UNC SCHOOL OF GOVERNMENT

2020 Misdemeanor Defender Training

November 3 – 6, 2020 / Online Live Sessions

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.

UNC SCHOOL OF GOVERNMENT

2020 Misdemeanor Defender Training

November 3-6, 2020

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

Tuesday, November 3

12:30-12:45	Welcome and Introductory Remarks
12:45-2:00	**Basics of Driving While Impaired: Elements, Sentencing, and Motions Practice** (75 min.) Shea Denning, Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
2:00-2:15	*Break*
2:15-3:00	**Basics of Driving While Impaired** (*continued*) (45 min.) Shea Denning, Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
3:00-3:15	*Break*
3:15-4:00	**Pretrial Release Advocacy** (45 min.) Emily Mistr, Attorney
4:00	*Adjourn*

Wednesday, November 4

9:00-10:00	**Ethical Issues in District Court** (ETHICS) (60 min.) Whitney Fairbanks, General Counsel North Carolina Office of Indigent Defense Services, Durham, NC
10:00-10:15	*Break*
10:15-11:00	**Client Interviewing** (45 min.) Tucker Charns, Regional Defender North Carolina Office of Indigent Defense Services, Durham, NC
10:45-11:00	*Break*
11:00-12:30	**Introduction to Structured Sentencing** (90 min.) Jamie Markham, Thomas Willis Lambeth Distinguished Chair in Public Policy UNC School of Government, Chapel Hill, NC
12:30-1:30	*Recess for lunch*
1:30-2:30	**Probation Violations** (60 min.) Jamie Markham, Thomas Willis Lambeth Distinguished Chair in Public Policy UNC School of Government, Chapel Hill, NC
2:30	*Adjourn*

Thursday, November 5

9:00-9:30	**Negotiating Effectively** (30 min.) Derek Brown, Attorney The Derek K. Brown Law Firm, PC, Greenville, NC
9:30-9:45	*Break*
9:45-11:00	**Suppressing Evidence in District Court** (75 min.) Phil Dixon, Jr., Defender Educator UNC School of Government, Chapel Hill, NC
11:00-11:15	*Break*
11:15-12:00	**Problems with Pleadings** (45 min.) Belal Elrahal, Assistant Public Defender Mecklenburg County Office of the Public Defender, Charlotte, NC
12:00-1:00	*Recess for lunch*
1:00-1:45	**Driving Records and Getting Your Client Back on the Road** (45 min.) Michael Paduchowski, Attorney Law Office of Matthew Charles Suczynski, Chapel Hill, NC
1:45	*Adjourn*

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Friday, November 6 (Mini Bench Trial School Using Hypotheticals)

9:00-9:45	**Theory of Defense/Emotional Themes** (45 min.) Tucker Charns, Regional Defender North Carolina Office of Indigent Defense Services, Durham, NC
9:45-10:15	**Cross Examination** (30 min.) Jeff Connolly, Regional Defender North Carolina Office of Indigent Defense Services, Durham, NC
10:15-10:30	*Break*
10:30-12:00	**Cross Examination Workshops** (90 min.)
12:00-1:00	*Recess for lunch*
1:00-1:30	**Direct Examination** (30 min.) Susan Brooks, Public Defender Administrator North Carolina Office of Indigent Defense Services, Durham, NC
1:30-1:45	*Break*
1:45-2:30	**Rules of Evidence Refresher** (45 min.) Jonathan Broun, Attorney North Carolina Prisoner Legal Services, Raleigh, NC
2:30	*Adjourn*

CLE HOURS: 14.25
Includes 1 hour of ethics/professional responsibility
Pending approval by the NC State Bar

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(NC Indigent Defense Education)

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

Shea Denning
School of Government

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rules for breath testing.

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

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

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

Rules for blood or urine testing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- enters a voluntary dismissal;

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

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

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

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

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

11. Apply DWI sentencing laws.

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

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

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

c. What is the maximum length of probation?

Five years

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

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

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

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

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

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

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

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

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

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

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

12 months minimum to 36 months maximum.

If suspended

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

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

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

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

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

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

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

E. The defendant pleads guilty to two DWI offenses.

a. May the offenses be consolidated for sentencing?

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

b. May the sentences run concurrently?

Yes.

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

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

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

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

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

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

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

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

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

Ignition interlock. Ignition interlock is required as a condition of a limited driving privilege if the person had an alcohol concentration of 0.15 or more. In addition, a limited driving privilege issued to a person convicted of impaired driving with an alcohol concentration of .15 or more may not become effective until 45 days after the final conviction. G.S. 20-179.3(c1). A judge awarding a limited driving privilege following any other DWI conviction may require ignition interlock in his or her discretion. G.S. 20-179.3(g3).

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

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

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

DWI Sentencing

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

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

1 Determine the Applicable Law

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

Offenses committed on or after October 1, 2013

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

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

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

2 Determine Whether Any Grossly Aggravating Factors Exist

There are four grossly aggravating factors:

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

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

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

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

4 Count the Grossly Aggravating Factors

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

5 Determine the Sentencing Level

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

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

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

6 Consider Aggravating and Mitigating Factors

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

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

7 Determine Aggravating Factors

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

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

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

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

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

8 Determine Mitigating Factors

Determine whether mitigating factors exist.

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

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

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

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

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

(4) A safe driving record.

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

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

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

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

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

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

9 Weigh Aggravating and Mitigating Factors

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

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

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

10 Select a Sentence of Imprisonment

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

Place of Confinement

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

11 Review Additional Issues, as Appropriate

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

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

Getting Your Client Out of Jail

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1

Money Bail

- Intended as a way to ensure client's appearance
  - Now used to keep poor people in jail
- Fee of up to 15% (10% in other states)
- Only one other country uses money bail
  - The Philippines
- Eliminating/reducing money bail
  - Federal system and DC
  - New Jersey, California, New York
  - Philadelphia, Durham

2

Resources

- U.S. and NC Constitutions and Case Law
- Public Defender Manual and Litigating Race (*available on UNC-SOG website*)
- N.C.G.S. 15A-531 *et. seq.*
- Local pretrial release policy
- Other sources (PJI, Vera Institute, etc.)

3

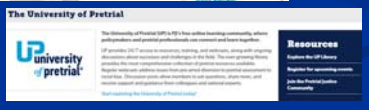
SOG Defense Manuals

https://defendermanuals.sog.unc.edu

4

Pretrial Justice Institute

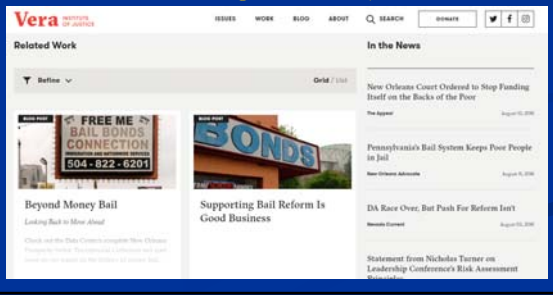
https://www.pretrial.org



5

Vera Institute

https://www.vera.org/ending-mass-incarceration/reducing-the-use-of-jails/bail



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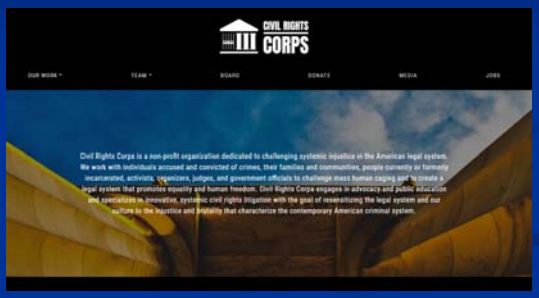
Civil Rights Corps

https://www.civilrightscorps.org



7

Case Law – U.S.

