations, until finally even the detox center turned her away because she'd been there too many times. That's when she found TROSA.

Tucked into a quiet neighborhood in Durham, N.C., TROSA — Triangle Residential Options for Substance Abusers — is an outpost for addicts who have run out of options. The people who come here are among the hardest cases in the substance abuse world. They've been battling addictions for years — sometimes decades — and have burned through whatever support networks they once had. They come with tragic pasts and mental health issues and criminal records. Some lived comfortable middle-class lives until their addictions drained everything away; others have been camping out in cars and under bridges for years. They come in their 20s and in their 50s. Many are high school dropouts. Some don't know how to read.

But more remarkable than the people TROSA takes in are the ones it turns out. Unlike typical treatment centers, which run for a few weeks or months and focus mostly on getting clean, TROSA is a two-year, live-in program that helps addicts rebuild their lives from the ground up. People come here to get off the drugs but also to dig deep, to discover who they really are and what they're capable of doing. Those who didn't finish school will earn GEDs; others can attend college classes. Everyone who graduates from the program will leave with a job. And everything they need along the way, from toiletries to interview coaching, will be provided. For free.

This is the other unusual thing about TROSA: It costs nothing to attend. Instead of paying for housing or meals, the people who come here work. Nearly half the money needed to fund the program comes from businesses run by the residents themselves, including a moving company, a lawn care service, and a frame shop. Residents also take jobs in the offices, kitchens, and garage on campus. This model has earned TROSA a reputation among some on the streets as a "work camp,"

but staff and residents insist the work is a central piece of the recovery process. It helps people build job skills, resumes — and most importantly, a work ethic. That work ethic, combined with the program's overall mission, has generated a lot of good will and repeat business in the community. The moving company regularly pulls in "best of" awards, and locals are quick to praise the drive and discipline of TROSA crews. As Marge Nordstrom, who has used the lawn care service for several years, explains, "These are men [and women] who are trying to get their lives back together and learn a trade so they stay out of trouble. And if I can help them to do that, I'm game."

* * *

For Ashley Hill, it was the day she sat in a holding cell in a Georgia jail, waiting to be led off to prison. She was 21 years old and had been in and out of trouble ever since an arrest for possession at 17. She'd even done a six-month stint in rehab for cocaine addiction but had come out "cross-addicted" to opiates; her peers in the program talked up the high so much she was hooked. By the time she was busted for her fourth or fifth probation violation, her lawyer told her there was nothing he could do. She watched the guards come to take her away, but by some lucky mathematical error in court — a twist of fate she still can't explain — they led her out to her family instead. "I got a second chance," she says, "so I knew I had to do something. I wasn't getting any better."

Her parents suggested TROSA, but to Hill it seemed extreme. She didn't want to be so far from home for so long. She dragged her feet and found reasons to put off leaving. Finally, one night, she nearly overdosed. Her parents stood firm: If you don't go now, we're done. She went.

A lawn care worker outside the gym

Newcomers to TROSA learn quickly that they're not just along for a ride. For the first 30 days they're put on "internship," tasked with emptying trash cans, sweeping the halls, and attending therapy sessions as they come down off the drugs. Their days are scheduled from 6:30 a.m. until 11 p.m. The rules are many and strict: No cursing. No talking back. No makeup. No dating. No unmade beds. And no contact with family members for the first several months. Comings and goings around campus are tracked with sign-in logs and monitored by leaders. People caught breaking the rules are called into a place known as the "Blue Room" and confronted about their behavior. Then they're punished with "contracts" — extra work duty — and sent back out stinging.

Later, the people who make it through the program will thank the staff and senior residents for this "tough love," but at the time it can be hard to swallow. For Hill, it was like nothing she'd ever known. At other programs, she says, "you could fail drug tests, and your punishment was that you couldn't go lay out at the pool that weekend." Here, on top of the physical torment of withdrawal, she found herself being called out again and again — sometimes for things she didn't even realize she was doing. No one had ever held her so accountable for her behavior. She panicked. More than once she called her parents from the Blue Room to beg them to come pick her up. She didn't know if she could make it.

* * *

In 1993, Kevin McDonald was working at a gang parolee program in Los Angeles when a group from Durham called. The city needed his help, they said; the drug situation was taking a steep toll. They knew he had set up a treatment program in Greensboro, N.C. — could he do the same here? Eventually he accepted, and with just $18,000 and a four-burner electric stove, he set up shop in an abandoned elementary school in a "transitional" part of town. The school was in shambles, the basement so flooded he thought it was a swimming pool. He paid the neighborhood kids a dollar a week to stop throwing

rocks through the windows. He had no written marching orders — just an understanding of how addicts think and a determination to give them another chance at life.


Dorms on the main TROSA campus

Today the main campus of TROSA is a cluster of more than a dozen buildings on land that was once a Flav-O-Rich dairy. What started as a 30-bed program now houses 431 residents — here and at a number of smaller properties around the city. Aside from the old dairy structures, everything on campus has been built by the residents themselves. The two-story dorms line meticulously landscaped quads. Inside, shoes are arranged under the beds in pairs, clothes hung neatly in closets. Against the walls stand scuffed wooden dressers. “Donated by Duke,” McDonald points out.

The word “donated” figures prominently in a tour of TROSA — if something wasn’t built by residents, chances are it was donated. “This kitchen? Donated.” Conference table? Donated. Blue-and-white diner booths? You guessed it. An entire department is devoted to reaching out to companies across the country to ask for things the program needs; McDonald estimates their efforts saved the organization up to $3 million last year. Residents even drive to local bakeries each day to pick up unwanted pastries for the snack bar.

“You’ve got to hustle,” McDonald says with a wink, and this seems to be one of the keys to the program’s success over the years: seeing opportunity where others don't. As the organization has expanded, it has snapped up run-down buildings in overlooked parts of town and transformed them into useful spaces — a pattern Durham Mayor Bill Bell says has had a “very positive effect.” Instead of walling itself off, TROSA has made its presence felt throughout the city.

As he crosses the campus, McDonald calls out to every resident he passes: “Hey, man, how you doing?” and “Good to see you, man.” They clasp hands; sometimes they hug. This, too, is part of the therapy: to be recognized as visible, a human being.

* * *

One thing recovering addicts will tell you about themselves is that they are self-centered. That after being driven by their own needs for so long, they have forgotten how to care about other people.

Vinicent Alexander came to TROSA after he looked up on Thanksgiving Day 2010 and realized he was sitting alone in his apartment with a bag of drugs. He had waded so far into his “obsession” that he’d pushed everyone away. “Something’s got to change,” he thought.

Because Alexander had run his own tailoring business for decades, the structure and discipline at TROSA weren’t so jarring; for him the hard part was being held responsible for other people's recovery. The proverb “each one, teach one” is a core philosophy here, emblazoned on signs and repeated in the hallways. It means, essentially, that one day you come in and learn how to sweep the floors, and the next you’re showing someone else how to do it.

But Alexander ended up teaching far more than one. At the end of his first 30 days, instead of being sent out to train at the moving company or one of the other businesses, he was named intern crew boss, which meant that he was on call around the clock, serving as a mentor, enforcer, and father figure to new waves of people coming in. For more than a year, as he counseled the interns through various crises, he found himself reliving his own intense transition to recovery again and

again. Soon he realized that helping others was doing more than anything else to change his way of thinking. It had awakened something in him. He had really started to care.

For this reason, even residents assigned to other training schools during the day are given a “people business” to manage on the side — a handful of more junior residents to monitor and guide. Often “guiding” means laying down the law. Strict as the program is, it runs largely on the honor system — so it’s up to the residents to blow the whistle when someone screws up. “That’s a really hard thing,” Kevin McDonald says, “because you want people to like you. And you don’t know how to get people to like you without [drugs]. ... But if you really care about somebody and they’re doing something wrong, you’ve got to say something.” Speaking up makes residents more invested in the whole process — and reminds them what they’re here to do.

* * *

As visitors approach an office, the word “Tour!” ripples through the room and instantly everyone rises. The men wear crisp button-down shirts and ties. The women are in slacks and business-casual blouses. One by one they introduce themselves.

My name is Krystal. Robert. Tyrone.

I’ve worked in this office five months. Eighteen months. Twenty-one months.

I started drinking alcohol when I was 11.

I’ve been using since I was 15, and my addiction was crack cocaine.

My addiction was opiates — pills and heroin.

I started out using crystal meth, and then it was pretty much anything.

I was in my addiction for 13 years. It tore my life apart.

At TROSA this is an everyday part of the culture: owning your addictions, putting your story front and center, talking about the darkest chapters of your life in the same tone someone else might use to lament a bad investment they made years ago. This openness is also one of the main points of departure from programs that emphasize anonymity. McDonald appreciates what those organizations have done to help people, but to him the thinking is backward. “You have to educate people,” he says — which means sharing what you’ve done in the past and who you are now.

A common frustration for those who work in the substance abuse world is the belief that addiction is a choice, that addicts go back to using because they are weak. “The perceptions haven’t caught up with the science,” says Paul Nagy, a clinical associate in Duke’s Department of Psychiatry and Behavioral Sciences who serves as an adviser to TROSA. “The science is very clear that it is a brain-based disorder.” A person may choose to use drugs at the beginning, but then the drugs create physical changes in the brain, disrupting the normal communication and reward systems in ways that inhibit the user’s self-control and drive more and more compulsive behavior. Some people are more susceptible to this than others, thanks largely to their genes. Recovery is a complex and ongoing process.

But for McDonald, it’s important to show the world that it’s possible — that addicts are people “who can get healed.”


TROSA founder and president Kevin McDonald

"We're not lepers," he says. "We're not society's garbage. We're not people who shouldn't be around people." TROSA members interact with the community through the moving company and other businesses, but they also go on speaking engagements around Durham in the hopes that their stories will inspire others to get help and shed light on the larger issue of substance abuse.

"People can't — from the top down — acknowledge what a serious problem this is in our country today," McDonald says. According to the Substance Abuse and Mental Health Services Administration, an estimated 21.6 million Americans needed special treatment for a drug or alcohol problem in 2011 — but only 2.3 million received it. Many won't admit they have a problem unless they're pressured by loved ones or caught in the criminal justice system. Meanwhile they're out on the streets, posing a danger to themselves and possibly others.

Cumulatively, the effects of addiction are staggering. The National Institute on Drug Abuse estimates that substance abuse costs the U.S. more than $600 billion annually — factoring in health care, lost productivity, and crime — and emphasizes that even that number doesn't reflect the full destructive effect on society: the disintegration of families, domestic violence and child abuse, and failure in schools. More than 10,000 people are killed in alcohol-related driving accidents each year.

"Why wouldn't we be doing more?" McDonald asks. By more, he means not just getting people into treatment, but also funding research and development into better ways to stop the destructive cycle of behavior. Over the years he's seen so many people conquer their addictions only to suddenly relapse. "Why does that moth go to that flame?" he says. "That's what we've got to figure out."

In the meantime, he's doing what he can to put a human face on the issue and raise awareness beyond TROSA's gates. He hopes that among the dozens of groups that tour the center every year — including students from Duke and other schools — there are future leaders who will have a better understanding of what's at stake, thanks to what they've seen and heard.

"That's what we have to think about," he says. "Not just TROSA, but this whole field. Until somebody's directly affected by [substance abuse], they don't get it."

* * *

Kevin McDonald started using alcohol when he was 13 years old. He was living in Germany, where his dad was stationed in the Air Force. He was a shy kid. His mother was abusive. He had trouble connecting with people. When the family moved back to California, McDonald tried to fall in with the hippie crowd — "weed, hash, regular stuff" — but he didn't quite fit there, either. Soon he turned to heroin and the rougher scene that came with it. The heroin took over his life and kept him from holding down a job. He overdosed multiple times but kept going back for more. His father didn't understand why he couldn't just quit. Eventually, McDonald began robbing pharmacies to feed his addiction. That's when he landed in jail.

From there McDonald caught a lucky break — after a few months, he was released into the Delancey Street Foundation, a therapeutic community in San Francisco that inspired the underlying model of TROSA. Hardened by years of abuse and paranoid from his time behind bars, McDonald was skeptical of these people who wanted him to share his feelings. He was in his early 30s then and hadn't cried since he was a teen. "I was thinking, 'I don't know if I can handle this,'" he says. "I was burnt, you know. I was crisp." He spent his days and nights on edge, half-waiting to get jumped. But eventually the anxiety

subsided, and he learned to open up. Here were people who truly wanted to know how he was doing every morning. Who wanted to give him tools he could use in the world. “All I knew when I got there was anger and hate,” he says, “and to change that around was life-saving.”

At TROSA, McDonald has borrowed many of the core elements of the Delancey Street model — most importantly peer mentoring and job training — but he’s also added other pieces over the years. Unlike Delancey Street, TROSA has a paid staff. They use evidence-based therapy and Seeking Safety (a program geared toward post-traumatic stress disorder) in their work with residents. McDonald has also brought in psychiatric support through Duke, which allows TROSA to help more people with mental health issues.

That mental health component has become increasingly important, says adviser Paul Nagy. In recent years he’s seen more and more residents come in with co-occurring disorders, especially depression and anxiety, and with histories of PTSD — not from war but from “life trauma” and abuse.

* * *

Behind a set of blacked-out glass doors a “dissipation” is in full swing. Here, residents who have been at TROSA long enough to build a solid foundation gather for 24 hours to unleash whatever demons still need freeing. Some come to purge deep-seated guilt over the things they’ve done in the past — to confess and seek forgiveness. Others come to work out anger at their families or fellow residents. “It’s very raw,” McDonald warns, and indeed when the door opens the air is charged. A group of 15 to 20 residents sit facing one another on couches arranged in a square, the lights so dim their expressions are barely visible. A man is gesturing and shouting at his neighbor.

One of the old dairy structures

“The stories I’ve heard in dissipations for 30 years...” McDonald says. “What people will do to each other and what people will do for dope is just mind-blowing. Nothing comes before it, when you get to a certain point. It’s just horrific.”

Equally horrific is what some of the residents have endured before coming here. Nearly everyone has been abused in some way, McDonald says. He tells the story of a recent graduate who grew up with a schizophrenic mom, was adopted by a violently abusive aunt, and then molested by her own father. He tells the story of Susan, who jumped off a bridge and broke her neck but survived — only to be attacked with a claw hammer in an attempted rape.

Upstairs, in the intake office, resident Dawn Sakowski hears stories like these every day. Before she came to TROSA, Sakowski spent years on the streets of Philadelphia, living in abandoned cars and turning to prostitution and theft to fund her crack cocaine habit. From the calls she makes as she’s screening applicants, it’s clear: “It’s still the same out there.” This week the reality of that hit home in a much more personal way, when her 22-year-old daughter was admitted to the program. Sakowski is glad she’s here, getting the help she needs, but “it’s hard to see,” she says. She fights off tears as she speaks.

* * *

At TROSA, time is measured in days and months. At 30 days, residents can write and receive mail. Ninety days until phone privileges. Six months to a wristwatch and an MP3 player. At 12 months, they’re called onstage to receive a medal, and new worlds begin to open up: They’re allowed to date. Families can come to campus to visit and, soon after, they can visit their

families at home. At 21 months, they go on “work-out,” taking a job in the community.