- ***Stack v. Boyle***, 342 U.S. 1, 4, 5 (1951)
  - "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *(Internal citation omitted.)*
  - "Bail set at a figure higher than an amount reasonably calculated to [assure the defendant's presence at trial] is excessive under the Eighth Amendment."
- ***Gerstein v. Pugh***, 420 U.S. 103, 114 (1975)
  - "The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships."
- ***U.S. v. Salerno***, 481 U.S. 739, 755 (1987)
  - "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."

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Case Law - NC

- ***State v. Knoll***, 322 N.C. 535 (1988)
  - DWI – importance of timely opportunity to gather evidence
- ***State v. Thompson***, 349 N.C. 483, 499, 500 (1998)
  - DV 48-hour hold unconstitutional as applied
  - "[I]t is beyond question that . . . liberty, is a fundamental right."
  - "The right to freedom prior to trial is reflected in the principle that there is a presumption of innocence in favor of the accused which is the undoubted law, axiomatic and elementary, and lies at the foundation of the administration of our criminal law." *(Internal citations omitted.)*

9

From G.S. 15A-534(b)

- "The judicial official in granting pretrial release **must impose** condition (1) [written promise], (2) [unsecured bond], or (3) [custody release] . . . unless he determines that such release will not reasonably assure the appearance of the defendant as required; will pose a danger of injury to any person; or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses." (*emphasis added*)

10

Local Pretrial Release Policy

- G.S. 15A-535 requires judges in each district to draft and release pretrial policies.

11

ABA Criminal Justice Section Standards on Pretrial Release

The law favors the release of defendants pending adjudication of charges. Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many circumstances, deprives their families of support.

Standard 10-1.1

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ABA Criminal Justice Section Standards on Pretrial Release

Financial conditions other than an unsecured bond should be imposed only when no less restrictive conditions of release will reasonably ensure the defendant's appearance in court. The judicial official should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay.

Standard 10-5.3(a)

13

U.S. Department of Justice

Never mind.

Guidance and letters on pretrial release were rescinded.

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U.S. Department of Justice

"[T]he Fourteenth Amendment prohibits a jurisdiction from categorically imposing different criminal consequences – including and especially incarceration – on poor people without accounting for their indigence."

"[A] jurisdiction may not use a bail system that incarcerates indigent individuals without meaningful consideration of their indigence and alternative methods of assuring their appearance at trial."

USDOJ Amicus Brief, *Walker v. City of Calhoun*, No. 16-10521-HH (11th Cir., Brief filed 8/18/2016)

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Importance of Release To Your Client and Family

- Psychological effects on client and family
- Financial burden on client's family
  (loss of income + additional spending)
- Assistance with defense
- Treatment
- Contribution to society/family
- Jail issues

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Importance of Release To the Community

- Community picks up slack
  (housing, medical, food, transportation, care)
- Community pays for jail
- Reliability/trust in criminal justice system
  - More convictions
  - Worse sentences
  - More future criminal conduct
- Less integration into community after

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Harm to Society

- More failures to appear
- Worse case outcomes
  - 14% less likely to be convicted if released
  - 4 times more likely to get jail sentence
    - 3 times longer jail sentences
  - 3 times more likely to be sentenced to prison
    - 2 times longer prison sentences
- More criminal activity
  - Before and AFTER case resolved

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Racial Disparities

- African Americans are more likely to be stopped, searched, charged (including more serious charges), convicted, and incarcerated
- More likely to be given money bond (instead of written promise or unsecured bond)
- Higher bond amounts
- African Americans and Latinos are ~30% of U.S. population, but 50% of U.S. jail population
- African Americans are 3.5 times more likely to be jailed than whites

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Harm to Justice

- Reduced reliability
  - Outcomes based on money and race
- Reduced trust in system
  - Especially for people of color

20

So the judge MUST release your client, right?

21

Factors Working Against You:

- Audience – open court
- Prosecutor
- Err on the side of caution
- Status quo versus change
- **"Danger to community"**

22

Money Bail Industry

- Backed by insurance companies
  - Rarely has to pay forfeitures
- Pays lobbyists to pass favorable laws
  - Tried many times to limit non-$ pretrial release
- Ties to ALEC (model legislation)
- Profit-motivated
- Very active

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Pitfalls (15A-533)

- No right to pretrial release if:
  - In custody or should be in custody
- Rebuttal presumption against release if:
  - Charged with trafficking while on pretrial release, AND A-E felony conviction within 5 years
  - Gang involvement in new charge while on pretrial release, AND prior gang conviction within 5 years
  - Charged with felony/A1 involving firearm AND
    - On pretrial release for same, OR
    - Conviction for same within 5 years

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More Pitfalls (15A-534)

- Prior FTA on same charges
  - At least same release conditions as most recent OFA
  - If no release conditions in OFA, double bond
  - If no bond listed, bond at least $1000
- Charged with felony, already on probation
  - Determine "danger to the public"
  - Can hold to get information (96 hours from arrest)
- On pretrial release for previous charge
  - Magistrate's discretion, but may double bond

25

Still More Pitfalls

- DV cases (15A-534.1)
- Impaired Driving charges (15A-534.2)
- Communicable Diseases (15A-534.3)
- Sex Offenses (15A-534.4)
- Threat to Health/Safety of Others (15A-534.5)
- Manufacturing Meth charges (15A-534.6)
- Probation Violations??

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Solutions to Pitfalls

- Talk with prosecutor
- Address at first appearances
- **Judge can modify bond**
- Automatic bonds might violate 8th and 14th Amendments
- Remember presumption of release
- Remember reasons for allowing secured bonds

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Get involved early

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Information You Need

- From your client:
  - Details of charged conduct (use with caution)
  - Personal characteristics of client
    - Record (but check accuracy)
    - Family
    - Work/school
    - Ties to community (church, volunteer, etc.)
    - Treatment (use with caution)
    - Financial situation

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More Information You Need

- Client's future
  - Will live where? Work where?
  - Get client contact information
- Talk to investigating officer:
  - Get details of charged conduct (official state version)
  - Might say something about client (but think long-term)

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Legal Considerations

- Other pending cases (including other counties)
  - Credit issue if bond out on one
- Probation status
  - PV about to be filed?
- Child support charges
- DV civil issues
- Possible additional charges
- Detainers

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Possibilities

If Pretrial doesn't take your client (or you don't have Pretrial in your county):

Talk with prosecutor

Possible results

- Reduce or unsecure bond
  - Conditions to ensure appearance/safety
- Release to treatment facility
- Reduce or unsecure bond in exchange for no PC hearing
- Other – be creative

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(First) Last Resort

File bond motion.

Have bond hearing.

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Bond Motion

- Check local rules
- You choose date
- Bonds can go up
- Successive bond motions might be more difficult

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Preparation for Hearing

- Characteristics of client
- Charged conduct
- Bond range from local guidelines
- Consider witnesses and/or letters

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Bond Hearing

- Judge must consider (G.S. 15A-534(c)):
  - Nature/circumstances of charged offense
  - Weight of evidence
  - Characteristics of your client: family ties, employment, finances, character, mental condition
  - Length of residence in community
  - Prior ***convictions***
  - History of flight/FTAs

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Secured Bond only if other release conditions…

- Will not reasonably assure the appearance of the defendant as required;
- Will pose a danger of injury to any person; or
- Is likely to result in:
  - Destruction of evidence,
  - Subornation of perjury, or
  - Intimidation of potential witnesses

15A-534(b)

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Danger to Community *(Theoretically)*

Only if the [judicial] official determines that none of [the non-monetary] conditions will assure the appearance of the defendant or protect against other possible harm may he impose the requirement that the defendant post a secured bond . . . **[H]is dangerousness and potential for harm, other than the risk of non-appearance, are not factors to be considered in setting the conditions of release on the secured bail bond**.

Official Commentary 15A-534 (emphasis added)

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Danger to the Public 15A-534(d2)

- Shall be considered when on probation and charged with felony
- Determination must be written
- If danger exists, then secured bond or EHA
- If not enough information to determine, then hold up to 96 hours for additional information (document hold and reasons in writing)

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Change the Discussion

- Judge's fear of what your client might do if released
  - Hypothetical
  - Emotional

VS

- Serious harm to client, family, and society if kept in jail
  - Documented
  - Fact-based
  - Real

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Our community pays and is harmed when we detain low/moderate risk people pretrial

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Dealing with Risk Factors *(Realistically, you'll have to)*

- Prior record – explain, if needed/possible
- If MH/SA issues, address treatment plan
  - Use with caution
- Supervision
  - Family
  - Pretrial Services
  - Probation
  - GPS/SCRAM

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Risk Assessments

- The Good
  - Fact-based, validated
  - Less racially biased than arbitrary decisions
  - Gives judge a reason to let your client out
- The Bad
  - May still be racially biased
  - Doesn't account for personal factors
  - Could give judge a reason to keep your client in

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Supervision Issues

- Over-supervision can lead to failure on pretrial
- Should be tailored to fit specific risk/need
- Should be least restrictive measure to address risk/need

Best method to decrease FTAs is reminders

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Why your client should be out

- Default is release
- Lots of costs to society for keeping someone locked up, especially pretrial
- Your client is a better citizen out of jail than in
- Facts to support low risk of your client
- Can't be kept in custody solely because of $
- Other reasons unique to your case/client

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Successive bond motions

- Proceed with caution
- Nothing in statutes prohibiting lots of bond motions, BUT, not much point unless something has changed (client's circumstances, state of the law, state's case, passage of time)
- Strength of case can be an issue and can change

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(Second) Last Resort

Talk to ADA (again)

Appeal bond to Superior Court (15A-538)

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Advantages in Superior Court

- Court of record
- Opportunity to present case in writing
- Superior court judges not necessarily inclined to go along with district court judge determinations
- Maybe better chance to be heard
- Client can see you are working for him/her

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(FINAL) Last Resort

For some cases…

Petition for Writ of Habeas Corpus

(Art. I, § 21 of NC Constitution)

N.C.G.S. §§ 17-1 through 17-46

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Denied if…

- In custody per court order
- In custody per judgment/final order
- Delayed application during vacation
- No probable ground for relief in application

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Advantages of Habeas Corpus

- **Any** superior court or appellate judge
- Anyone can file on behalf of person in custody
- Short time limits
- $2500 penalty if not granted when it should be
- Use as tool to get ADA to agree to release

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Examples

- Held too long on ICE detainer
- Not given first appearance on misdemeanor
- Declared incapable of proceeding and charges dismissed

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Be agents of truth and change

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Chapter 1
Pretrial Release

Sections 15A-531 through 15A-547.1 of the North Carolina General Statutes (hereinafter G.S.) contain the basic provisions on pretrial (and posttrial) release for criminal charges. *See also* G.S. 15A-1345(b), (b1) (release conditions in probation cases). Subject to these general requirements, local policies and practices may vary. *See* G.S. 15A-535(a) (senior resident superior court judge, in consultation with chief district court judge or all district court judges in district, must issue pretrial release policies for each county in judicial district); *see also State v. Harrison*, ___ N.C. App. ___, 719 S.E.2d 204 (2011) (district court judge did not err by *not* following administrative order issued by senior resident superior court judge on pretrial release conditions where superior court judge did not consult with district court as required by G.S. 15A-535(a)).

In many instances, prosecutors may not oppose the setting of pretrial release conditions that your client can meet. At other times, defense counsel must overcome the prosecutor's or court's resistance to a bond reduction. For sample bond reduction and other pretrial release motions,

consult the motions bank for non-capital cases on the IDS website, www.ncids.org (select "Training & Resources," then "Motions Bank, Non-Capital").

Conditions of pretrial release are set by judicial officials. *See* G.S. 15A-532(a). Typically, conditions are set by a magistrate or a district or superior court judge, but the term judicial official also includes clerks and appellate judges and justices. *See* G.S. 15A-101(5). There are certain situations, discussed in this chapter, in which only a specific judicial official is authorized to set conditions.

For a discussion of preadjudication custody in juvenile delinquency cases, see NORTH CAROLINA JUVENILE DEFENDER MANUAL Ch. 8 (Custody and Custody Hearings) (UNC School of Government, 2008), *available at* www.ncids.org (select "Training & Resources," then "Reference Manuals").

1.1 Importance of Pretrial Release

A critical first step in any case is to seek pretrial release of an in-custody client. Pretrial release has an obvious and immediate benefit for your client, but it also has other positive consequences for preparation of the case.

- Your client can meet with you more easily and help you prepare for trial by, for example, showing you relevant places and locating witnesses.
- Your client has the opportunity to demonstrate good behavior by getting a job, supporting his or her family, and other actions.
- Your client may put greater faith in your judgment on issues such as whether to testify or accept a plea.
- Your client may receive a better result at trial or sentencing simply because he or she is not in jail. *See Campbell v. McGruder*, 580 F.2d 521 (D.C. Cir. 1978) (discussing phenomenon that defendant who is not incarcerated at time of trial stands better chance of being acquitted or, if convicted, receiving probationary sentence).

In some situations, your client may decide not to seek pretrial release. For example, he or she may have a better chance of receiving a misdemeanor plea on a felony charge or a sentence of time served. He or she also may have personal reasons (drug addiction, homelessness, or the prospect of a violent confrontation with another person) for preferring to stay in jail. Ultimately, however, it is for the client to decide whether to forego seeking pretrial release. *See generally* N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 1.2 (allocation of authority between lawyer and client).