Not everyone finds success at TROSA. The graduation rate hovers around 30%, and the average stay is 11 months. Most of those who leave do so in the first two months, when emotions are running high and the transition is most difficult. Some leave later, after six or 12 or 18 months, because they think they’ve healed enough to strike out on their own. Others are sent away — for breaking the rules too many times, for health issues TROSA can’t accommodate, or for making threats. (Violence — even the threat of it — is not tolerated at TROSA; the program won’t accept rapists and certain other offenders for this reason. “There are wolves and lambs in the substance abuse world,” McDonald explains. ”You’ve got to equal the playing field. There has to be a safe feeling.”)

Elisha Gahagan quit TROSA at six months. She thought she had everyone fooled into believing she was a “goody-goody addict,” but then she broke a couple of rules and was presented with a contract. Suddenly she realized that these people were just like her; they could see through the manipulations and weren’t going to fall for her “crap.” She decided she didn’t need their help — she was off the drugs, she could handle herself now — so she called her ex to pick her up. The kids were thrilled to have her home, but within hours she realized she hadn’t thought it through. She had nothing — no change of clothes, no way to get to and from a job. Intense anxiety kicked in, and she found herself reaching for a beer. The kids watched her in disbelief. The next day she called TROSA and begged to return. When she came back, she started the program all over again.

“It was the best thing that could have ever happened to me,” she says, “because at that point I realized what I was doing. Everything hit me. I’ve got to really dig deep. I’ve got to take advantage of this opportunity and find out who I am and why I do the things I do. And to try to change and be a different person.”

Those who stick it out through graduation receive jobs and diplomas, but also continued access to inexpensive TROSA-owned housing and transportation to and from work. When donations allow, they’re given a car. Some stay on to finish their studies or train for full-time positions on staff (more than half of the 50-person staff went through the program). As the rest venture out into the world, they can stay connected to TROSA through group activity nights and, if they need them, free meals. They’re still not “cured,” Paul Nagy points out, even after two years — because there is no permanent cure for addiction. They’ve started on the total life change required for recovery, but they will be working at it every day for the rest of their lives. And they’ll need all the help they can get.

* * *

It’s Sunday afternoon — Mother’s Day — and a group of black-robed graduates is gathering for a picture under a concrete awning. “Everybody say, '1, 2, 3 ... sh-t!'” McDonald jokes. “It’s a special occasion.”

Less than two miles away, Melinda Gates has just finished addressing 5,000 graduates on the campus of Duke University, and celebratory horns can still be heard in the distance. Here, as the crowd files into the TROSA gymnasium, there’s a different kind of energy: excitement mixed with relief, wariness, and hope.

Ashley Hill is here, adjusting her cap and gown. It’s the day after her 24th birthday and two years since the near-overdose. In the end, all that trouble she got into early on paid off — she got tired of losing her free time to extra duty and started focusing on the future. “I proved to myself my strength,” she says. “I’m really proud of myself today.” She’ll be staying on at TROSA to finish her associate degree so she can transfer to a four-year college. She waves to her parents as they arrive.


Ashley Hill with her parents

As the ceremony begins, a static recording of “Pomp and Circumstance” leads the graduates to the stage, where one by one they collect their diplomas and rings and stop in front of the microphone to address the audience. They offer variations on refrains one hears a lot at TROSA: “This place saved my life” and “I don’t know where I would be.”

“You talkin’ 'bout a miracle?” asks Robert Murphy. “You’re looking at it. Right here.”

TROSA is not a religious program, but nearly everyone thanks God. They thank the staff for that “tough love” and “extra therapy” they hadn’t known they’d needed. They assure the interns in the crowd that it will all make sense in the end.

Then they turn to the families, who are the other stars of this day. “I’d like to ask my family to rise.” Each time, the crowd turns and erupts in applause.

Ashley Hill looks out at her parents: “I apologize for the things I put you guys through. I can’t imagine what it was like for you to watch me go through that.”


Vinicent Alexander on graduation day

Vinicent Alexander promises his family: “I am a better man and will be a better man until the day I die.”

Men of all ages speak to loved ones they left behind:

“You’ve got your son back.”

“You’ve got your brother back.”

“Y’all got your Daddy back.”

Will Crooks points out his brother, who graduated from law school the previous day: “I am so proud of him.” He tells the crowd about his mother, who passed away when he was 19. “I had to watch her as she slipped away,” he says, “and I sat there and promised her, ‘Mom, I’m going to change. I’m going to be a different man.’ And today, I am changed. This is for my mother. Happy Mother’s Day, Mom.”

After the ceremony, Elisha Gahagan mingles with the graduates and staff. She shares a text message she just received from her 11-year-old daughter. “Happy Mother’s Day,” it reads. “I love you more than words can express.”

Gahagan finally collected her ring and diploma last year; today she works at TROSA as one of the president’s assistants. She still lives on campus but has reconnected with her kids and sees them regularly. Her life, she says, is complete: “I look at everything, day in and day out, and it is so perfect right now that I wouldn’t change a thing. I wouldn’t change my past. I wouldn’t change the experiences that I had. This is how I had to get here. I’m just glad I got here.”

Members of the graduating TROSA class celebrate after the ceremony

THEORY OF DEFENSE

SELECTED BARS AND DEFENSES IN MISDEMEANOR CASES

STATUTE OF LIMITATIONS

- SOL is 2 years for misdemeanors. GS 15-1.
  - Begins to run when crime is completed. 258 NC 533.
  - State must issue valid criminal process within the 2 years. 272 NC 491.
    - Void warrant does not toll statute. 140 NCA 600.
    - Either an indictment or a presentment issued by grand jury within two years arrests SOL. 118 NCA 130.
- Defense is waived if:
  - D fails to raise it. 133 NC 709; 222 NC 28.
  - D pleads guilty. 193 NC 747.
- **Exceptions**:
  - Where valid warrant is issued within SOL, D is convicted in district court, and D appeals, D can be tried in Superior Court on the original warrant more than 2 years after the offense. 244 NC 68.
  - Defective *indictment* (not warrant) charging a misdemeanor can be refiled within one year of dismissal. GS 15-1, 140 NCA 600.
  - SOL does not apply when the issue of D's guilt of misdemeanor offense is submitted to the jury as a lesser-included offense of a felony. ___ NCA ___, 713 S.E.2d 82.

LACK OF JURISDICTION

- NC has jurisdiction if any part of offense took place in state. GS 15A-134.
- Where jurisdiction is challenged, State has burden to prove beyond reasonable doubt. 342 NC 91.

FAILURE OF PROOF

- State fails to put on substantial evidence of each element of the charge and of D's identity as the perpetrator. 299 NC 95.
  - Remedy is nonsuit/dismissal. GS 15-173; 15A-1227.
  - Motion should be allowed where evidence raises only suspicion or conjecture. 318 NC 102.
  - Timing of motion in district court:
    - At close of State's evidence
    - At close of all evidence.
- Fatal Variance-State's proof at trial is different from what is alleged in pleading, resulting in insufficient evidence of offense alleged. 297 NC 100.
  - Remedy is dismissal. GS 15A-952. (See Pleadings Checklist.)

DOUBLE JEOPARDY

- No person shall be put in jeopardy twice for the same offense. US Const. 5th Am; NC Const. Art. I Sec. 19.
  - D is put in jeopardy when the trial begins, meaning the first evidence is presented or the first witness is sworn in. 327 NC 244.
  - For guilty pleas, jeopardy attaches when court accepts the plea. 345 NC 462.
- Double Jeopardy rules bar:
  - Reprosecution for same offense following acquittal,
  - Reprosecution for same offense following conviction, and
  - Multiple punishments for same offense, absent clear legislative intent that multiple punishments allowed. 459 US 359; 159 NCA 103.
- Same evidence test: All elements of one offense included in other offense. 287 NC 207.

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SELF-DEFENSE

- May use non-deadly force against another when the amount of force reasonably appears necessary to protect self from offensive contact or injury. 230 NC 54.
    - May not continue to use force after need has disappeared. 252 NC 57.
    - May not assert defense if, without justification, voluntarily entered or remained in fight. 228 NC 228.
        - But, if D withdraws from fight, can regain right. 293 NC 353.
    - Brandishing weapon may constitute non-deadly force. 74 NC 244; 252 NC 57.
- Burden of Persuasion: State must prove beyond reasonable doubt that D did not act in self defense. 268 NC 140.
- Applicability to Resist/Delay/Obstruct and Assault on Officer: Citizen has right to use reasonable force to resist unlawful conduct by officer. 1 NCA 479 (aff'd, 274 NC 380).
- GS 14-51.2, 14-51.3, and 14-51.4 address circumstances in which a person may use defensive force.

DEFENSE OF OTHERS

- "Stand in shoes" of person attacked
    - May use force to protect 3d person where reasonably believe 3d person would have been justified in using force. 265 NC 312; 337 NC 615.
    - D clearly has right to defend family members and others with whom D has special relationship and probably has right to defend "strangers." 363 NC 793; 194 NC 34; 332 NC 639.

DEFENSE OF PROPERTY

- Rebuttable presumption that lawful occupant of home, motor vehicle, or workplace has a reasonable fear of imminent death or serious bodily harm when using defensive force under specified circumstances. GS 14-51.2.
- May use reasonable, non-deadly force to protect property. 258 NC 44.

DURESS/NECESSITY

- D must show took reasonable action to protect life, limb, or health and no other acceptable choice was available. 167 NCA 705; 160 NCA 349.
    - Defense is available in DWI trials. 167 NCA 705.
- Defense not available if D had reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm. 201 NCA 631; 152 NCA 29.
- A defendant can be convicted of aiding and abetting an offense committed by a third party under duress; duress does not transform acts into noncriminal activity. ___ NCA ___, 718 S.E.2d 174.

ACCIDENT

- D injures another person unintentionally. 340 NC 338.
    - State has burden to show injury was not accidental. 330 NC 249.
    - Defense not available if D was engaged in misconduct at the time of the killing. 340 NC 338; 198 NCA 22.

ENTRAPMENT

- D is not guilty if officer tricked or persuaded D to commit offense that D would not otherwise have committed. 307 NC 1; 194 NCA 685.
    - Defense is available in DWI trials. 164 NCA 658.
- D must show entrapped to satisfaction of finder of fact. 307 NC 1. Burden to prove lack of predisposition to commit criminal act is on D. ___ NCA ___, 721 S.E.2d 391; 201 NCA 643.
- D may raise entrapment-by-estoppel defense when the government affirmatively assures D that certain conduct is lawful, D engages in such conduct in reasonable reliance on the assurance, and a criminal prosecution ensues. ___ NCA ___, 715 S.E.2d 537.

UNCONSCIOUSNESS/AUTOMATISM

- D could not physically control acts. D is not conscious of what he or she is doing. 195 NCA 770.
    - ie, epilepsy, blow to head, fever, or sleepwalking.
    - Defense does not apply where the D's mental state was due to voluntary intoxication. ___ NCA ___, 720 S.E.2d 430.
- D has burden to prove to satisfaction of finder of fact. 287 NC 266.

IGNORANCE/MISTAKE

- Mistake of fact is defense to crimes requiring knowledge. 232 NC 77; 290 NC 266; 202 NCA 697.
    - Where D drives while license suspended without notice of suspension, case should be dismissed. 290 NC 266.
- State has burden of showing D had required knowledge.
    - Depending on definition of offense, State may meet burden by showing D knew or had reason to know of fact.

INVOLUNTARY INTOXICATION

- D is forced to drink alcohol/ingest drug, or does so unknowingly. 173 NCA 600.
- Defense does not arise where D knows he is ingesting the substance, but does not know it is intoxicating.
    - Defense was not available in DWI case where D drove home from dentist impaired by pain medication. 173 NCA 600.

DIMINISHED CAPACITY

- D could not form the specific intent to commit the offense because of an emotional or mental condition. 322 NC 243; ___ NCA ___, 715 S.E.2d 602.
    - Defense is only available for crimes that require specific intent, such as larceny or an attempt to commit a crime.
- State has burden to show D was capable of forming specific intent. ___ NCA ___, 727 S.E.2d 387.

VOLUNTARY INTOXICATION

- D was voluntarily intoxicated to a degree that D could not form the specific intent to commit the offense. 304 NC 511.
    - Defense is only available for crimes that require specific intent, such as larceny or an attempt.
    - State has burden to show D could form specific intent. 323 NC 339.

INSANITY

- At the time of the act, D was laboring under such a defect of reason caused by disease or deficiency of the mind that D was incapable of knowing the nature and quality of his or her act; or, if D did know the nature and quality of the act, that D was incapable of distinguishing between right and wrong in relation to the act. 336 NC 617; 293 NC 413; ___ NCA ___, 713 S.E.2d 190.
- D has burden of proving insanity. 314 NC 374.
    - Uncontradicted evidence of D's insanity does not result in directed verdict of not guilty by reason of insanity. 300 NC 223.

IMMATURITY

- Person under 16, but at least 6, who commits a crime is under jurisdiction of juvenile court. GS 7B-1501(7).
    - But, if juvenile was 13 years old or older when he or she committed Class A felony, juvenile is tried as an adult, and juvenile may be tried as an adult if offense would be felony if committed by adult. GS 7B-2200.

If You Build It, They Will Come: Creating and Utilizing a Meaningful Theory of Defense

by Stephen P. Lindsay

Stephen P. Lindsay is a senior partner in the law firm of Cloninger, Lindsay, Hensley & Searson, P.L.L.C, in Asheville. His firm specializes in all types of litigation. Lindsay focuses primarily on criminal defense in both state and federal courts. He graduated from Guilford College with a BS in Administration of Justice and earned his JD from the University of North Carolina School of Law. A faculty member of the National Criminal Defense College in Macon, Georgia, Lindsay dedicates between four and six weeks per year teaching and lecturing for various public defender organizations and criminal defense bar associations both within and outside of the United States.

So the file hits your desk. Before you open to the first page you hear the shrill noise of not just a single dog, but a pack of dogs. Wild dogs. Nipping at your pride. You think to yourself, "Why me? Why do I always get the dog cases? It must be fate." You calmly place the file on top of the stack of ever-growing canine files. Your reach for your cup of coffee and seriously consider upping your membership in the S.P.C.A. to "Angel" status. Just as you think a change in profession might be in order, your coworker steps in the door, new file in hand, lets out a piercing howl and says, "This one is the dog of all dogs. The mother of all dogs!" Alas. You are not alone.

Dog files bark because there does not appear to be any reasonable way to mount a successful defense. Put another way, winning the case is about as likely as a crowd of people coming to watch a baseball game at a ballpark in a cornfield in the middle of Iowa. According to the movie, *Field of Dreams,* "If you build it, they will come . . ." And they came. And they watched. And they enjoyed. Truth be known, they would come again, if invited —even if they were not invited.

Every dog case is like a field of dreams: nothing to lose and everything to gain. Believe it or not, out of each dog case can rise a meaningful, believable, and solid defense—a defense that can win. But as Kevin Costner's wife said in the movie, "[I]f all of these people are going to come, we have a lot of work to do." The key to building the ballpark is in designing a theory of defense supported by one or more meaningful themes.