1.2 Required Proceedings

At a number of points during the life of a case, the court must consider the defendant's eligibility for pretrial release. Whenever feasible, counsel should be prepared to present information on the defendant's behalf.

A. Initial Appearance

By the time counsel is appointed, the defendant ordinarily will have appeared at least once before a judicial official on the question of pretrial release. On arrest, the defendant must be taken without unnecessary delay before a magistrate or other judicial official for an initial appearance. *See* G.S. 15A-501(2); G.S. 15A-511. An initial appearance before a magistrate is required on arrest in both misdemeanor and felony cases. *See* G.S. 15A-511 (requirements of initial appearance). In most instances, the magistrate must set conditions of pretrial release. Defense counsel ordinarily has no input at this stage of the case; however, counsel who already represents the client may be able to speak with the magistrate who holds the initial appearance and thereby avoid a later bond motion. Errors made by a magistrate, such as holding a defendant without bond, may provide grounds for relief for a defendant in some circumstances. *See infra* § 1.4, Exceptions to Eligibility for Pretrial Release; § 1.11, Dismissal as Remedy for Violations. For a detailed discussion of magistrates' responsibilities at initial appearance, see Jessica Smith, *Criminal Procedure for Magistrates*, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/08 (UNC School of Government, Dec. 2009) [hereinafter Smith], *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0908.pdf.

B. Misdemeanors

Generally. Unless local practice provides otherwise, a judge does not automatically review pretrial release conditions in a misdemeanor case. Typically, at initial appearance the magistrate sets a trial date in district court, which may be a week or more away. At the first trial date, the district court may appoint counsel and continue the case but does not necessarily reconsider pretrial release conditions. By the time counsel learns of appointment, the defendant may have served as much time as he or she could receive if convicted. Counsel therefore should consider moving for a bond reduction immediately after appointment or for the court date to be moved up if, for example, the defendant plans to enter a plea of guilty for time served.

Legal limits on delay. Delays in the appointment of counsel for an indigent defendant in a misdemeanor case may result in longer pretrial incarceration and may violate statutory and constitutional requirements, although the remedy for a violation is not clear.

In its 2008 decision in *Rothgery v. Gillespie County*, 554 U.S. 191 (2008), the U.S. Supreme Court held that the right to counsel attaches at initial appearance before a magistrate. Although the Court did not require that a defendant have counsel at the initial appearance, it stated that counsel must be appointed within a reasonable time thereafter. North Carolina's statutes also require early inquiry into the appointment of counsel for in-custody defendants, in misdemeanor as well as felony cases. G.S. 7A-453 states that for defendants who have been in custody for 48 hours without having counsel appointed, the authority having custody of the defendant must notify the designee of the Office of Indigent Defense Services (IDS) in counties designated by IDS—that is, the Public Defender in districts with a public defender office—and the clerk of court in all other counties. The Public Defender or clerk must take steps to ensure appointment of counsel,

who then can act to protect the client's rights, such as moving to modify pretrial release conditions. In practice, however, many districts may not be following the statute's requirements—for example, the custodian may not have a procedure in place for reviewing whether inmates have counsel and for notifying the Public Defender or clerk.

Practical solutions. Different districts may have procedures that expedite the appointment of counsel and the consideration of pretrial release conditions by a judge, but such procedures are not in place statewide. Some public defender offices have a system for reviewing the jail list to determine whether new inmates have counsel and to ensure that counsel is appointed. Some judicial districts hold first appearances for misdemeanors, although first appearances are not statutorily required. Some magistrates at initial appearance advise defendants of their *Rothgery* rights, telling them they have a right to have counsel appointed if they qualify and noting any request for counsel on the release order or other form; it is unclear, however, whether such an advisement leads to expedited appointment of counsel. In 2009, the General Assembly revised G.S. 7A-146(11) and G.S. 7A-292(15) to provide that chief district court judges may authorize magistrates who are licensed attorneys to appoint counsel in noncapital cases for defendants entitled to counsel at state expense, but most magistrates are not attorneys.

C. Felonies

First appearance. After the initial appearance in a felony case, the defendant ordinarily appears before a district court judge for a first appearance. For an in-custody defendant, the first appearance must occur within 96 hours of arrest or at the next regular session of district court, whichever is earlier. At the first appearance, the district court judge (or clerk of court if no district court judge is available) appoints counsel and reviews the conditions of pretrial release. *See generally* G.S. 15A-601 through G.S. 15A-606 (requirements of first appearance).

The prosecutor may argue that he or she is not prepared for or on notice of a hearing on bond, but counsel should resist any further delay by pointing out that it is mandatory for the court to review the defendant's eligibility for release at first appearance. *See* G.S. 15A-605.

In some instances, appointed counsel will enter the case early enough to represent an indigent defendant at first appearance. For example, under G.S. 7A-452(a), the Public Defender for the judicial district may appoint himself or herself to represent a defendant, subject to approval by the court; or, counsel already may represent the defendant on another matter. In an effort to reduce jail overcrowding, some places (such as Durham County through the Public Defender's office) may have a "bond attorney" to represent indigent defendants at first appearance. *See also infra* § 1.5D, Pretrial Services Programs (some pretrial services programs recommend pretrial release conditions at or before first appearance).

Probable cause hearing. In felony cases, the defendant is entitled to a probable cause hearing before a district court judge within fifteen working days of the first appearance. If

the judge finds probable cause to bind the defendant over to superior court, he or she must review the defendant's conditions of pretrial release. *See* G.S. 15A-614. Counsel should be prepared to cite this provision because the State may argue, erroneously, that the district court no longer has jurisdiction to modify bond once it has found probable cause.

In many judicial districts, probable cause hearings seldom occur so the district court does not necessarily reconsider the defendant's eligibility for release. The probable cause stage of a case still may afford the opportunity to obtain more favorable pretrial release conditions. For example, counsel may want to argue for release or a lower bond if the probable cause hearing is continued over the defendant's objection, especially where contrary to statute. For a further discussion of probable cause hearings, see Chapter 3, Probable Cause Hearings.

Cases initiated by indictment. Some felony cases begin by indictment, with the defendant arrested under an order for arrest. *See* G.S. 15A-305(b)(1). On the defendant's arrest, the magistrate still must hold an initial appearance and determine pretrial release conditions; however, if the superior court has specified a bond amount in the order for arrest, it is unlikely that the magistrate will lower the bond.

The defendant is entitled to a first appearance thereafter, at which a judge must review pretrial release conditions. The first appearance may take place in superior court because, on indictment, the case is within the superior court's jurisdiction. As a practical matter, however, the district court holds first appearances in some districts and reviews pretrial release conditions. The defendant does not receive a probable cause hearing when the case begins by indictment.

Potential speedy trial grounds for release. Although North Carolina no longer has a speedy trial statute, there is an older statute prohibiting lengthy pretrial incarceration. If a defendant is incarcerated in jail on a felony warrant and demands a speedy trial in open court, the defendant must either be indicted during the next term of court or be released from custody, unless the State's witnesses are not available. Similarly, if an incarcerated person accused of a felony demands a speedy trial and is not tried within a statutorily set period (two terms of court, provided the two terms are more than four months apart), the person is entitled to release from incarceration. *See* G.S. 15-10; *State v. Wilburn*, 21 N.C. App. 140 (1974). For a further discussion of speedy trial, *see infra* Chapter 7, Speedy Trial and Related Issues.

1.3 Eligibility for Pretrial Release

A. Noncapital Offenses

Generally. Under G.S. 15A-533(b), defendants charged with a noncapital offense are entitled to have pretrial release conditions determined except in specified circumstances. *See also State v. Labinski*, 188 N.C. App. 120 (2008) (subject to certain exceptions, a

noncapital criminal defendant has the right to pretrial release under G.S. 15A-533). The exceptions are discussed *infra* § 1.4, Exceptions to Eligibility for Pretrial Release.

Probation violations. Generally, defendants charged with probation violations have the same right as other noncapital defendants to have conditions of release set pending a violation hearing. *See* G.S. 15A-1345(b); STEVENS H. CLARKE, LAW OF SENTENCING, PROBATION, AND PAROLE IN NORTH CAROLINA 180 (UNC Institute of Government, 2d ed. 1997). Courts sometimes set a bond to apply in the event the defendant violates a condition of probation. This practice has been questioned by the N.C. Court of Appeals and at most constitutes a recommendation should the defendant be arrested for a probation violation. *See State v. Hilbert*, 145 N.C. App. 440 (2001). Following arrest, the court must hold a preliminary hearing (essentially, a probable cause hearing) within seven working days unless a full revocation hearing is first held or the probationer waives the preliminary hearing. If the court fails to hold a timely preliminary hearing, the probationer ordinarily must be released pending the revocation hearing. *See* G.S. 15A-1345(c).

In 2009, the General Assembly created exceptions to the usual pretrial release rules in cases in which the defendant is on probation and is charged with a felony. *See infra* § 1.4C, Setting of Pretrial Release Conditions Delayed: Domestic Violence and Probation Cases; § 1.4E, Pretrial Release Conditions Denied: Capital, Probation, and Other Cases; and § 1.4F, Certain Release Conditions Required: Failures to Appear, Probation, and Other Cases.

Infractions. A defendant charged with an infraction may not be incarcerated. *See* G.S. 15A-1113; ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 82 (UNC School of Government, 4th ed. 2011) (describing rules for infractions); *see also Pulliam v. Allen*, 466 U.S. 522 (1984) (successful suit against magistrate for practice of setting secured bond on nonjailable offenses). Although a defendant charged with an infraction may initially be asked to post a bond in some circumstances, an unsecured bond must be set if the defendant is unable to post a secured one. *See* G.S. 15A-1113(c).

Interstate Wildlife Violator Compact. A defendant may not be arrested and required to post bond for offenses subject to the Interstate Wildlife Violator Compact. *See* John Rubin, *2008 Legislation Affecting Criminal Law and Procedure,* ADMINISTRATION OF JUSTICE BULLETIN No. 2008/06, at 24–25 (UNC School of Government, Nov. 2008), *available at* www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0806.pdf.

B. Capital Offenses

Defendants charged with a capital offense do not have the right to have pretrial release conditions determined; however, a judge (not a magistrate) has the discretion to authorize pretrial release. *See* G.S. 15A-533(c); *State v. Oliver*, 302 N.C. 28 (1981) (pretrial release of capital defendant within judge's discretion). In *State v. Sparks*, 297 N.C. 314 (1979), the court found that the judge acted within his discretion in denying bail for a defendant charged with first-degree murder even though he could not be tried capitally because

North Carolina's capital scheme had been declared unconstitutional. *Sparks* may be limited to the unusual circumstances of that case and may not deny a defendant the right to have pretrial release conditions set in a first-degree murder case once the State has decided to proceed noncapitally.

1.4 Exceptions to Eligibility for Pretrial Release

A. Generally

The setting of bail may be delayed or denied only if authorized by statute and within constitutional limits. *See United States v. Salerno*, 481 U.S. 739 (1987) (discussing circumstances in which preventive detention, without bond, is permissible). The drafters of G.S. Chapter 15A decided initially to steer clear of provisions allowing bail to be delayed or denied based on predictions of future dangerousness. *See* Official Commentary to G.S. 15A-534 (observing that drafters "steered clear of the preventive detention controversy"). Over the years, however, statutory exceptions to the right to pretrial release have multiplied; and, as a practical matter, pretrial release is sometimes delayed or denied without statutory authorization. For an in-depth discussion of potential constitutional limits on preventive detention, see 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 12.3, at 41–79 (3d ed. 2007) [hereinafter LAFAVE, CRIMINAL PROCEDURE].

By the time counsel appears in the case, some of these obstacles to pretrial release will have passed and release conditions will have been set. If a client is still being held without release conditions, counsel should make a motion to set conditions; many of the exceptions to pretrial release apply only to the setting of conditions by the magistrate at initial appearance. (The discussion below is organized from the perspective of when a magistrate may delay or deny pretrial release conditions.) The delay or denial of pretrial release conditions in some circumstances may warrant other relief as well. Provisions and practices delaying or denying pretrial release conditions have not been tested extensively other than in impaired driving and domestic violence cases (*see infra* § 1.11, Dismissal as Remedy for Violations) and may warrant challenge by defense counsel.

B. Initial Appearance Delayed

Inability to understand procedural rights. If the defendant is unable to understand his or her procedural rights, is unconscious, or is so unruly that he or she disrupts and impedes the proceeding, a magistrate may briefly postpone the initial appearance and setting of pretrial release conditions. *See* G.S. 15A-511(a)(3). This statute authorizes a brief delay only, as its effect is to deprive the defendant of other protections afforded at initial appearance, including the advisement of charges and of the right to communicate with counsel.

Defendants unwilling or unable to identify themselves. When a defendant fails to identify himself or herself, a magistrate may decide to conduct a further inquiry, including asking law enforcement to conduct a further investigation, which may have the

effect of delaying the setting of pretrial release conditions. Although not specifically authorized by statute, a short delay incidental to this investigation may be permissible. If a magistrate lacks identifying information about the defendant, he or she may take that factor into account in determining the conditions of release to impose. *See* Smith at 21–22, *available at* http://sogpubs.unc.edu//electronicversions/pdfs/aojb0908.pdf.

A magistrate may not insist on official United States or North Carolina identification as a condition of release; any reasonable form of identification should be sufficient, even if not in writing (for example, a member of the community might vouch for the defendant's identity). *Id.* Improper insistence on official U.S. or N.C. identification may work a particular hardship on noncitizen clients. If a noncitizen client is still in custody because of such a condition when you enter the case, make a motion to the court to determine whether the client has produced sufficient identification for release. For a discussion of other pretrial release issues affecting noncitizen clients, see *infra* "Noncitizens and detainers" in § 1.4G, Circumstances Not Justifying Delay or Denial of Pretrial Release; § 1.9H, Post-Release Issues Affecting Noncitizen Clients.