What Is a Theory and Why Do I Need One?

Having listened over the last 20 years to some of the finest criminal defense attorneys lecture on theories and themes, it has become clear to me that there exists great confusion as to what constitutes a theory and how it differs from supporting themes. The words "theory" and "theme" are often used interchangeably. However, they are very different concepts. So what is a theory? Here are a few definitions:

- *That combination of facts (beyond change) and law which in a common sense and emotional way leads a jury to conclude a fellow citizen is wrongfully accused.*—Tony Natale
- *One central theory that organizes all facts, reasons, arguments and furnishes the basic position from which one determines every action in the trial.* —Mario Conte
- *A paragraph of one to three sentences which summarizes the facts, emotions and legal basis for the citizen accused's acquittal or conviction on a lesser charge while telling the defense's story of innocense or reduces culpability.* —Vince Aprile

Common Thread Theory Components

Although helpful, these definitions, without closer inspection, tend to leave the reader thinking "Huh?" Rather than try to decipher these various definitions, it is more helpful to compare them to find commonality. The common thread within these definitions is that each requires a theory of defense to have the same three essential elements:

1. a factual component (fact-crunching/ brainstorming);
2. a legal component (genre); and
3. an emotional component (themes/ archetypes).

In order to fully understand and appreciate how to develop each of these elements in the quest for a solid theory of defense, it

is helpful to have a set of facts with which to work. These facts can then be used to create possible theories of defense. The Kentucky Department of Public Advocacy developed the following fact problem:

State v. Barry Rock, 05 CRS 10621 (Buncombe County)

Betty Gooden is a "pretty, very intelligent young lady" as described by the social worker investigating her case. Last spring, Betty went to visit her school guidance counselor, introducing herself and commenting that she knew Ann Haines (a girl that the counselor had been working with due to a history of abuse by her uncle, and who had recently moved to a foster home in another school district).

Betty said that things were not going well at home. She said that her stepdad, Barry Rock, was very strict and would make her go to bed without dinner. Her mother would allow her and her brother (age 7) to play outside, but when Barry got home, he would send them to bed. She also stated that she got into trouble for bringing a boy home. Barry yelled at her for having sex with boys in their trailer. This morning, she said, Barry came to school and told her teacher that he caught her cheating—copying someone's homework. She denied having sex with the boy or cheating. She was very upset that she wasn't allowed to be a normal teenager like all her friends.

The counselor asked her whether Barry ever touched her in an uncomfortable way. She became very uncomfortable and began to cry. The counselor let her return to class, then met her again later in the day with a police officer present. At that time, Betty stated that since she was 10, Barry had told her if she did certain things, he would let her open presents. She explained how this led to Barry coming into her room in the middle of the night to do things with her. She stated that she would try to be loud enough to wake up her mother in the room next door in the small trailer, but her mother would never come in. Her mother is mentally retarded, and before marrying Barry, had quite a bit of contact with Social Services due to her weak parenting skills. She stated that this had been going on more and more frequently in the last month and estimated it had happened 10 times.

Betty is an A/B student who showed no sign of academic problems. After reporting the abuse, she has been placed in a foster home with her friend Ann. She has also attended extensive counseling sessions to help her cope. Medical exams show that she has been sexually active.

Kim Gooden is Betty's 35-year-old mentally retarded mother. She is a "very meek and introverted person" who is "very soft spoken and will not make eye contact." She told the investigator she had no idea Barry was doing this to Betty. She said Barry made frequent trips to the bathroom and had a number of stomach problems that caused diarrhea. She said that Betty always wanted to go places with Barry and would rather stay home with Barry than go to the store with her. She said that she thought Betty was having sex with a neighbor boy, and she was grounded for it. She said that Betty always complains that she doesn't have normal parents and can't do the things her friends do. She is very confused about why Betty was taken away and why Barry has to live in jail now. An investigation of the trailer revealed panties with semen that matches Barry. Betty says those are her panties. Kim says that Betty and her are the same size and share all of their clothes.

Barry Rock is a 39-year-old mentally retarded man who has been married to Kim for five years. They live together in a small trailer making do with the Social Security checks that they both get due to mental retardation.

Barry now adamantly denies that he ever had sex and says that Betty is just making this up because he figured out she was having sex with the neighbor boy. After Betty's report to the counselor, Barry was interviewed for six hours by a detective and local police officer. In this videotaped statement, Barry is very distant, not making eye contact, and answering with one or two words to each question. Throughout the tape, the officer reminds him just to say what they talked about before they turned the tape on. Barry does answer "yes" when asked if he had sex with Betty and "yes" to other leading questions based on Betty's story. At the end of the interview, Barry begins rambling that it was Betty that wanted sex with him, and he knew that it was wrong, but he did it anyway.

Barry has been tested with IQs of 55, 57, and 59 over the last three years. Following a competency hearing, the trial court found Barry to be competent to go to trial.

The Factual Component

The factual component of the theory of defense comes from brainstorming the facts. More recently referred to as "fact-busting," brainstorming is the essential process of setting forth facts that appear in discovery and arise through investigation.

It is critical to understand that facts are nothing more—and nothing less—than just facts during brainstorming. Each fact should be written down individually and without any spin. Non-judgmental recitation of the facts is the key. Do not draw conclusions as to what a fact or facts might mean. And do not make the common mistake of attributing the meaning to the facts that is given to them by the prosecution or its investigators. It is too early in the process to give value or meaning to any particular fact. At this point, the facts are simply the facts. As we work through the other steps of creating a theory of defense, we will begin to attribute meaning to the various facts.

Judgmental Facts (WRONG)	Non-Judgmental Facts (RIGHT)
Barry was retarded	Barry had an IQ of 70
Betty hated Barry	Barry went to Betty's school, went to her classroom, confronted her about lying, accused her of sexual misconduct, talked with her about cheating, dealt with her in front of her friends
Confession was coerced	Several officers questioned Barry, Barry was not free to leave the station, Barry had no family to call, questioning lasted six hours

The Legal Component

Now that the facts have been developed in a neutral, non-judgmental way, it is time to move to the second component of the theory of defense: the legal component. Experience, as well as basic notions of persuasion, reveal that stark statements such as "self-defense," "alibi," "reasonable doubt," and similar catch-phrases, although somewhat meaningful to lawyers, fail to accurately and completely convey to jurors the essence of the defense. "Alibi" is usually interpreted by jurors as "He did it, but he has some friends that will lie about where he was." "Reasonable doubt" is often interpreted as, "He did it, but they can't prove it."

Thus, the legal component must be more substantive and understandable in order to accomplish the goal of having a meaningful theory of defense. Look at Hollywood and the cinema; thousands of movies have been made that have as their focus some type of alleged crime or criminal behavior. According to Cathy Kelly, training director for the Missouri Pubic Defender's Office, when these types of movies are compared, the plots, in relation to the accused, tend to fall into one of the following genres:

1. It never happened (mistake, set-up);
2. It happened, but I didn't do it (mistaken identification, alibi, set-up, etc.);
3. It happened, I did it, but it wasn't a crime (self-defense, accident, claim or right, etc.);
4. It happened, I did it, it was a crime, but it wasn't this crime (lesser included offense);
5. It happened, I did it, it was the crime charged, but I'm not responsible (insanity, diminished capacity);
6. It happened, I did it, it was the crime charged, I am responsible, so what? (jury nullification).

The six genres are presented in this particular order for a reason. As you move down the list, the difficulty of persuading the jurors that the defendant should prevail increases. It is easier to defend a case based upon the legal genre "it never happened" (mistake, set-up) than it is on "the defendant is not responsible" (insanity).

Using the facts of the Barry Rock example as developed through non-judgmental brainstorming, try to determine which genre fits best. Occasionally, facts will fit into two or three genres. It is important to settle on one genre, and it should usually be the one closest to the top of the list; this decreases the level of defense difficulty. The Rock case fits nicely into the first genre (it never happened), but could also fit into the second category (it happened, but I didn't do it). The first genre should be the one selected.

But be warned. Selecting the genre is not the end of the process. The genre is only a bare bones skeleton. The genre is a legal theory, not your theory of defense. It is just the second element of the theory of defense, and there is more to come. Where most attorneys fail when developing a theory of defense is in stopping once the legal component (genre) is selected. As will be seen, until the emotional component is developed and incorporated, the theory of defense is incomplete.

It is now time to take your work product for a test drive. Assume that you are the editor for your local newspaper. You have the power and authority to write a headline about this case. Your goal is to write it from the perspective of the defense, being true to the facts as developed through brainstorming, and incorporating the legal genre that has been selected. An example might be:

Rock Wrongfully Tossed from Home by Troubled Stepdaughter

Word choice can modify, or entirely change, the thrust of the headline. Consider the headline with the following possible changes:

Rock →	***Barry, Innocent Man, Mentally Challenged Man***
Wrongfully Tossed →	***Removed, Ejected, Sent Packing, Calmly Asked To Leave***
Troubled →	***Vindictive, Wicked, Confused***
Stepdaughter →	***Brat, Tease, Teen, Houseguest, Manipulator***

Notice that the focus of this headline is on Barry Rock, the defendant. It is important to decide whether the headline could be more powerful if the focus were on someone or something other than the defendant. Headlines do not have to focus on the defendant in order for the eventual theory of defense to be successful. The focus does not even have to be on an animate object. Consider the following possible headline examples:

Troubled Teen Fabricates Story for Freedom

Overworked Guidance Counselor Unknowingly Fuels False Accusations

Marriage Destroyed When Mother Forced to Choose Between Husband and Troubled Daughter

Underappreciated Detective Tosses Rock at Superiors

Each of these headline examples can become a solid theory of defense and lead to a successful outcome for the accused.

The Emotional Component

The last element of a theory of defense is the emotional component. The factual element or the legal element, standing alone, are seldom capable of persuading jurors to side with the defense. It is the emotional component of the theory that brings life, viability, and believability to the facts and the law. The emotional component is generated from two sources: archetypes and themes.

Archetypes, as used herein, are basic, fundamental, corollaries of life that transcend age, ethnicity, gender and sex. They are truths that virtually all people in virtually all walks of life can agree upon. For example, few would disagree that when one's child is in danger, one protects the child at all costs. Thus, the archetype demonstrated would be a parent's love and dedication to his or her child. Other archetypes include love, hate, betrayal, despair, poverty, hunger, dishonesty and anger. Most cases lend themselves to one or more archetypes that can provide a source for emotion to drive the theory of defense. Archetypes in the Barry Rock case include:

- The difficulties of dealing with a stepchild
- Children will lie to gain a perceived advantage
- Maternity/paternity is more powerful than marriage
- Teenagers can be difficult to parent

Not only do these archetypes fit nicely into the facts of the Barry Rock case, each serves as a primary category of inquiry during jury selection.

In addition to providing emotion through archetypes, attorneys should use primary and secondary themes. A primary theme is a word, phrase, or simple sentence that captures the controlling or dominant emotion of the theory of defense. The theme must be brief and easily remembered by the jurors.

For instance, a primary theme developed in the theory of defense and advanced during the trial of the O.J. Simpson case was, "If it doesn't fit, you must acquit." Other examples of primary themes include:

- One for all and all for one
- Looking for love in all the wrong places
- Am I my brother's keeper?
- Stand by your man (or woman)
- Wrong place, wrong time, wrong person
- When you play with fire, you're going to get burned

Although originality can be successful, it is not necessary to redesign the wheel. Music, especially country/western music, is a wonderful resource for finding themes. Consider the following lines taken directly from the songbooks of Nashville (and assembled by Dale Cobb, an incredible criminal defense attorney from Charleston, South Carolina):

Top 10 Country/Western Lines (Themes?)

10. Get your tongue outta my mouth 'cause I'm kissin' you goodbye.
9. Her teeth was stained, but her heart was pure.
8. I bought a car from the guy who stole my girl, but it don't run so we're even.
7. I still miss you, baby, but my aim's gettin' better.
6. I wouldn't take her to a dog fight 'cause I'm afraid she'd win.
5. If I can't be number one in your life, then number two on you.
4. If I had shot you when I wanted to, I'd be out by now.
3. My wife ran off with my best friend, and I sure do miss him.
2. She got the ring and I got the finger.
1. She's actin' single and I'm drinkin' doubles.

Incorporating secondary themes can often strengthen primary themes. A secondary theme is a word or phrase used to identify, describe, or label an aspect of the case. Here are some examples: a person—"never his fault"; an action—"acting as a robot"; an attitude—"stung with lust"; an approach—"no stone unturned"; an omission—"not a rocket scientist"; a condition—"too drunk to fish."

There are many possible themes that could be used in the Barry Rock case. For example, "blood is thicker than water"; "Bitter Betty comes a calling"; "to the detectives, interrogating Barry should have been like shooting fish in a barrel"; "sex abuse is a serious problem in this country—in this case, it was just an answer"; "the extent to which a person will lie in order to feel accepted knows no bounds."

Creating the Theory of Defense Paragraph

Using the headline, the archetype(s) identified, and the theme(s) developed, it is time to write the "Theory of Defense Paragraph." Although there is no magical formula for structuring the paragraph, the following template can be useful:

Theory of Defense Paragraph
- Open with a theme
- Introduce protagonist/antagonist
- Introduce antagonist/protagonist
- Describe conflict
- Set forth desired resolution
- End with theme

Note that the protagonist/antagonist does not have to be an animate object.

The following examples of theory of defense paragraphs in the Barry Rock case are by no means first drafts. Rather, they have been modified and adjusted many times to get them to this level. They are not perfect, and they can be improved upon. However, they serve as good examples of what is meant by a solid, valid, and useful theory of defense.

Theory of Defense Paragraph One

The extent to which even good people will tell a lie in order to be accepted by others knows no limits. "Barry, if you just tell us you did it, this will be over and you can go home. It will be easier on everyone." Barry Rock is a very simple man. Not because of free choice, but because he was born mentally challenged. The word of choice at that time was "retarded." Despite these limitations, Barry met Kim Gooden, who was also mentally challenged, and the two got married. Betty, Kim's daughter, was young at that time. With the limited funds from Social Security Disability checks, Barry and Kim fed and clothed Betty, made sure she had a safe home in which to live, and provided for her many needs. Within a few years, Betty became a teenager, and with that came the difficulties all parents experience with teenagers: not wanting to do homework, cheating to get better grades, wanting to stay out too late, experimenting with sex. Mentally challenged, and only a stepparent, Barry tried to set some rules—rules Betty didn't want to obey. The lie that Betty told stunned him. Kim's trust in her daughter's word, despite Barry's denials, hurt him even more. Blood must be thicker

than water. All Barry wanted was for his family to be happy like it had been in years gone by. "Everything will be okay, Barry. Just say you did it and you can get out of here. It will be easier for everyone if you just admit it."