C. Setting of Pretrial Release Conditions Delayed: Domestic Violence and Probation Cases

Domestic violence offenses. For certain domestic violence offenses, a defendant may be held in custody for up to 48 hours after arrest so that a judge can set conditions of pretrial release. If a judge is not available within 48 hours of arrest, a magistrate must proceed to set pretrial release conditions. *See* G.S. 15A-534.1. Note that G.S. 15A-534.1 does *not* authorize a 48-hour hold on defendants arrested for the specified offenses. A defendant must be brought before a judge at the earliest opportunity, and the failure to do so may warrant dismissal. *See State v. Thompson*, 349 N.C. 483 (1998). Litigation over this provision is discussed *infra* in § 1.11B, Domestic Violence Cases.

G.S. 15A-534.1(a)(1) also provides that a judge may delay release for a reasonable period of time, even after the defendant is brought before the judge, if the defendant's immediate release would pose a danger to a domestic violence victim or another person. *See State v. Gilbert*, 139 N.C. App. 657 (2000) (permissible for judge to delay release by additional five hours). This type of hold predated the General Assembly's enactment of the 48-hour provision and, as a practical matter, should now be rarely used because the defendant will already have been held for some time before having pretrial release conditions set.

Probationer charged with felony if insufficient information about danger. For this category of probationers, a magistrate or other judicial official must delay setting conditions if there is insufficient information about whether the defendant poses a danger to the public. *See* G.S. 15A-534(d2). "Danger" is not defined in the statute. The judicial official must record the basis for his or her decision that additional information is needed, the nature of the information needed, and a date, within 96 hours of arrest, for the defendant to be brought before a judge. If sufficient information is provided before the first appearance, the first available judicial official must set pretrial release conditions. (If the person is found to be a danger, a secured bond is required, as described in subsection

F., below.) If a pretrial release determination has been delayed until the defendant's first appearance, the judge at first appearance must set conditions. It does not appear that the judge may further delay the determination. If there is insufficient information about dangerousness, which is presumably the State's burden to show, the judge must set pretrial release conditions as in other cases.

Probation violation by probationer who has pending felony charge or is subject to sex offender registration, if insufficient information about danger. For this category of probationers, a magistrate or other judicial official must delay setting conditions if there is insufficient information about dangerousness. G.S. 15A-1345(b1). "Danger" is not defined in the statute. Denial of release for this reason may last no longer than seven days. After seven days, if sufficient information has not been provided to determine dangerousness, the defendant must be brought before any judicial official to determine conditions of release. It does not appear that the judicial official may further delay the determination. If there is insufficient information about dangerousness, which presumably is the State's burden to show, the judicial official must set conditions of release as in other cases. If a person is found to pose a danger, release conditions may be denied as described in subsection E., below.

D. Pretrial Release Conditions Set but Release Delayed: Impaired Driving and Other Cases

Impaired driving. A defendant charged with an impaired driving offense is entitled to have pretrial release conditions set. However, if the magistrate finds by clear and convincing evidence that the defendant's impairment presents a danger of physical injury or damage to property, the magistrate must delay release until either: (1) the defendant is no longer impaired to the extent that he or she presents such a danger; *or* (2) a sober responsible adult assumes responsibility for the defendant. The defendant may be detained for this reason no longer than 24 hours. Once condition (1) or (2) is met and the defendant has satisfied any conditions of pretrial release, such as the posting of bond, the defendant must be released. *See* G.S. 15A-534.2. If release is improperly delayed or denied, grounds may exist for dismissal of the charges. For a further discussion of this type of case, see *infra* § 1.11A, Impaired Driving Cases.

Testing for AIDS or Hepatitis B. A defendant may be detained for up to 24 hours for AIDS or hepatitis B testing in accordance with the requirements of G.S. 15A-534.3. In such cases, a magistrate ordinarily will conduct the initial appearance and set pretrial release conditions and will order the defendant held for up to 24 hours for the testing to be conducted.

E. Pretrial Release Conditions Denied: Capital, Probation, and Other Cases

Capital offenses. *See* G.S. 15A-533(c); *see also supra* § 1.3B, Capital Offenses.

Certain other offenses. For the following offenses, North Carolina statutes establish a rebuttable presumption that no condition of pretrial release would assure the safety of the

community if the conditions set forth in the applicable statute apply:

- certain drug trafficking offenses (G.S. 15A-533(d));
- certain gang offenses (G.S. 15A-533(e)); and
- certain methamphetamine offenses (G.S. 15A-534.6).

For the drug trafficking and gang offenses, if the statutory conditions apply, only a judge (not a magistrate) may release the person and only on finding that there is a reasonable assurance that the person will appear and release does not pose an unreasonable risk of harm to the community. *See* G.S. 15A-533(e).

Legislative note: Effective for proceedings to determine pretrial release conditions on or after December 1, 2013, S.L. 2013-298 (S 316) adds new G.S. 15A-533(f), which creates a rebuttable presumption that no condition of release will reasonably assure the defendant's appearance and the community's safety if a judicial official finds reasonable cause to believe the defendant committed a felony or Class A1 misdemeanor involving the illegal use, possession, or discharge of a firearm, and the official also finds that (1) the offense was committed while the defendant was on pretrial release for another felony or Class A1 misdemeanor involving the illegal use, possession, or discharge of a firearm, or (2) the defendant has previously been convicted of a felony or Class A1 misdemeanor involving the illegal use, possession, or discharge of a firearm and not more than five years have elapsed since the date of conviction or the defendant's release for the offense, whichever is later. If the statutory conditions apply, only a judge (not a magistrate) may release the person and only on finding that there is a reasonable assurance that the person will appear and release does not pose an unreasonable risk of harm to the community.

Violation of certain health control measures. If a person violates certain health control measures and poses a threat to the health and safety of others, the judicial official must deny pretrial release until the person no longer poses a threat. *See* G.S. 15A-534.5.

Probation violation by probationer who has pending felony charge or is subject to sex offender registration, if probationer poses danger to public. For this category of probationers, if the person is found to be a danger, the judicial official must deny release conditions pending the violation hearing. G.S. 15A-1345(b1). "Danger" is not defined in the statute. As a general rule, a person charged with a probation violation is entitled to a preliminary hearing under G.S. 15A-1345(c). That statute provides that if the hearing is not held within seven working days of arrest, the probationer is entitled to be released to continue on probation pending a hearing. For probationers who have a pending felony or are subject to sex offender registration, however, G.S. 15A-1345(c) states that they must be held until the final violation hearing if they have been denied release on the ground of dangerousness. This provision may conflict with due process principles, which require that probationers be afforded a preliminary hearing "as promptly as convenient after arrest." *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972) (parolees); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (applying principle to probationers).

Fugitives. A fugitive from another state has a limited right to pretrial release. G.S. 15A-736 states that a judge or magistrate may allow bail if the defendant is not charged with an offense punishable by death or life imprisonment in the state where the offense was committed. Once a governor's warrant issues, a defendant does not appear to have a right to pretrial release regardless of the nature of the charges. *See* ROBERT L. FARB, STATE OF NORTH CAROLINA EXTRADITION MANUAL at 57 (UNC School of Government, 3d ed. 2013) (interpreting case law as barring pretrial release after issuance of governor's warrant).

Interstate Probation Compact. An out-of-state probationer who is subject to the Interstate Compact for Adult Supervision (G.S. 148-65.4 through G.S. 148-65.9) is not subject to the rules on extradition of fugitives. Under current practice, a probationer charged with a violation is committed to jail to await a hearing, unless waived, before an administrative officer of the Division of Community Correction, at which the administrative officer determines whether the probationer should be returned to the originating state. The hearing must take place within 15 days of arrest. *See* G.S. 148-65.8. The probationer does not receive release conditions pending the hearing, does not appear before a judge, and at present does not receive appointed counsel to assist him or her in preparing for the hearing, in determining whether to waive the hearing, or in challenging untimely hearings. For a further discussion of appointment of counsel for probationers subject to the compact, see *infra* "Interstate compact for adult offender supervision" in § 12.4C, Particular Proceedings.

Post-release supervision or parole violations. A person taken into custody for a violation of post-release supervision or parole is not subject to the provisions on pretrial release. *See* G.S. 15A-1368.6 (post-release supervision); G.S. 15A-1376 (parole).

Involuntary commitment. A defendant who commits an offense while subject to a valid inpatient involuntary commitment order does not have a right to pretrial release; rather, the defendant is returned to the treatment facility where he or she was residing. *See* G.S. 15A-533(a); G.S. 122C-254; *cf. infra* § 2.8E, Disposition of Criminal Case While Defendant Incapable to Proceed (person who is incapable of proceeding but not subject to inpatient involuntary commitment order may have pretrial release conditions set).

Federal offenses. A local officer may arrest a person for a federal offense and take the person before a North Carolina magistrate or judge, who may set pretrial release conditions in accordance with usual state procedures. In limited circumstances, the North Carolina judicial official may order the person temporarily detained without setting release conditions. *See* 18 U.S.C. 3041, 3142.

Military deserters. Military deserters are not entitled to pretrial release conditions. *See Huff v. Watson*, 99 S.E. 307 (Ga. 1919). *But cf.* G.S. 127A-54(b) (military personnel in the North Carolina National Guard who are placed in pretrial confinement in a local confinement facility pending a court martial are entitled to pretrial release in the same manner as if charged with a violation of state criminal law).

F. Certain Release Conditions Required: Failures to Appear, Probation, and Other Cases

In some circumstances, a magistrate at initial appearance is required by statute to set certain pretrial release conditions. In all of these instances, counsel may still make a later motion to reduce or modify bond.

- If *a person fails to appear*, and he or she is arrested on an order for arrest (OFA) or surrendered by a surety, the magistrate must, at a minimum, impose the conditions in the OFA. If the OFA does not require particular conditions, the magistrate must set a secured bond in at least twice the amount of the previous bond, regardless of whether the previous bond was secured or unsecured. If there was not a previous bond, the magistrate must set a secured bond of at least $500. G.S. 15A-534(d1). [*Legislative note*: Effective for proceedings to determine pretrial release conditions on or after December 1, 2013, the minimum amount is $1,000 if there was not a previous bond. S.L. 2013-298 (S 316).] If the person is surrendered by a surety before he or she is arrested, the OFA should be recalled because the person has already been taken into custody and had new pretrial release conditions set; if the OFA is not recalled, the person may be wrongfully rearrested.
- If *a probationer is charged with a felony and is found to be a danger*, the magistrate must impose a secured bond. G.S. 15A-534(d2).
- If *a person is placed on electronic house arrest*, the magistrate must set a secured bond. G.S. 15A-534(a).
- In *certain cases involving child victims*, the magistrate must impose specified restrictions on the defendant's conduct, such as stay-away conditions. G.S. 15A-534.4.
- If *fingerprints or a DNA sample have not been collected from the defendant as required by certain statutes*, the magistrate must make collection a condition of pretrial release. G.S. 15A-534(a).

Legislative note: Effective for proceedings to determine pretrial release conditions on or after December 1, 2013, S.L. 2013-298 (S 316) adds new G.S. 15A-534(d3) to provide that when a defendant is currently on pretrial release for a prior offense, the judicial official must require a secured appearance bond in an amount at least double the amount of the most recent prior secured or unsecured bond for the charges or, if no bond has yet been required for the charges, in the amount of $1,000.

G. Circumstances Not Justifying Delay or Denial of Pretrial Release

Common violations. Magistrates sometimes delay or deny release when there is no statutory authority for doing so. They may misapply the provisions described above or may delay or deny release without authority. Some common errors are as follows:

- Magistrates sometimes do not set pretrial release conditions if a person who is charged with an offense in another county is arrested in the magistrate's county. There is no

authority for the magistrate in the arresting county to wait for the defendant to be transported to the charging county for the setting of release conditions; the magistrate in the arresting county must set pretrial release conditions, which are valid throughout the state, regardless of where the offense occurred. *See* Smith at 18–19, *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0908.pdf; *see also* G.S. 7A-273(7) (initial appearance before magistrate may be held anywhere in state).

- Magistrates sometimes do not set pretrial release conditions if a person is arrested based on an electronic "hit" (via the Division of Criminal Information/Police Information Network) and the paperwork is not then available. A law enforcement officer may arrest a person if there is an outstanding warrant but the officer does not then have the paperwork. *See* G.S. 15A-401(a)(2) (arrest by officer pursuant to warrant not in possession of officer). There is no authority, however, for a magistrate to delay setting conditions to await the arrival or service of paperwork. *See* Smith at 18–19.
- Electronic hits sometimes say "no bond," particularly in cases in which it is alleged that a probationer is an "absconder." There is no authority for delaying or denying bond to an in-state probationer except in the circumstances described in subsections C., E., and F., above.

Noncitizens and detainers. Magistrates sometimes delay or deny pretrial conditions in cases in which they believe the defendant is not a citizen. Magistrates have no role in addressing citizenship matters. If Immigration and Customs Enforcement (ICE) has filed a detainer, the jail may detain the defendant for up to 48 hours (excluding weekends and holidays) after the defendant satisfies pretrial release conditions. 8 C.F.R. 287.7. The jail, not the magistrate, is responsible for implementing the 48-hour detainer, and the magistrate may not delay or deny conditions to give ICE more time to file a detainer or assume custody of the defendant. Under G.S. 162-62, when a person charged with a felony or impaired driving offense is confined to jail, the person in charge of the facility must attempt to determine whether the inmate is a legal resident and must make inquiry to ICE if the inmate's status cannot be determined. However, the statute provides that "[n]othing in this section shall be construed to deny bond to a prisoner or to prevent a prisoner from being released from confinement when that prisoner is otherwise eligible for release." G.S. 162-62(c).

If the magistrate has set conditions but the jail refuses to release a noncitizen client, consider filing a petition for writ of habeas corpus. A sample petition, with supporting documents, is available on the non-capital motions bank on the IDS website, www.ncids.org.

For a discussion of other pretrial release issues that may affect noncitizen clients, see *supra* "Defendants unwilling or unable to identify themselves," in § 1.4B, Initial Appearance Delayed, and *infra* § 1.9H, Post-Release Issues Affecting Noncitizen Clients.