Theory of Defense Paragraph Two

The extent to which even good people will tell a lie in order to be accepted by others knows no limits. Full of despair and all alone, confused and troubled, Betty Gooden walked into the guidance counselor's office at her school. Betty was at what she believed to be the end of her rope. Her mother and stepfather were mentally retarded. She was ashamed to bring her friends to her house. Her parents couldn't even help her with homework. She couldn't go out as late as she wanted. Her stepfather punished her for trying to get ahead by cheating. He even came to her school and made a fool of himself. No—of her!!! She couldn't even have her boyfriend over and mess around with him without getting punished. Life would be so much simpler if her stepfather were gone. As she waited in the guidance counselor's office, *Bitter Betty* decided there was no other option—just tell a simple, not-so-little lie. *Sex abuse is a serious problem in this country.* In this case, it was not a problem at all—because it never happened. *Sex abuse was Betty's answer.*

The italicized portions in the above examples denote primary themes and secondary themes—the parts of the emotional component of the theory of defense. Attorneys can strengthen the emotional component by describing the case in ways that embrace an archetype or archetypes—desperation in the first example, and shame towards parents in the second. It is also important to note that even though each of these theories are strong and valid, the focus of each is from a different perspective. The first theory focuses on Barry, and the second on Betty.

The primary purpose of a theory of defense is to guide the lawyer in every action taken during trial. The theory will make trial preparation much easier. It will dictate how to select the jury, what to include in the opening, how to handle each witness on cross, how to decide which witnesses are necessary to call in the defense case, and what to include in and how to deliver the closing argument. The theory of defense might never be shared with the jurors word for word; but the essence of the theory will be delivered through each witness, so long as the attorney remains dedicated and devoted to the theory.

In the end, whether you choose to call them dog cases, or to view them, as I suggest you should, as fields of dreams, such cases are opportunities to build baseball fields in the middle of cornfields in the middle of Iowa. If you build them with a meaningful theory of defense, and if you believe in what you have created, the people will come. They will watch. They will listen. They will believe. "If you build it, they will come . . ." ▪

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STORYTELLING: PERSUADING THE COURT TO ACCEPT YOUR THEORY OF DEFENSE

Ira Mickenberg, Esq.
6 Saratoga Circle
Saratoga Springs, NY 12866
(518) 583-6730
FAX: (518) 583-6731
imickenberg@nycap.rr.com

What Does Telling a Story Have to Do With Our Theory of Defense?

Stories and storytelling are among the most common and popular features of all cultures. Humans have an innate ability to tell stories, and an innate desire to be told stories. For thousands of years, religions have attracted adherents and passed down principles not by academic or theological analysis, but through stories, parables and tales. The fables of Aesop, the epics of Homer, and the plays of Shakespeare have survived for centuries and become part of popular culture because they tell extraordinarily good stories. The modern disciplines of anthropology, sociology, and Jungian psychology have all demonstrated that storytelling is one of the most fundamental traits of human beings.

Unfortunately, courts and law schools are among the few places where storytelling is rarely practiced or honored. For three (often excruciating) years, fledgling lawyers are trained to believe that legal analysis is the key to becoming a good attorney. Upon graduation, law students often continue to believe that they can win cases simply by citing the appropriate legal principles, and talking about reasonable doubt and the elements of crimes. Prisons are filled with victims of legal analysis and reasonable doubt arguments.

For public defenders, this approach is disastrous, because it assumes that judges and jurors are persuaded by the same principles as law students. Unfortunately, this is not true. When they deal with criminal trials, lawyers spend a lot of time thinking about "reasonable doubt," "presumption of innocence," and "burden of proof." While these are certainly relevant considerations in an academic sense, the verdict handed down by a jury is usually based on more down-to-earth concerns:

1. "Did he do it?"

and

2. "Will he do it again if he gets out?"

A good story that addresses these questions will go much further towards persuading a jury than will the best-intentioned presentation about the burden of proof or presumption of innocence.

ETHICS NOTE: When we talk about storytelling, we are not talking about fiction. We are also not talking about hiding things, omitting bad facts, or making things up. Storytelling simply means taking the facts of your case, and presenting them to the jury in the most persuasive possible way.

What Should the Story Be About?

A big mistake that many defenders make is to assume that the story of their case must be the story of the crime. While the events of the crime must be a part of your story, they do not have to be the main focus.

In order to persuade the jury to accept your theory of defense, your story must focus on one or more of the following:

Why your client is factually innocent of the charges against him.

Your client's lower culpability in this case.

The injustice of the prosecution.

How to Tell a Persuasive Story

I. Be aware that you are crafting a story with every action you take.

Any time you speak to someone about your case, you are telling a story. You may be telling it to your family at the kitchen table, to a friend at a party, or to a jury at trial, but it is always a story. Our task is to figure out how to make the story of our client's innocence persuasive to the jury. The best way to do this is to be aware that you are telling a story, and make a conscious effort to make each element of your story as persuasive as possible. This requires you to approach the trial as if you were an author writing a book, or a screenwriter creating a movie script. You should therefore begin to prepare your story by asking the following questions:

1. Who are the characters in this story of innocence, and what roles do they play?

2. Setting the scene -- Where does the most important part of the story take place?

3. In what sequence will I tell the events of this story?

4. From whose perspective will I tell the story?

5. What scenes must I include in order to make my story persuasive?

6. What emotions do I want the jury to feel when they are hearing my story? What character portrayals, scene settings, sequence and perspective will help the jurors feel that emotion?

If you go through the exercise of answering all of these questions, your story will automatically become far more persuasive than if you just began to recite the events of the crime.

II. "But I Don't Have Enough Time to Write a Novel For Every Case"

We all have caseloads that are too heavy. A short way of making sure that you tell a persuasive story to the jurors is to make sure that you focus on at least three of the above elements:

1. Characters – before every trial, ask yourself, "Who are the characters in the story I am telling to the jury, and how do I want to portray them to the jurors?"

    a. Who is the hero and who is the villain?
    b. What role does my client play?
    c. What role does the complainant/victim play?
    d. What role do the police play?

2. Setting – Where does the story take place?

3. Sequence – In what order am I going to tell the story

    a. Decide what it is most important for the jury to know
    b. Follow principals of primacy and recency:
        i. Front-load the strong stuff
        ii. Start on a high note and end on a high note

III. Once you have crafted a persuasive story, look for ways to tell it persuasively.

You will be telling your story to the jury through your witnesses, cross-examination of the State's witnesses, demonstrative evidence, and exhibits. When you design these parts of the trial, make sure that your tactics are tailored to the needs of your story.

A. The Language You Use to Communicate Your Story is Crucial

1. Do not use pretentious "legalese," or "social worker-talk" You don't want to sound like a television social worker, lawyer or cop.

2. Use graphic, colorful language.

3. Make sure your witnesses use clear, easy-to-follow and lively language.

4. If your witnesses are experts, make sure they testify in language that laypeople can understand.

B. Don’t Just Tell the Jury What You Mean – Show Them

1. Don’t just state conclusions, such as “the officer was biased,” or “my client is an honest man.” Instead, show the factual jury vignettes that will make the jurors reach those conclusions on their own.

2. Use demonstrative evidence to make your point.

3. Create and use charts, pictures, photographs, maps, diagrams, and other graphic evidence to help make things understandable to the jurors.

4. Visit the crime scene and any other places crucial to your theory of defense. That way when you are describing them to the jury, you will know exactly what you are talking about.

Creating a Theory of Defense

A theory of defense is a short written summary of the factual, emotional, and legal reasons why the jury (or judge) should return a favorable verdict. It gets at the essence of your client's story of innocence, reduced culpability, or unfairness; provides a roadmap for you for all phases of trial; and resolves problems or questions that the jury (or judge) may have about returning the verdict you want.

Steps in creating a theory of defense

Pick your genre

1. It never happened (mistake, setup)
2. It happened, but I didn't do it (mistaken id, alibi, setup, etc.)
3. It happened, I did it, but it wasn't a crime (self-defense, accident, elements lacking)
4. It happened, I did it, it was a crime, but it wasn't this crime (lesser offense)
5. It happened, I did it, it was the crime charged, but I'm not responsible (insanity)
6. It happened, I did it, it was the crime charged, I'm responsible, so what? (jury nullification)

Identify your three best facts and three worst facts

- Helps to test the viability of your choice of genre

Come up with a headline

- Barstool or tabloid headline method

Write a theory paragraph

- Use your headline as your opening sentence
- Write three or four sentences describing the essential factual, emotional, and legal reasons why the jury (or judge) should return a verdict in your favor
- Conclude with a sentence describing the conclusion the jury (or judge) should reach

Develop recurring themes

- Come up with catch phrases or evocative language as a shorthand way to highlight the key themes in your theory of defense and move your audience

CROSS

CROSS-EXAMINATION SKILLS

Fred T. Friedman
Chief Public Defender
Sixth District
Minnesota
218/733-1027
218/733-1034 (fax)

CROSS-EXAMINATION PURPOSES

Cross-examination is the process of questioning an adverse party or witness. Cross-examination questions should be limited to those which reveal information necessary to support statements made in the closing argument. Cross-examination usually consists of narrow, leading questions calling for "yes" or "no" or specific answers. There are exceptions to this generalization which are most likely to occur during supportive cross-examination. Careful consideration must be given, however, before open-ended questions are asked on cross-examination.

Cross-examination serves two primary purposes:

Destructive Cross. Cross-examination can be used to discredit the testifying witness or another witness. This may be accomplished in several ways including attacking the credibility of the witness or testimony. Most of the questions asked on cross-examination will be designed to reduce the credibility or persuasive value of the opposition's evidence.

Supportive Cross. Cross-examination can be used to bolster evidence that supports the cross-examiner's theory of the case. Cross-examination may be used to independently develop favorable aspects of the case not developed on direct examination.

PREPARATION AND ORGANIZATION

A. Background. Full preparation, including knowledge of the facts, evidence, law opponent, and witness, will facilitate cross-examination. All available discovery and investigation techniques should be used to learn everything there is to know about the case.

B. Anticipation. Anticipation of the opponent's side of the case is essential. Considerations include what all the witnesses will testify to, how the other side will try the case,

how both sides of the case can be attacked, and what evidence can be kept out under the rules.

C. Scope of Cross-Examination. The scope of cross-examination is limited to questions involving the subject matter of the direct examination or the credibility of a witness. The outside limits of cross-examination fall within the discretion of the trial judge.

If an area of inquiry extends beyond the scope of direct and does not involve credibility, the cross-examiner has at least two options. The attorney can request the judge to permit a broader inquiry, or the attorney can call the witness to testify as an adverse or hostile witness during the presentation of the case in chief or during rebuttal.

D. Credibility. Factors involved in evaluating and attacking the credibility of a witness include bias, interest, association with the other side, motive, experience, accuracy, memory, demeanor, candor, style, manner of speaking, background, and intelligence. See Section 8l5.

The following areas should be considered when weighing the credibility of the testimony:

1. Is the testimony consistent with common sense?
2. Is the testimony consistent within itself?
3. Is the testimony consistent with other testimony presented in the case?
4. Is the testimony consistent with the established facts of the case?

E. Should there be a Cross-Examination? The most important decision in cross-examination is whether to cross-examine. The following should be weighed in making that determination:

1. Has the witness hurt the case?
2. Is the witness important to the other side?
3. Will the jury expect cross-examination?
4. Will it affect the case if no cross-examination is done?
5. Was the witness credible?
6. Did the witness leave something out on direct examination that might get in if there is cross-examination? Was the omission set up as a trap for the inexperienced cross-examiner?

7. Will cross-examination unavoidably bring out information that is harmful to the case?
8. Are questions being asked only for the sake of questions?
9. Does the witness know more than the attorney does about the case?
10. Will the witness be very difficult to control?
11. Has the witness been deposed or given statements?

F. Preparing Written Questions in Advance. Cross-examination is most effective when questions are prepared in advance. Most prepared questions will not be significantly altered during the trial, but an attorney must retain flexibility to adapt to new material or inconsistencies as they arise.

G. Structure. The areas selected for cross should be structured in a way that clearly shows their purpose and helps the fact-finder remember that point. The attorney should begin and end the cross with strong points.

H. Attention. Close attention to the witnesses on direct examination may reveal signs of deception, lack of assurance, or bluffing that can be explored on cross-examination. The attention shown by the jury or judge may also be a clue.

PRESENTATION AND DELIVERY

A. Confidence. A confident attitude will assist in making the cross-examination effective and persuasive.

B. Not Repeating Direct Examination. Generally, repetition of the direct examination only emphasizes the opponent's case. Repetition of any part of the direct that is supportive of the cross-examiner's case, however, may be effective and justify the use of an open-ended question.

C. Leading the Witness. Questions that suggest or contain the answer should be asked on cross. Questions that require "yes," "no," or short anticipated answers help control the witness, so the testimony develops as anticipated. The questions "why" and questions requiring explanations should be avoided because they call for uncontrolled open-ended answers.

D. Simple, Short Questions. Short, straightforward questions in simple, understandable language are most effective. Broad or

confused questions create problems of understanding for witnesses, attorneys, the jury, and the judge.

E. Factual Questions. Questions that seek an opinion or conclusory response may allow the witness to balk or explain an answer. Questions which include fact words and accurate information force the witness to admit the accuracy of the question.

F. Controlling the Witness. The most effective way to control a witness is to ask short factual questions. Some witnesses must be politely directed to respond; some witnesses may require the intervention and control of the judge.

G. Maintaining Composure. An attorney who displays a temper or argues with a witness may irritate the court and the jury, causing them to side with the witness or the opponent and may draw objections.

H. Adopting Appropriate Approach. Some witnesses may require righteous indignation, others may be attacked, but most need to be carefully and courteously led. A cross-examiner can be very effective by being politely assertive and persistent without having to attack a witness.

I. Stopping When Finished. When the planned questions are asked and the desired information is obtained, the attorney should stop. The case may be harmed more by asking too many questions than by not asking enough.

J. Good Faith Basis. An attorney cannot ask a question on cross unless the attorney has proof of the underlying facts. An attorney cannot fabricate innuendos or inferences on cross-examination. The attorney must have a good faith basis which includes some proof of such facts.

K. Witnesses Requiring Special Consideration. Certain witnesses require special consideration in both the formulation and delivery of questions. These witnesses include children, relatives, spouses, experienced witnesses, investigators, experts, the aged, the handicapped, and those with communication problems. Outside resources may be used to assist in developing tactics to deal with special witnesses.

EXPERT WITNESSES

Areas for cross-examination of experts parallel areas for lay witnesses and permit additional areas of inquiry regarding:

1. Their fees
2. The number of times they have testified before
3. Whether they routinely testify for the plaintiff or defendant
4. Their failure to conduct all possible tests
5. The biased source of their information
6. Their lack of information
7. The existence of other possible causes or opinions
8. The use of a treatise to impeach

The cross-examiner must develop absolute mastery of the expert's field before examining the expert in a specific area. A well-constructed concise hypothetical question may be effective if it elicits an opinion contrary to the testimony on direct examination.

IMPEACHMENT

A. Factors. Impeachment discredits the witness or the testimony. To evaluate whether impeachment is appropriate, the following should be considered:

1. How unfavorable is the testimony and how much did it hurt the case?
2. Will impeachment be successful?
3. Is there a sound basis for impeachment and can it be accomplished?
4. Is the impeachment material relevant to the facts or the credibility of the witness?
5. Is the impeachment material within the court's discretion and not too remote or collateral?

B. Sources of Impeachment. The credibility of a witness may be attacked in any number of ways. Many witnesses, however, will not have obvious or apparent weaknesses in their testimony. The following factors represent the more common and frequent matters employed to reduce the credibility of a witness.

1. *Misunderstanding of Oath.* The witness may not understand the oath or know the difference between telling the truth and telling a lie. This situation rarely arises.
2. *Lack of Perception.* The witness may not have actually observed the event, or the witness may have perceived something through the senses (sight, taste, hearing, smell or touch). It can be shown that conditions were not favorable to that perception.
3. *Lack of Memory.* The witness may not have a sound, independent memory of what was observed.
4. *Lack of Communication.* The witness may be unable to adequately communicate what was perceived.
5. *Bias, Prejudice, or Interest.* The witness may have a personal, financial, philosophical, or emotional stake in the trial.
6. Prior Criminal Record. The witness may have a prior criminal conviction which may be admissible. See Fed.R.Evid. 609. Local law and practice may limit the use of the information.
7. Prior Bad Acts. The testimony concerning a witness' prior bad conduct may sometimes be used to impeach a witness if it is probative of untruthfulness.
8. Character Evidence. A witness may be impeached by a character witness who is familiar with the reputation of the witness for truth and veracity or who has an opinion regarding the truthfulness of the witness. See Fed. R. Evid. 608(a).
9. Prior Inconsistent Statements or Omissions. The witness may have made former contradictory or inconsistent oral statements or may have omitted some facts during previous testimony or in a prior statement. If the witness denies these prior statements, a copy of the statement or another witness may be needed to prove them.

C. Extrinsic Evidence and Collateral Matters. An attorney may be able to introduce extrinsic evidence if a witness denies a cross-examination impeachment question. Extrinsic evidence is evidence introduced through a source other than the witness, such as another witness or document. Whether extrinsic evidence is admissible depends on whether the facts are "collateral" or "non-collateral" to the case. A matter is collateral and not admissible if it has no connection to the case. A matter is non-collateral and admissible if it has a relationship to the case.

D. Use of Inconsistent Statements for Impeachment. The statements must be inconsistent or contradictory to be used. The document referred to must be available to prove the

inconsistency. Federal Rule of Evidence 613 provides the option of not showing the prior statement to the witness, but this option may be altered by tactical considerations or by local rule or practice.

The introduction of prior inconsistent statements or omissions usually include three phases:

1. The cross-examiner commits the witness to the direct examination testimony. This may be done by having the witness repeat the testimony to reaffirm the evidence.
2. The cross-examiner next leads the witness through a series of questions describing the circumstances and setting of the prior inconsistent statement.
3. The cross-examiner then introduces the prior inconsistency. This may be done in several ways. The attorney may read from the prior statement or have the witness read it.

A fourth possible stage involves the attorney exploring both statements with the witness, but this may provide the witness with a chance to explain the discrepancy.

If the witness admits the prior statement, the impeachment process is concluded. If the witness denies the prior statement, the exhibit should be marked, identified, and offered as evidence. Proper foundation must be laid for its admission.

The opposing lawyer can request that other portions of the prior statement be introduced contemporaneously with the impeaching testimony to prevent a cross-examiner from introducing selective facts out of context. See Fed. R. Evid. 106. On redirect the opposing lawyer will usually have the witness explain or clarify any discrepancy or rehabilitate the witness with a prior consistent statement, if available. See Fed.R.Evid.801(d)(1)(B).

e. Cross-examination of Character Witness. Character witnesses may be impeached like any other witness. They may also be cross-examined regarding their knowledge of specific instances of bad conduct by the person whose character they praised. Some jurisdictions limit the specific acts of areas that are probative of the untruthfulness of the person. See Fed.R.Evid.608(b).

ADDITIONAL CONSIDERATIONS--THE TEN COMMANDMENTS

Irving Younger’s Ten Commandments for cross-examination are worth remembering:

1. Be brief
2. Ask short questions and use plain words

3. Never ask anything but a leading question
4. Ask only questions to which you already know the answers
5. Listen to the answer
6. Do not quarrel with the witness
7. Do not permit a witness on cross-examination to simply repeat what the witness said on direct examination
8. Never permit the witness to explain anything
9. Avoid one question too many
10. Save it for summation

These suggestions will not be applicable to all cases and all situations. The cross-examiner who has a legitimate reason for asking a question – whether or not that reason "violates" one of the ten commandments – will conduct an effective cross-examination.

AVOIDING MISTRIALS AND REVERSALS

A. Do Not Harass or Embarrass the Witness. Using accusatory questions to seek answers that would harass or embarrass witnesses, even though true, and which are irrelevant to the issues in the case is unethical. DR 7-106(C)(1),(2); Model Rule 3.4; see also Fed R.Evid.611(b). For example, in a motor vehicle accident case, defense counsel bringing out that the plaintiff's child is illegitimate is unethical.

B. Avoid Innuendoes Based on Untrue Facts. Since the lawyer is allowed to use leading questions during cross-examination, there is a great opportunity for abuse. Questions might be asked which discredit a witness before the witness even answers. This can be accomplished by sneers and innuendoes as well as by asking questions that the lawyer knows cannot be proved by any evidence.

C. Do Not Elicit Irrelevant and Prejudicial Responses. Other questioning may not be harassing or damaging to a particular witness, but may be irrelevant and so prejudicial as to warrant a new trial. For example, in a wrongful death action, it is unethical for the plaintiff's attorney to ask the defendant's expert witness if he didn't say to the plaintiff's attorney, off the record during the deposition, that plaintiff's attorney "had a good case and knew it."

The Basics of Cross-Examination

The Purpose of Cross-Examination:
Obtain FACTS that will be used in closing argument (*as opposed to making a closing argument during cross-examination*). [There is crucial difference between eliciting facts from a witness and making an argument to a jury based upon those facts.]

I. Preparation

1) List all of the facts you need from each witness.

2) Organize, by topic, how you want to elicit (or present) the facts. Use one page for each topic or major fact (i.e., the "chapter" method).

3) On each page, list all of the predicate (or foundation) questions required to get the fact or cover the topic.

II. Courtroom Technique

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

2) Always ask leading questions.

3) Always ask one-fact questions.

DIRECT

DIRECT EXAMINATION:

"ALLOWING OTHERS TO HELP TELL THE STORY"

July 2006

Prepared by and reprinted with the permission of Phyllis Subin and Dan Shemer

I. A Few Key Concepts

A. Persuasive Storytelling: The Goal of direct examination is to persuasively have others tell your story or to discredit the prosecutor's case.

B. The SIX Ps: **"P**roper **P**reparation **P**revents **P**iss **P**oor **P**erformance**!"** (John Delgado, Esq.)

C. **Advances the Theory of Defense**

D. You must have an **"AURA"** about yourself:

A = **ATTENTION** Get and Keep Your Jurors' **ATTENTION**.
U = **UNDERSTAND** Make Sure The Jurors **UNDERSTAND** Your Witness' Testimony.
R = **REMEMBER** Make Sure The Jurors **REMEMBER** Your Witness' Testimony.
A = **ACCEPT** Make Sure The Jurors **ACCEPT** Your Witness' Testimony.

E. Keep the **Jury in Mind**

1. What you do must be considered from the perspective of the jury (or your trier of fact).

2. Try viewing your ideas through the eyes and minds of your potential jurors.

3. While delivering your direct, always consider the juror's ability to see, hear, understand, etc.

F. YOUR Witness: The witness is in your possession and it is your responsibility to do all you can to ensure that your witness' testimony is successful.

G. Persuasion

1. Communication is 65% non-verbal.

2. Use non-verbal communication (body language, key words, tone, pitch, pace, movement, gestures, etc.) to <u>reinforce</u> your message.

3. If you communicate one message with your words and a different one non-verbally, the trier of fact will believe the non-verbal message or not know which one to believe.

H. Your witness is the Attraction: On cross examination, the focus is on you. On direct, the focus must be on your witness

II. Do I Put <u>This</u> Witness On?

A. Does your theory of defense require you to put on this witness?

1. Test your theory of defense with this witness and without. Which is better? Why?

2. Benefits of calling this witness

    a. Directly supports your theory of defense
    b. Damage the prosecutor's version.
    c. Corroboration by witness supports theory.

3. Benefits of NOT calling this witness

    a. Good defense witnesses can help. Bad defense witnesses can destroy. Weigh the benefits against possible damage. Do you need it? Is it valuable enough?
    b. Keeps spotlight on the prosecution's case. Limits prosecutor's case and arguments.
    c. Even truthful witnesses may not be believed.
    d. Defense witnesses can fill or fix holes in the prosecutor's case.

B. Choose quality over quantity.

1. Put up the best evidence and witnesses to back up your theory of defense.

2. Having the body to say the words, does not make a defense. They must say it well!

III. INVESTIGATING For Direct Examination

A. Investigation concepts.

1. Investigation Fact finding

    a. What are the facts? What does the witness have to say?
    b. Does the witness seem credible? Will s/he be a good witness?
    c. Help decide theory of defense?

2. Investigation Fact development

    a. Find facts that support or enhance your theory of defense.
    b. Seek details that make the witness' testimony real and believable.
    c. Collect corroborating documentation and locate other supporting witnesses.

B. What do you need to know about your witness? **EVERYTHING.**

1. **History (background**) - educational, employment, military, family, criminal history, religious affiliations, health, vision problems, hearing problems, etc.

2. **Relations -** to client, other parties, witnesses, relatives of witnesses or parties

3. **Knowledge** - facts of the case, other witnesses or other parties, source of knowledge and reason for recollection

4. **Quality** - demeanor and attitudes, intelligence, willingness to cooperate, communication skills, ability to survive cross examination, etc.

5. **Actions** - With whom has this witness spoken about the case? police? prosecutor? written statements? contact with other witness? nature of that contact?

C. Is this witness essential to the theory of defense or case?

1. Is there a less dangerous means of presenting the evidence than through a witness who may be subject to cross examination? A document? A less "attackable" witness?

2. Is the witness' testimony cumulative, trivial or peripheral?

IV. PREPARING The Direct Examination: 13 STEPS

Once you have decided that your theory of defense allows and requires to call *this* witness, you must have an organized method of preparing. There are many methods of preparation. What follows is one method. It is one method of many, but it is one that may work for you. Whether you use this one or another is immaterial, so long as you develop one that works for you.

A. STEP 1: Review Everything

1. Read everything document in the file. Then re-read everything that you have about this witness.

2. **"Stream of consciousness note taking"** - anything that pops into your mind about this witness or this witness' testimony should be jotted down. By writing down these thoughts and ideas, you preserve your initial reactions, as well as those flashes of brilliance (that arrive invariably while you are in the shower!) about trial tactics and direct examination techniques that will be perfect for this case and/or this witness.

3. Brainstorm with others – including others who are not lawyers.

B. STEP 2: Juror Questions and Emotions Lists

1. **Anticipate the jurors thoughts about and reaction to your witness and your witness' testimony. (Assess your witness).** This includes the factual thoughts and the "gut" or emotional reactions.

2. **Juror Questions List**

   a. What questions will “normal” people i.e. non-lawyers ask about this witness? about the witness' testimony? What are the motives of the witness?
   b. **Write them down.**
   c. Which questions work for you? against you?

3. **Juror Emotions List**

   a. What will the jurors "feel" about your witness and his/her testimony?
   b. **Write them down.**
   c. Which emotions work for you? against you?

C. **STEP 3: Determine your Objectives**

1. How will this witness advance your theory of defense?

2. What are your **legal, factual, emotional and "believability enhancement" themes and objectives with this witness?**

3. **Factual Themes**

   a. What do you want the jurors to believe after hearing from this witness?
   b. Every objective must advance your theory.
   c. Develop objectives that appeal to people, not lawyer.

4. **Emotional Themes**

   a. How do you want the jurors to **feel** when the witness is finished testifying?
   b. What words would you like them to use to describe the witness?
   c. Emotional objectives must advance your theory.

5. **"Believability Enhancement" Objectives**

   a. Make the witness be and appear to be believable in the eyes of your jurors.
   b. What facts can you bring out? What things can you have the witness do? What can you do to make this witness more believable?
   c. Develop in the jury one of the following reactions: **Identification,** "The Witness is like me;" or **Understanding,** "The Witness is nothing like me, but I understand how s/he came out that way."
   d. Create a connection between the witness and juror i.e. “That’s what I would have done.”

6. **Legal objectives**

   a. Is this witness necessary to establish a legal point?
      - the absence of an element?
      - an affirmative defense?
      - to generate an issue?
      - to lay an evidentiary foundation?
   b. List the legal point(s) that must be established.
   c. List the legal point(s) that <u>this witness</u> must establish.
   d. List the facts that this witness must testify to, to satisfy the legal objective(s).

7. Re-evaluate and Reduce

   a. We all have limited attention spans. Re-evaluate your objectives, reducing them to the essentials. Discard any that you believe are not important.
   b. Select, from among all of the objectives lists, only those objectives that are critical for this witness.

D. **STEP 4: Marshal the facts**

1. Ask yourself, “what am I trying to achieve, and why?”

2. For EVERY THEME, list EVERY SUPPORTING FACT.

3. Consider every fact in the case in light of the particular theme. Repeat this process for each objective, going through the facts over and over, considering the next objective each time.

4. Don't settle for just the obvious facts. Develop reasonable and logical extrapolations.

5. Ask yourself: Which facts lead you to believe that the stated objective is true. Write those facts down. Then look for more!

6. Marshaling the facts develops depth and believability in your theory. It provides new facts that support your objectives that had not been identified before.

E. **STEP 5: Develop story(s), images and key words**

1. Identify and develop the **witness' story(s)** and develop **key words.**

2. Whatever information you want the witness to convey, put it in story form.

3. **Why Stories?**

   a. Stories create and maintain interest.
   b. Stories provide a context into which the jurors may understand and place the facts. It allows the jurors to discern which facts are important and which are insignificant.
   c. Stories enhance recall.
   d. Stories encourage empathy and increase believability.

4. **Identify the witness' story(s).**

   a. A single witness may have one or several relevant stories. Whatever the witness has to offer, be it short or long, consider how to present it in story form.
   b. Gives your jurors a better sense of the witness and makes the witness more "real".
   c. You work with the witness as they are the storyteller. The lawyer's role is that of facilitator.

5. **Develop key words**

   a. "Words Are Magic". Maximize the effectiveness of a witness' testimony e.g. "scared" or "in fear" is less compelling than "terrified," or "I knew I was about to die."
   b. Consider the best words and the worst words that the witness can use. The witness must use the best language to make their point and avoid the bad phrases.
   c. Develop word that **maximize or minimize** the desired impression.
   d. Develop descriptive, poetic language.

F. **STEP 6: Organize persuasively**

1. Organize your themes and your witness' story(s) persuasively and effectively. Organization is a key tool of persuasion.

2. Where To Begin Your Direct

   a. Traditional Organization**:** Ease-In
      - Allows the witness to get comfortable on the stand.
      - Allow the witness to ease into the testimony.
      - Allows the witness to get over the nervousness of being on the stand.
      - Allows better communication of the important points better.

   b. Modern Organization: Primacy and Recency
      - We remember best what we hear first and last.
      - Jurors will perceive the first and last points as most important.
      - Identify your best one or two points. This points should be the first and last points you have the witness make.
      - Consider starting with questions that establish the theme of the witness' testimony superficially, turning to background information and returning to the theme.

3. Other Organizational Issues

   a. Background / Scene / Action organization - This approach is logical and easy to follow.
      (1) Witness background
      (2) Event background
      (3) Scene of the action described
      (4) Action described
   b. Logical progression of your questions; from general to specific
   c. Complete a topic before moving to another.

4. Do you disclose weaknesses?

   a. The **"majority opinion**" recommends that you disclose weaknesses to maintain credibility and take the "sting" out of disclosure by the adversary. The disclose must be made in a way that reduces the impact of the weakness.
   b. The **"minority opinion**," sometimes referred to as the "sponsorship" theory, recommends that you do not disclose weaknesses because doing so increases, rather than reduces, the impact of the weaknesses. "If they are admitting that much, imagine how bad it really is" is representative of this view.
   c. **If you do plan to disclose weaknesses**, consider the following:
      - Place it in the middle where it is least likely to have a major impact and least likely to be remembered.
      - Only disclose weakness that you are sure will come out.
      - Present the **good stuff before the bad stuff.**
      - Present the weakness in the best possible light.
      - Attempt to reasonably minimize the weakness by using minimizing words and questioning about it briefly.

G. **STEP 7: Anticipate cross examination**

1. Anticipate the weaknesses in witness' attitude, testimony and history for cross examination.

2. What are the weaknesses of this witness?

    a. Easily riled?
    b. Have an "attitude?"
    c. Will s/he hold up on cross?
    d. Does s/he answer well, volunteer too much or shade the answers?

3. What are the weaknesses of this witness' testimony?

    a. Holes in the story
    b. Unbelievable story
    c. Absence of expected corroboration

4. What attitude/demeanor do you anticipate from the prosecutor during cross.

H. **STEP 8: Prepare re-direct examination**

1. Be very careful with re-direct. Use it to rehabilitate or introduce something that is necessary and failed to introduce during direct (if you can).

2. Re-direct can be dangerous. Because it is difficult to plan the result, often questions that are unartfully crafted, open doors, and permits re-cross providing the prosecutor with another chance to hurt your client and the witness.

3. If re-direct is necessary be brief. It is not necessary to refute or respond to every point made by the prosecutor on cross examination. Stick to the important ones.

I. **STEP 9: Prepare Your Trial Props**

1. Doing things and using things during the trial heighten interest, clarify facts, increase recall and promote acceptance.

2. Using slides, videos, pictures, etc., or moving around during the presentation usually is more interesting than just standing still and talking. Appeal to the jurors' senses.

3. Use actions and creations during trial

    a. Use re-enactments, demonstrations by the witness
    b. Create and use maps, diagrams, pictures, things written on flip charts
    c. Rebuild the interrogation room where your client confessed in the courtroom.
    d. Use clothing, toy guns, knives or weapons similar to the ones involved in the case. Use Sweet N' Low packets to show a gram of cocaine, or an ounce of oregano to show an ounce of marijuana. Such things help illustrate the witness' testimony.

J. **STEP 10: Prepare the other parts of the trial to aid your direct examination**

1. The trial is an "integrated whole." Each part of the trial should be used to support and advance the other parts of the trial and the theory of defense.

2. Think about how each part of the trial can be used to aid the testimony of this witness. The other part of the trial may be used to undercut anticipated cross, to minimize weaknesses, to corroborate strengths, etc.

    a. What **pre-trial motions** can/must be filed to aid the direct examination of this witness?
        - During a suppression motion, "lock down" a witness' testimony that will corroborate the direct of a defense witness.
        - File a Motion In Limine to determine whether a particular defense witness' prior conviction or an item of evidence will be admissible.
    b. What **voir dire questions** can be asked to aid the direct examination of this witness?
    c. What **types of jurors** are most desirable considering this witness and his/her testimony?
    d. What can/must be said in **opening statement** to aid the direct examination of this witness?
    e. What **cross examination** of state's witnesses can/must be conducted to aid the direct examination of this witness?
    f. What **jury instructions** can/must be requested/given to aid the direct examination of this witness?
    g. What must be said in **closing argument** to aid the direct examination of this witness?

K. **STEP 11: Prepare your <u>questions</u>**

1. Review your themes & objectives lists and marshal the facts sheet.

2. Should you write out your questions for each theme? It depends on your organizational style.

    a. Writing out your questions can be beneficial however it is time consuming and may prevent you from actually listening to the answers.
    b. It requires you to think about the best way to ask the question. It also encourages better use of good key words.
    c. If you don't write out your questions, write out the themes and facts that must be covered.
        - Use a separate page for each theme / objective (Posner and Dodd)
        - Easy to re-organize or discard.

3. Choreograph the direct

    a. Build movement into your direct. The absence of movement during the direct will add to the boredom potential substantially. Movement adds interest to the exam.
    b. Plan when, where and how YOU and YOUR WITNESS will move.
    c. Plan how to use your voice; loud, soft, when to use the appropriate tone of voice, etc.

L. **STEP 12: Practice**

1. Practice your questions and practice with props and demonstrations.

2. If you don't practice out loud, alone or in front of someone else, at least, go through the questions and movements in your head. Ideally, ask a friend, spouse, etc. for feedback. If not, a mirror will do.

3. Sometimes ideas that seem wonderful in your mind or on paper, don't work when given sound. Try it, and find out before you are standing before a jury.

4. Practice demonstrations and practice with demonstrative aids or items of tangible evidence. A great demonstration about the ease of misfiring a gun may fall flat if you can't get the gun open when standing before the jury.

M. **STEP 13: Tune-up**

Review and refine your direct examination. This is the time to tighten-up your examination, to add anything necessary, to discard anything unnecessary, etc.

V. PREPARING <u>Your Witness</u>:

N. General thoughts

1. **The witness stand is an alien environment.** It has strange rules, a foreign language and an odd Q & A style of communication. Keep this in mind when preparing the witness for testimony.

2. **Don't forget to ask your witness.** S/he may have good suggestions and insights about what will work.

3. **Explain why**. Your witness must understand why everything that s/he is to do or say is necessary. If your witness understands "why", s/he will respond better on direct and cross.

O. **STEP 1: The Basics**

1. **Logistics**

   a. The physical layout of the courtroom
   b. Courtroom location, number, directions, etc.
   c. Court reporters, sheriffs, bailiffs, jail guards, etc.
   d. Time to arrive, where to wait, what to do upon arrival, who will meet the witness
   e. How the witness will be called into the courtroom, the oath, etc.

2. Basics of law, procedure and evidence

P. **STEP 2: Explain Witness' Role**

1. Explain your **theory of defense**, the **witness' role** in that theory and it's **importance.**

   a. If the witness understands the **big picture,** this will help the witness to know what is important to tell you and tell the jury.
   b. **Beware** giving too much detail or explaining too much to a potentially hostile witness, as they may use this information against you or tell your adversary what they learned.
   c. Your explanation should clarify what information is required of the witness, how it fits in with the overall theory and why it is important.

Q. **STEP 3: Discuss Appearance and Communication Skills**

1. Refine the witness' appearance and communication skills.

2. Discuss how to dress for court

   a. Proper dress is about **respect** for the court, the trial process and the jury.
   b. Be **specific.** Don't merely say, "Dress nicely," or "Wear what you would wear to worship services."

3. **Discuss non-verbal communication and refine these skills**

   a. May require **Q & A sessions**
   b. **Explain** what non-verbal communication is and its **impact**
      - what the jurors believes
      - the jurors' impression of the witness
      - believability
   c. **Body language**
   d. **Voice and manner**
      - volume - loud enough for the farthest juror to hear
      - tone - should be conversational but congruent with the content of the testimony
      - polite, always polite
      - pause before answering to ensure that the question is completed; to ensure that witness understands the question and, on cross, to permit you to object
      - Nervousness is OK - Acknowledge witness' reality
   e. **Words Choice**
      - Encourage **Simple words** - "bar" talk, per Terry MacCarthy e.g. "Told me" rather than "indicated"
      - Encourage **Fact words** - not opinions, characterizations or conclusions; "6'2" and 240 lbs." rather than "big"; "Light blue button down shirt, khaki pants and docksiders" rather that "preppie attire"
      - Encourage **Power words** - Words that communicate certainty.
      - Avoid **Hedge words** (I think, probably, I submit, we contend, etc.)
      - Avoid **Unnecessary intensifiers** (really, very, extremely, etc.)
      - **Hesitations or filler words** (ah, ladies and gentlemen, well, etc.)
      - **Question intonation** (when your voice goes up at the end of a sentence)

R. **STEP 4: Review Prior Statements**

1. Review all of the witness' prior statements with your witness.

2. Let your witness read all of his/her prior statements, especially those given to the State.

S. **STEP 5: Practice Questions and Answers**

1. Practice and refine your questions and answers with the witness.

2. Encourage **NARRATIVE ANSWERS** by the witness

3. **Conduct a mock direct examination** session with your witness.

    a. **Ask the exact questions** and explain why you are asking those questions; don't merely talk about the topics you plan to ask about.
    b. **Get the exact answers the witness will give** - as they will answer in the courtroom.
        - Improve the quality of the answer - The answer may not be clear, may not bring out all of the facts, use poor language, include irrelevant information, etc. You must help the witness answer clearly and effectively.
        - You are not putting words into the witness' mouth. You are ensuring that the words that do come out are clear, complete and effectively communicate the information.

4. Tell the witness to look at the jury, where appropriate or at the questioning lawyer.

T. **STEP 6: Practice Cross and Re-direct**

1. Prepare your witness for **cross examination and re-direct** examination.

2. **Explain "typical" cross examination objectives and tactics**.

    a. Leading questions
    b. Attempts to limit the witness to "yes" or "no" answers
    c. Efforts to show that the witness is unsure, mistaken, biased or lying
    d. Efforts to show that the witness is not reliable or a believable person
    e. Efforts to get the witness upset or angry, in the hope that the witness will appear violent, rash, less believable, or will say something foolish or wrong.

3. **Explain "typical" cross examination techniques** that you expect will be used.
    a. Asking about the witness' recollection about other days around the time of the crime.
    b. Asking why didn't the witness tell this information to the police.
    c. Asking how does the witness recall this particular date.
    d. Exploiting the witness' relationship with the client to suggest that the witness is lying.
    e. Making big issues out of minor variations or inconsistencies with the testimony of others witnesses or with the witness' prior statements.
    f. Asking the "lying then or lying now" question.
    g. The old, "You say A. Witness X says B. Is Witness B lying or mistaken?" technique.
    h. You discussed this information with the defense attorney and others and were told what to say.

4. **Explain <u>this</u> prosecutor's anticipated cross examination objectives and why.**

5. **Practice cross Q & A session.**

    a. Have someone else play the prosecutor's role. Don't take it easy on the witness.
    b. Consider several different styles - an aggressive, fast paced, in-your-face style or a friendly disarming pleasant style cross.

6. **Explain the rules of re-direct and your objectives.**

    a. Explain your **objectives,** why and how they fit in with the theory

b. Conduct a **Q & A** session for the re-direct questions.

VI. DELIVERING Your Direct Examination.

U. Remember your **"AURA"** and being **jury centered**!

V. **Your Organization - Start Well**

1. **Traditional or modern "primacy" approach**

2. **Primacy** - You may start with the **ultimate question.**

3. **Traditional** - You may wish to **ease in** to the exam

W. **Your Movement, Body and Voice**

1. **Your movement**

a. Movement **adds interest.** Exciting movies aren't called "action" pictures for nothing!
b. Your movement should **not detract** or distract attention from the witness
c. Your movement should be intentional. **Limit** your movement.

2. **Your witness' movement**

a. **Build in** as much movement of this witness as is possible e.g. witness draw diagrams, show photos, demonstrate actions, handle exhibits, etc.
b. Good witness? Get him or her off the stand and as close to the jury as much as possible.

3. **Your Voice**

a. A lack of variety in the examination makes any direct **boring.**
b. Inflection in your voice will create interest. If your tone of voice is monotone, your witness will begin to answer in the same monotone. If you sound interested, your witness will sound interested and be more interesting to your jurors.
c. **Variety in your voice:** Pace, tone, volume, pitch
d. **Belief -** Your belief in your witness must come across. If you do not believe your witness, do not put the witness on the stand.

4. **Congruity**

a. You and your questions must be congruent. Your tone, volume, pace, word choice, etc. must be congruent with the content of the question and the content of the witness' testimony.
b. **Mirror the emotion**
c. Your pace, tone, etc. must be congruent with the message

X. **Basic Questioning Thoughts and Techniques**

1. **Main objective: Get THE WITNESS to speak**. The witness must be the focus of attention, not the attorney.

2. **LISTEN** to your witness and her answers.

3. **Avoid Prosecutorial techniques**

   a. The "What, if anything,..." questions.
   b. The "And then what happened?" or the "What happened next?" questions.
   c. These are examples of being unprepared

4. **Simple and short questions**

   a. **Single issue** or single point per question
      - Avoid compound, long questions
      - Simple questions are understood easily by your witness and your jurors.

5. **Open-ended questions**

   a. Ask questions that seek and solicit a **NARRATIVE** response.
   b. **Journalism questions** - Ask questions that begin with **who, what, when, where, why, how, tell us, describe, explain**, etc. These are the questions that will let the witness speak, the objective of direct examination.

6. **Leading questions? RARELY.**

   a. Leading questions reduce your and your witness' credibility and the impact of the witness' testimony because it appears that you are putting words into your witness' mouth.
   b. Leading <u>sometimes</u> is okay
      - Preliminary or inconsequential matters
      - Hostile witness

7. Avoid or clarify **"quibble"** words

   a. "Quibble" words are unhelpful qualifiers and words that are subject to interpretation. Unhelpful qualifiers are words like very, really, extremely, so, etc.
   b. Words that are subject to interpretation usually are adjectives, such as upset, big, fast.
   c. These words do not clearly define the testimony for the trier of fact. How upset is upset? Is really upset any clearer?
   d. Prepare your witness not to use these words. Prepare them to offer the facts instead. If they do use them, ask a clarifying question.

8. **Transitions**

   a. Transitions are used to let everyone know that you are changing the subject or to highlight an important question or answer.

b. **Pauses**

- Those golden moments of silence in the courtroom, the ones that terrify lawyers. Those moments of silence are powerful weapons and should be used.
- A moment of silence between topics signals a change in the subject matter of the questions to the witness and the trier of fact.
- Silence lets the good stuff sink in and lets the jurors think about and **feel the emotional impact** of the testimony

c. **Headlines**

- Use to **change topic or objectives**
- **Orient the jurors** and make the testimony easier to follow
- **Orient the witness** and make the questions easier to answer e.g. "I'd like to ask you about the lighting in the alley"; "Lets talk about the moment when you first saw Mr. Violent."; "Can I stop you right there. What was going through your mind at that moment.";"I have some questions about your relationship with Mr. Smith."

9. **Avoid "recollection stage" of questions and answers.**

a. The recollection stage, ("Do you recall seeing....") can lead to confusing and inefficient responses.
b. For example, if you ask "Do you recall if the person had a moustache?" and the witness says "No," does the witness mean that she didn't see a moustache or that she doesn't recall seeing a moustache or doesn't recall whether the person had a moustache or not. To avoid the problem, leave the "do you recall" part of the question out.
c. Further, including this stage in the question suggests uncertainty. If the question suggests uncertainty, the witness may become or appear uncertain.

Y. Advanced Questioning Thoughts and Techniques

1. **Present tense questions**
   a. Ask questions in the present tense, rather than the past tense.
   b. This techniques adds interest and immediacy to your witness' testimony. If you ask the questions in the present tense, the witness will begin to answer in the present tense.
   c. Q: Where were you on May 2, 1993 at 1 a.m.? A: I was in Red Alley.
      Q: Now Mr. Client, it <u>is</u> May 2, 1993 at 2 a.m. in Red Alley. What <u>are</u> you doing?
      A: I am standing there and this big guy is walking toward me.

2. **Sense questions**

a. Ask questions that seek answers that focus on the **senses**. These questions seek evocative answers to which the trier of fact will relate.
   - **Hear**
   - **See**
   - **Smell**
   - **Taste**
   - **Touch**
   - **Feel physically**
   - **Feel emotionally.**

b. Focusing on colors and familiar objects at the scene will make the scene come to life f or the jurors.

3. **Looping technique**

   a. Use the words of a question or answer in a succeeding question or questions.
   b. These can be planned and/or spontaneous.
      Q: How big was the man? A: He was 6'2" and weighed about 225.
      Q: What was the 6'2", 225 lb. man doing when you saw him? A: Hitting Mr. Client.
      Q: When the 6'2", 225 lb man was hitting Mr. Client, what was Mr. Client doing?

4. **Juror's Voice Technique**

   a. Ask the questions that are in the jurors' minds. (See your "juror questions list")
   b. Ask the questions using the same words and the same tone of voice that the juror would use if asking the question. Hear it in your head.
   c. You become the juror's representative. The jurors will come to rely on you to ask the things they want to know. This also takes the sting out of the prosecutor's points
   d. For example:
      Q: How could you have seen it wasn't Mr. Client when you were driving the car at the same time as you say you were watching the fight?
      Q: How could you possibly recall such details about a single day 14 months ago?
   e. A well prepared witness will knock these questions out of the ballpark!

5. **Jury instruction questions.** Use the language of the anticipated jury instructions in framing questions and refining answers.

6. **"What were you thinking / feeling" questions**

   a. Ask questions that disclose the witness' thoughts, feelings and motivations, particularly at the critical time for the witness.
   b. These question humanize the witness and help juror identification.
      Q: "As you saw the person being robbed, what were you thinking?"
      Q: "When you heard that your son was charged with shooting someone on Saturday, May 3, what went through your mind?"
      Q: "You told us that he came at you with a knife. What were you feeling at that moment?"

7. **Emphasis**

   a. Highlights, clarifies and adds interest
   b. Placing **emphasis** on a particular word in a sentence can change the meaning or focus of the question.
      Q: **WHERE** was Fred when you first saw him?
      Where **WAS** Fred when you first saw him?
      Where was **FRED** when you first saw him?
      Where was Fred **WHEN** you first saw him?
      Where was Fred when **YOU** first saw him?
      Where was Fred when you **FIRST** saw him? etc.

c. **Pausing** after a particular word in a sentence can change the meaning or focus of the question.
   Q: Where..... was Fred when you first saw him?
   Where was..... Fred when you first saw him?
   Where was Fred..... when you first saw him?

8. **Flagging** a question will give it emphasis.

Q: "Now, Mr. Witness, this question is very important, so please listen carefully before answering...."
Q: "What is the one thing that stands out most in your mind?"

9. **Stretch out / shrink down technique**

a. The **"stretch out"** technique seeks to maximize the impact of information by "stretching out" answers. It can be used to make something big seem bigger, something far seem farther, something slow seem slower, etc. For example:
   To show that the client stood <u>far</u> from the shooting and, therefore, was not involved;
   Q: You told us that Mr. Client was across the street from where the shooting took place. I'd like to ask you about how far away he was. First, is there a sidewalk?
   Q: How wide is it?
   Q: Is there a lane where cars park on the south side of the street?
   Q: How many lanes of traffic going south?
   Q: How many lanes of traffic going north?
   Q: Is there a lane where cars park on the north side of the street? etc.

b. The **"shrink down"** technique seeks to minimize the impact of information by "shrinking it down." It can be used to make something fast seem faster, something minor seem even more minor, something close seem closer, etc. For example:
   To show client stood <u>close</u> to the shooting and therefore, was not involved:
   Q: You told us that Mr. Client was across the street from where the shooting took place. How close was he to Mr. Decedent at the time the shots were fired?
   A: Pretty close. He was just across the street. He's lucky he didn't get hit himself.

10. **Influencing words**

a. The words included in the question can influence the answer.
b. Decide what answer you want and use the language of the desired answer to ask the question.
   - If you want something to seem far, ask "How far?"
   - If you want something to seem close, ask "How close?"
   - Short/tall; big/small; fast/slow. etc.
c. Your question may presuppose a desired fact. "Did you see <u>THE</u> gun?" versus "Did you see <u>A</u> gun?" This presumes the existence of the gun. The jurors and the witness are more likely to believe that a gun was involved and seen by the witness.

11. **Stop action or Freeze frame technique**

    a. Have the witness focus on a specific moment or part of an event and have her describe it in detail. For example:
       Q: "Let me stop you there. Please describe Mr. Aggressor at that moment."
       Q: "Where was the knife?"
       Q: "Where was his other hand?"
       Q: "What was he saying?"
    b. This technique brings a critical moment to life by presenting substantial detail.

Z. **Techniques for Problem Witnesses**

1. Non-responsive answers or who won't stay on the subject

    a. Take the blame - "I'm sorry, my question wasn't clear. Let me try again."
    b. Explain what you want - "Mr. Witness, I'm trying to find out about whether you got a look at the face of the attacker. Do you understand that? Now, did you see his face? Can you please tell us about it?"

2. Who has a bad attitude (occasionally, your client)

    a. Confront it.
    b. Your jurors are taking it in. "Mr. X, you seem upset. Would you like to tell the ladies and gentlemen of the jury why you are upset?"

3. Who repeatedly refer to **inadmissible evidence:** Explain the rules, but be nice!
   Q: "Mr. Witness, the law doesn't allow you to offer your opinion about Mr. Victim. When I ask you a question about him, please just tell us the facts that answer the question. OK?"
   Q: "Ms. Witness, the law doesn't permit you to tell us what you heard in the neighborhood. That is called hearsay. You can tell us only what <u>you</u> saw, <u>you</u> heard. Not what someone else told you. Do you understand what I mean by that?"

4. Who gives an **unexpected bad / fatal answer**

    a. Prevention, through preparation, is the best technique.
    b. There are no good ways to handle this. Seek the lesser of evils.
       - Ignore it and hope the jurors didn't hear it. At least you aren't making a big deal out of it for the jurors.
       - Claim surprise and cross examine the witness.
       - "You just said.... Is that what you meant to say?"
       - Refresh recollection with previous interview notes. Q: "You and I just spoke about this yesterday, didn't we?" Q: "Didn't you say X, not Y?" Q: "Can you explain that?"
       - **Fail-safe response** - Approach the bench and hope for a good plea!

5. Who is **forgetful**

    a. Refresh recollection
    b. Use a document as "past recollection recorded"
    c. Ask for a recess

d. Lead the witness - option of last resort

AA. **Storytelling and picture painting techniques**

1. **Scene Before Action.**

a. Before describing the action of a story, tell the jurors about the place where the events are happening. This gives context for the story; gives the jurors a place to put the people and events to follow.

b. Sometimes a **physical description** of the location is required.
Q: I'd like you to tell the ladies and gentlemen of the jury about Red Alley. Can you please describe it?
Q: If I were walking in it, what things would I see?
Q: What does it smell like?

c. Sometimes the **emotional landscape** must be described.
Q: What kind of place is Joe's Bar? A: It's a filthy biker's bar.
Q: Can you describe the people who have been there when you've been there in the past?
A: They're all biker's, big guys with tattoos who get drunk and like to mess with people.
Q: What activities have gone on there when you've been there? A: There are always fights, every night I was ever there.

d. Having set the scene, you can describe the action using any of the techniques described below.

2. **Flashback** or **flash forward** - Start the story at the point that is most critical for your theory. Then, flash back to something earlier or forward to something later. For example:
Q: Mr. Client, why did you hit Mr. Jones?
A: He threw a beer in my face and was reaching for a pool stick. I hit him before he got the stick and smacked me with it.
Q: Let's back up a moment, and please, tell us how this all started?
A: I was in the bar with a few friends and this guy was drunk and ....

3. **Parallel action development** - Present the story of different parties separately, a little at a time, until you bring them together at the critical moment. For example:
Q: Ms. Witness, what was Mr. Client doing at this time?
A: He was sitting there minding his own business, drinking a beer at the bar.
Q: While Mr. Client was minding his own business, what was Mr. Accuser doing?
A: He was shooting pool.
Q: How was he acting?
A: He was screaming at some guy, accusing him of taking his quarter. He was pretty drunk and pretty loud.
Q: How did Mr. Client come to fight with Mr. Accuser?
A: Mr. Accuser swung the pool stick at the guy he was playing pool with and missed. He hit Mr. Client. As Mr. Accuser was winding up again, that's when Mr. Client hit him.

4. **Freeze frame** - Select the critical moment in light of the specifics of your theory and paint it in minute detail so that your jurors see it exactly as it was. For example:

Q: Mr. Witness, you told us that you saw the whole thing. Can you tell us what you saw?
A: Yes, I saw Mr. Deceased running at Mr. Client with a table leg and Mr. Client shot him.
Q: I'd like you to tell us about Mr. Deceased and what he was doing. First, How big is he?
A: He is a big man, 6'2", maybe 225 lbs.
Q: How was he built?
A: He was real strong. Built kinda like a weightlifter. Big arms and all.
Q: Tell us about his clothes?
A: He had on a black tank top with something like "...Meanest SOB in the valley" on it.
Q: What else was he wearing?
A: Jean shorts, cutoffs, black combat boots....

5. The **Interview** or the **Investigation** - Tell the story by following the police investigation or the interview of an important witness.
   Q: Officer Jones you told us that you were the investigating officer? Was Mr. Witness on the scene when you got there? A: Yes
   Q: Did you talk to him? A: Yes.
   Q: Did he tell you he saw the guy who did it? A: Yes
   Q: Did you ask him whether he could describe the guy?
   A: Yes. He said he could.
   Q: Tell us about the questions that you asked him?

6. **Panorama to zoom** - Put the story into context. Question the witness about the big picture and move to questions about the specific important things. For example:
   Q: Can you tell us about the area?
   A: It's a nice neighborhood. There are row houses on both sides of the street. Cars park on both sides too. There's a little Ma & Pa grocery on the corner. It's nice.
   Q: What kind of day was it?
   A: It is a beautiful day. Real sunny, the sky was blue and it was real warm. In the street, some of the kids were playing stickball.
   Q: Did you see Mr. Violent in the area?
   A: Yeah, on the corner with a group of guys, wearing a blue coat and had a black steel revolver in his right hand.
   Q: Tell us about the gun?

7. **The walk through.** Directional comments are confusing and meaningless too often. Think about the homicide police report; "The body was lying in a northerly direction with the head facing in a westerly direction and the feet facing the southeast...." Not very helpful. Instead, select a place to start and question the witness about the things they see to their right, their left, in front, etc. as they walk through the scene. For example:
   Q: Officer Jones when you walked into the alley, what did you see?
   A: I saw a body.
   Q: Please describe the way the body was lying as you were looking at it?
   A: It was face down. The person's face was to the left...
   Q: Whose left?
   A: My left and his left. His face was facing kind of away from me.

8. **Chronological** - Easy to follow, but it's less interesting and harder to highlight the important stuff.

BB. **Objections**

1. **Your objections to the prosecutor's cross examination.**

   a. Can you object? Is the prosecutor doing something improper? Can you win? at what cost?
   b. Should you object?
      - Your objections must be consistent with your theory.
      - Does the question hurt the witness? damage your theory? If the answer is no, why object?
      - Jurors dislike objections. They feel excluded and believe that you are hiding something from them. So, even if the objection is proper, is it worth the price?
   c. Protect your witness. If your witness needs help, step in with a proper objection.
      - Harassment, too fast paced
      - Prosecutor won't let witness answer
      - Interrupting the witness
      - Remember, a good witness may be able to handle it.

2. **Objections by the prosecutor to your direct examination**

   a. Prevention; don't ask objectionable questions.
   b. Make 'em pay
      - Tell the jury that you won; "Thank you, your Honor. Mr. Witness the Judge has ruled that the question is proper. You may answer the question."
      - Repeat the question; "Let me state the question again. Why do you say that Mr. State's Witness is known to be a lying scumbag in the neighborhood?"
      - Summarize what the witness said; "Before the objection, you told us that Mr. Victim was drunk, had a large knife and was looking for my client. Had you finished the answer or is there more you'd like to add?"
   c. Don't apologize or withdraw the question. Rephrase the question so that the judge will allow it.
   d. Use proffers and other strategies to get the court to allow an important question.

CC. **FINISH STRONG:** You should save something with high impact and substance for your last point.

VII. Your Client in the Courtroom and on the Stand

A. **To Testify or Remain Silent**

1. There should be no set rule. Like any other witness, the decision to have a client testify depends on the quality of the client as a witness and the value and necessity of his/her testimony. Remember, this is the client's decision, but should be reached with the advice of counsel.

2. Recent research suggests that juror's expect the client to testify and held it against him or her when s/he didn't. However, the same study found that when the client did testify, the testimony did more harm than good far more often than not.

B. **Should the client show emotion?**

1. Traditional wisdom suggests that clients shouldn't show emotion in front of the trier of fact. However, a lack of emotion under the circumstances seems unnatural. Your call.

2. If the client will be emotional, be sure that the emotion is consistent with the theory of defense.

3. Anger and violence are not suggested, but frustration and righteous indignation may be fine.

C. **Over preparation? No such thing with your client**

1. Everything done to prepare a witness for direct, should be done to prepare your client.

2. Discuss how your client should behave in the courtroom. Remind her that someone on the jury will always be watching.

3. Practice denials: Just saying "no" may not have enough force. Tell your client to give the denial some verbal "ummph" and add something like "No, I didn't do it," "No, that is not true" or the like.

D. **References to your client**

1. **Physical reference.**

   a. Do not have witnesses point at your client. You shouldn't do it either.
   b. You and/or the witness become just another accusing finger. Clients have suggested that this makes them uncomfortable.
   c. If you must, gesture to your client using an open hand, palm up. Preferably, walk over to the client or ask the client to stand.

2. **Verbal reference**

   a. Have witnesses call your client by name, preferably a less formal name. John is better than Mr. Client. If a judge won't permit this, call him John Client. CAVEAT: If you are considerably younger than your client or circumstances suggest that it will appear disrespectful to use the client's first name alone, don't do it.
   b. Never use the dehumanizing phrase "the defendant." The only way to ensure that you do not use this phrase during the trial is not to use it at all. Calling your client by name will help you to see him or her as a person. Where a generic name is needed, such as in motions, substitute the word "accused" for defendant.

E. Beware of, and counsel against, **overly broad responses**

1. **Opens the door** to otherwise irrelevant and inadmissible testimony.

2. Avoid generalizations like:
   a. "I never have done...."
   b. "I wouldn't even know what that stuff looks like."

3. This is a good suggestion to discuss with all witnesses.

F. **Organization for the client's direct**

1. The beginning (The important stuff)

   a. Consider beginning with an absolute denial and brief explanation why. Client wants to say it and jurors want to hear it. The explanation orients the jurors. A simple "No" isn't enough. A little added punch is necessary.
   b. Q: "Mr. Client, did you do it?"
      A: "No, I didn't."
      Q: "If you didn't do it, where were you at the time of the shooting?"
      A: "I was home with my mother and girlfriend the whole night." .....(Pause)
      Q: "Can you tell us about yourself?"

2. The middle (The bad or less important stuff)
   a. Confront prior record, prior inconsistent statements and other bad stuff in the middle where they are more likely to be minimized or forgotten.

3. The end (More important stuff or the same important stuff from the beginning)
   a. Select a second strong point and question about it here. Alternatively, repeat the same point with which you began.
   b. Consider ending with a denial again, if asked in a slightly different way to avoid an objection.
   c. Consider closing with a trilogy.
      You may close with a trilogy
      Q: On June 1st did you point a gun at Mr. Jones? A: No, I didn't.
      Q: On June 1st did you shoot a gun at Mr. Jones? A: No, absolutely not.
      Q: On June 1st did you have a gun? A: No, I didn't have a gun at all.

      PAUSE
      Thank you. I don't have any other questions.

G. **Humanize the client.**

1. Lots of background information, whenever you can

2. All the good stuff and Even the bad stuff, playing up the rough upbringing angle to develop understanding or sympathy.

H. **Corroboration.** Seek as much corroboration of the client's testimony as is possible, but don't get bogged down in details.

VIII. Conclusion

Direct examination is too important to surrender to prosecutors. If you prepare yourself, your case and your witness well, direct examination and the techniques set forth here will help you win cases. Remember the "Six Ps" and always remember your "AURA."

Daniel Shemer

“I was an Assistant Public Defender in Maryland from 1980 until 1999. The material included in this handout was shamelessly stolen from numerous parties and publications. I have listed many of the subjects of my theft below. My thanks to the ingenious authors, actors and lawyers, particularly, the many other Maryland Public Defenders, for creating and sharing this wealth of ideas. May your creative juices continue to bubble up and ‘may justice flow down like the waters and mercy like an everflowing stream.’”

1. "Direct Examination: Strategic Planning, Preparation and Execution." by Phyllis H. Subin, Esq., Director Of Training and Recruitment, Defender Association Of Philadelphia.
2. The ABA Journal, Litigation Section, by James McElhaney, Esq.
3. "The Art Of Formulating Questions: Preparation Of Witnesses." by Neal R. Sonnett, Esq., 2 Biscayne Blvd., 1 Biscayne Tower, Ste.2600, Miami, Fla. 33131
4. "The Drama and Psychology of Persuasion in the Defendant's Opening Statement," by Jodie English, Esq. (I know this outline is about direct examination, but this is an exceptional article that explains the psychological bases for many of the techniques recommended in this outline.)
5. Joe Guastaferro, Actor, Director and Trial Consultant. 4170 N. Marine Drive, #19L, Chicago, Ill. 60613. Just about anything Joe has ever said or done!
6. "Jury Psychology" by Paul Lisnek, J.D., Ph.D., Trial Consultant. 612 N. Michigan Ave., Suite 217, Chicago, Ill. 60611.

Any thoughts, comments or suggestions to improve this outline? Share them, please. Write me at Office of the Public Defender, Training and Continuing Education Division, 6 St. Paul Street, Baltimore, Maryland 21202, call me at (410) 767-8466 or FAX to me at (410) 333-8496. Thank you.

THE THREE P'S OF DIRECT EXAMINATION

1. PLAYERS

   Select witnesses who advance your theory of the case

2. PREPARATION

   a. Think about your questions

      i. Open-ended

      - Who
      - What
      - When
      - Where
      - How
      - Why
      - Tell us about/Describe

      ii. Specific

   b. Prepare and practice with the witness

3. PRODUCTION

   a. Remember primacy & recency

   b. Use "chapters" and "signposts"

   c. Elicit factual details

   d. Tap into your frustrated inner actor

   b. Have a conversation with the witness

   f. LISTEN

THE THREE P'S OF DIRECT EXAMINATION

2015 New Misdemeanor Defender Program

Susan Brooks, IDS

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a) Think about your questions
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   ii. Specific
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#3: PRODUCTION

a) Remember primacy and recency
b) Use chapters and signposts
c) Elicit factual details
d) Tap into your frustrated inner actor
e) Have a conversation
f) LISTEN

THE END

Take a bow and SIT DOWN

Motions and Objections

OBJECTIONS AND MOTIONS PRACTICE IN NON-DWI BENCH TRIALS

I. Objections

A. Why?

- Protect client's rights
- Keep out evidence that hurts your theory
- Build trust with client by showing you are working on his or her behalf
- Show judge you know authority
- Don't let prosecutor get away with improper techniques
- Get better plea offers when prosecutors realize you are a skilled trial lawyer

B. When?

- Gut and Grounds
  - Just do it if something doesn't feel right.
  - And of course if you know legal grounds.
- Object even if late/realize should have done it previously.
- Continue to object so don't waive issue.

C. How?

- You may object while sitting down and even briefly state grounds while sitting, but stand to be heard/argue.
- Tone: quiet authority. Firm, calm, and respectful…unless truly outraged!
- State legal grounds.
  - Multiple grounds if they exist
  - **Constitutionalize!**
    - E.g., pair evidentiary objections with Due Process Clause; pair hearsay objections with Confrontation Clause
- If sustained, move to strike any answer that came in. Consider asking for mistrial if egregious.
  - Also move to strike when DA asks a proper question, but witness gives objectionable response.
- If overruled, keep objecting when gut or grounds.

II. Motions

A. Why?

- Same as objections.
- Discovery tool when made pretrial.

B. When?

- Depends on motion. See common ones below.

C. How?

- Generally oral, but will stand out if written and supported by memorandum of law.
    - Plus affidavit in support of suppression motion.

COMMON DISTRICT COURT MOTIONS

1. Motion to Dismiss

a. For insufficiency of evidence
    i. In every case, two times: at close of State's evidence and all evidence.
b. For defective pleading
    i. Defective on face: make motion pretrial, after arraignment. Argue court has no jurisdiction because allegations vague or incomplete…
    ii. Fatal variance: make motion at close of State's evidence. Argue State's evidence did not match allegations in warrant…

2. Motion to Suppress

a. Goal: exclude evidence that is obtained unlawfully or otherwise inadmissible.
    i. Often 4th Am: evidence obtained as result of illegal stop, search, or seizure, e.g., no RS for stop or no PC for arrest or search.
    ii. Or 5th Am: defendant's statement not voluntary because in custody and not Mirandized prior to interrogation…
    iii. Also, through motion in limine, prohibit witness from testifying to matters not based on personal knowledge/observation or prohibit expert from testifying to matters outside expertise.
b. When? Typically during trial (in non-DWI case), when State's witness is about to testify about unlawful evidence.
c. How? "Objection. Move to suppress on grounds the search violated my client's 4th Am rights. Request to take the witness on voir dire, your honor."
d. Voir Dire
    i. You ask questions first.
    ii. Ask leading questions.
    iii. State gets to ask questions after you.
    iv. You argue first: why the evidence should be suppressed.
    v. Then State argues why it should come in.
    vi. In absence of warrant, State's burden to prove PPE that evidence obtained lawfully.
    vii. If motion granted, continue to object where State seeks to introduce the evidence/circumvent judge's ruling
    viii. If motion denied, still keep objecting to the evidence.
        -Develop habit of preserving record.

COMMON OBJECTIONS TO THE STATE'S EVIDENCE IN DISTRICT COURT

Objection	Law	Key Phrases	Examples and Practice Tips
Not relevant	Rule 401 Rule 402	No tendency to make the existence of any fact of consequence more or less probable than it would be without the evidence Evidence that is not relevant is not admissible	Ex. DA in simple assault case: *Mr. Δ, you are behind on your child support payments, aren't you?* Tip Be careful not to open the door to evidence that would not otherwise be admissible by asking about it yourself.
Unfairly Prejudical	Rule 403	Probative value substantially outweighed by danger of unfair prejudice Confusion of issues Waste of time or cumulative	Ex. DA in resist/delay/obstruct case: *Mr. Δ, you have a tattoo of a swastika on your arm, don't you?* Tip It is improper for the State to suggest that the judge decide the case based on emotions, like disliking Δ.
Leading	Rule 611(c)	Leading questions should not be used on direct	Ex. DA in possession of paraphernalia case: *Officer, you saw Δ holding a crack pipe, didn't you?* Tip The judge may allow leading on direct if needed to develop testimony, ie, if the witness is immature or hostile.
No personal knowledge/ speculation	Rule 602 Rule 701	Witness may not testify to ___; no evidence has been introduced sufficient to show that she has personal knowledge of it Witness can only testify as to opinions or inferences that are rationally based on her own perceptions	Ex. Witness in harassing calls case: *When the phone rang again, I figured it was Δ, but I didn't pick up.* Tip Testimony that a person is/was telling the truth is improper opinion evidence. 130 NCA 505.

Objection	Law	Key Phrases	Examples and Practice Tips
Violates Δ's right to confront	US Const. 6th Am. *Crawford v. Washington* 541 US 36 (2004)	In all criminal prosecutions, Δ has the right to be confronted with the witnesses against Δ Testimonial statements by witnesses who do not appear at trial may not be admitted (unless the witness is unavailable to testify and there has been a prior opportunity for cross examination)	Ex. Officer in assault on female case: *When I got to Amy's house, I interviewed Amy who won't testify about this; she told me that Δ had punched her in the eye and then fled an hour before I got there.* Tip If the officer is questioning the witness to deal with an ongoing emergency, the statement is non-testimonial. If the emergency has passed and the officer is gathering information for prosecution, the statement is testimonial/excludable.
Hearsay	Rule 801(c) Rule 802	A statement, other than one made by the declarant while testifying at the trial, offered to prove the truth of the matter asserted Hearsay is not admissible (unless some exception applies)	Ex. Officer in possess stolen goods case: *Mrs. Jones next door told me Δ didn't own a lawn mower like the one I saw Δ using.* Tip Familiarize yourself with common exceptions set out in Rules 803 and 804.
No authentication	Rule 901	No showing that the evidence is what the State claims it is (ie, handwriting, photos, phone calls, voice identifications, public records, documents, data compilations, and systems)	Ex. Witness in communicating threats case: *I have not seen Δ's handwriting before, but Δ wrote this letter because that is Δ's name at the end.* Tip Rule 901 gives examples of methods of authentication that will get the evidence in. Rule 902 describes certain self-authenticating documents.
Character evidence is not admissible to prove conduct	Rule 404(a)	Evidence of a character trait can't be used to show that a person acted in conformity on a particular occasion (Exception: Δ opens door by putting on evidence of Δ's character.)	Ex. DA in assault inflicting serious injury case: *Mr. Victim, isn't it true that Δ is a violent man?* Tip In self-defense cases, Δ can put on evidence of Victim's character for violence to show V was aggressor, Δ reasonably feared V, and Δ used reasonable force. 125 NCA 721; 120 NCA 276. Rule 405(b) allows proof of specific instances of conduct, eg, proof that Victim once pulled a gun on Δ.

Objection	Law	Key Phrases	Examples and Practice Tips
The State may not put on evidence that their witness is truthful unless Δ has attacked the credibility of that witness	Rule 608(a)	Evidence of character for truthfulness is admissible only after it has been attacked	Ex. DA: *Officer, you have testified before this court many times and you always tell the truth, don't you?* Tip Under Rule 611(b), Δ may cross a witness regarding her credibility, but this will open the door to evidence of the witness' truthfulness in the form of reputation and opinion.
Prior crimes or bad acts are not admissible to prove conduct	Rule 404(b)	The State can't use evidence of other crimes, wrongs, or acts to prove the character of Δ in order to show Δ did _____ on this occasion (The evidence may be admissible for other purposes though, ie, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, entrapment or accident)	Ex. DA in forgery case: *Mr. Δ, you sold marijuana back when you were in college, didn't you?* Tip Prior acts that are remote in time and not similar to the charged offense are less likely to be admissible. Argue that a burglary 12 years ago does not prove Δ had intent or plan to commit this larceny.
Prior bad acts can only be used to impeach credibility if they relate to truthfulness or untruthfulness Improper for DA to ask Witness about Δ's prior bad acts to impeach Δ's credibility; DA may only cross Δ about them	Rule 608(b)	The court may allow cross-examination of a witness about specific prior acts if they are probative of truthfulness or untruthfulness No extrinsic evidence may be used to attack credibility (Exception: Witness opens the door by testifying about another's truthfulness)	Ex. DA in trespass case: *Ms. Landlady, isn't it true that Δ lied on this rental application about his employment?* Tip Be careful not to open the door: If Witness testifies that Δ is honest, the State may cross Witness about Δ's prior acts that go to truthfulness, eg, Neighbor testifies on direct that Δ is honest; the State may cross Neighbor about Δ pirating cable TV…

Objection	Law	Key Phrases	Examples and Practice Tips
Prior convictions do not come in unless Δ takes the stand Class 3 misdemeanors and infractions can't be used Priors over 10 years old are generally not admissible	Rule 609	A witness may be impeached with evidence that he has been convicted of a felony, or a Class A1, 1, or 2 misdemeanor The State may not use a prior if 10 years have passed since the date of conviction (or release from confinement, whichever is later) unless the State gives written notice and the court makes findings that it is especially probative	Ex. DA in break & enter case: *Mr. Δ , isn't it true that you were convicted of second degree trespass 12 years ago?* Tip When advising Δ about whether to take the stand, explain which of Δ's prior convictions will come in if Δ does and what impact they will have.
Religious beliefs may not be used to show a witness is credible or lacks credibility	Rule 610	Evidence of religious beliefs is not admissible to show that a witness' credibility is impaired or enhanced	Ex. DA in pass school bus case: *Ms. Bus Driver, as a Christian woman, you would not lie to the court about what you saw, right?* Tip Religious beliefs may be used to show bias, eg, Δ may elicit evidence that co-Δ is anti-semitic and therefore had motive to damage the property of the synagogue.
The information is privileged	§8-57 §8-53 §8-53.2 §8-53.3 §8-53.7 §8-53.9	Husband-wife Doctor-patient Clergyman-communicants Psychologist-patient Social worker Optometrist-patient	Ex. DA in injury to real property case: *Mr. Minister, when you visited Δ in jail to offer spiritual comfort and guidance, Δ admitted he threw a rock at the synagogue, didn't he?* Tip Δ may waive the privilege by failing to object.