1.5 Types of Pretrial Release

North Carolina now recognizes five types of pretrial release: written promise to appear, unsecured bond, custody release, secured bond, and electronic house arrest with a secured bond. The judicial official must choose "at least" one of these in setting pretrial release conditions. G.S. 15A-534(a). Previously, the statute stated that the judicial official must impose "one" form of pretrial release, which apparently meant that a judicial official could impose one form only. The language was changed when house arrest with electronic monitoring (electronic house arrest or EHA) was added as a form of pretrial release and a secured bond was made a requirement for EHA. *See* 2009 N.C. Sess. Laws Ch. 547 (S 726). While the change may have been intended merely to give effect to the required combination of EHA and a secured bond, the phrasing is not limited to that situation and may authorize other combinations, such as a written promise to appear and a custody release.

A. Types Not Requiring Security

Three types of pretrial release do not require any security.

Written promise to appear. The judicial official does not specify any dollar amount for this form of pretrial release (known in some states as "release on own recognizance"). *See* G.S. 15A-534(a)(1).

Unsecured bond. The defendant executes an appearance bond promising to pay the amount specified if he or she does not appear. No one else need sign, and the defendant need not post any security. *See* G.S. 15A-534(a)(2). If the defendant fails to appear in court as required, he or she is bound to pay the specified amount to the State of North Carolina. As a practical matter, the State is unlikely to proceed civilly to collect the amount owed; instead, the court will issue an order for arrest in the criminal case and, once taken into custody, the defendant will likely have to satisfy a secured bond to obtain release. *See supra* § 1.4F, Certain Release Conditions Required: Failures to Appear, Probation, and Other Cases.

Custody release. Any individual or organization may supervise a defendant, including friends, relatives, employers, and shelters. G.S. 15A-534(a)(3). The supervising party must consent. *See State v. Gravette*, 327 N.C. 114 (1990) (court may not order probation department to supervise defendant without department's consent). A defendant may reject a custody release and choose a secured bond instead. G.S. 15A-534(a).

B. Types Requiring Security

The fourth and fifth type of pretrial release, a secured bond and a secured bond with electronic house arrest (EHA), must be secured in one of the ways described below. For a discussion of limits on a judge's authority in setting a secured bond, see *infra* § 1.6, Law Governing Judge's Discretion; for a detailed discussion of the

mechanics of posting a secured bond, see Smith at 38–44, *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0908.pdf.

Cash. A defendant may secure a bond by posting cash, or having someone else post cash, in the full amount of the bond. *See* G.S. 15A-534(a)(4); G.S. 58-75-1 (person may post cash or securities of State of North Carolina or United States to satisfy bond requirement). When the defendant deposits cash, no one other than the defendant need sign the bond.

The AOC form appearance bond (AOC-CR-201) requires the defendant to agree that cash posted by him or her may be used to satisfy the defendant's other obligations in the case, such as restitution or fines imposed if the defendant is convicted. (If a family member or someone else posts cash for a defendant, and he or she wants it returned at the end of the case and not applied to the defendant's obligations, the person may so indicate on the bond form; if the person does not so indicate, the cash will be treated as belonging to the defendant and applied to the defendant's obligations.) Requiring the defendant's agreement to such a condition is not specifically authorized by statute, but it may be difficult for a convicted defendant to challenge the use of a cash bond for this purpose. Counsel should be alert, however, to the practice of bond being set in the amount alleged to be owed by the defendant—for example, the amount of child support alleged to be due in a child support contempt case. Collection of a debt allegedly due is not a recognized purpose in setting bond. *See infra* § 1.6C, Secured Bond as Last Resort, and § 1.6D, Amount of Secured Bond; *see also* G.S. 15A-1364(b) (defendant may not be imprisoned for inability to comply with order to pay fine and costs).

Judicial officials sometimes require all-cash bonds. The propriety of this practice is discussed *infra* in § 1.6E, Type of Security.

Mortgage. The defendant may meet the requirements of a secured bond by executing a mortgage on real property. *See* G.S. 15A-534(a)(4); G.S. 58-74-5 (describing mortgage procedure). If the defendant is the sole owner of the real property, no one else need sign the bond.

Commercial sureties. A bond may be secured by a commercial or noncommercial surety. Commercial surety companies fall into two categories—"surety bondsmen" and "professional bondsmen." A surety bondsman is a licensed agent of an insurance company, who essentially pledges the assets of the insurance company as security (G.S. 58-71-1(11)); a professional bondsman is licensed to pledge his or her own assets (G.S. 58-71-1(8)). The differences between the two types of commercial sureties may be of little consequence for the defendant unless the court has specified an all-cash bond. *See infra* § 1.6E, Type of Security.

Noncommercial sureties. A private person who receives no consideration, such as a relative or friend, may act as surety. (An attorney may not act as a surety on a bail bond except for an immediate family member. *See* G.S. 15A-541.) Such a person, called an

"accommodation" or "property" bondsman, promises to pay the amount of the bond in the event of breach. The person must provide evidence that he or she has sufficient property (real or personal) to satisfy the bond. *See* G.S. 58-71-1(1). Although the statute does not require the person to post any property as security, some counties may require the person to provide security (such as a deed of trust, certificate of deposit, etc.) for bonds over a certain amount. For large bonds, many counties will allow two or more people to split the bond—that is, divide the liability. For example, on a $50,000 bond, two sureties (commercial or noncommercial) could agree to be liable for half of the bond.

Automobile club bond. For motor vehicle offenses other than impaired driving or a felony, a defendant may be able to use an automobile club card to secure a bond up to $1500. *See* G.S. 58-69-50; G.S. 58-69-55.

C. Electronic House Arrest

If a judicial official imposes electronic house arrest (EHA) as a form of pretrial release, he or she also must impose a secured bond. *See* G.S. 15A-534(a). A magistrate should not impose EHA as a condition of release if the program is not then able to accept the defendant—for example, it does not have equipment available to place the defendant on EHA. Such a pretrial release condition would amount to denial of pretrial release, which ordinarily is impermissible. *See supra* § 1.4, Exceptions to Eligibility for Pretrial Release. Not all counties have pretrial EHA programs. In those counties with programs, counsel may be able to seek a bond reduction and get the defendant released on the condition that he or she be placed on EHA.

Can a defendant be required to reimburse the administering agency for the cost of EHA? Effective July 1, 2011, G.S. 7A-313.1 allows a county that provides the personnel, equipment, and other costs of electronic monitoring to collect a fee from the defendant as provided in that section. The fee is the lesser of the amount of the jail fee allowed by G.S. 7A-313 ($10 for each 24 hours of confinement if the defendant is convicted) or the actual cost of providing the electronic monitoring. A county may not collect a fee from a defendant who is determined to be indigent and entitled to court-appointed counsel. An indigent defendant placed on pretrial EHA may still be responsible for a one-time fee of $15 on conviction. *See* G.S. 7A-304(a)(5).

D. Pretrial Services Programs

Because of their interest in reducing jail overcrowding, pretrial services programs may be a useful ally in obtaining pretrial release for a defendant. A number of North Carolina counties have pretrial services programs. Not all provide the same services, however. For example, some programs primarily gather information through interviews and record checks of defendants; others may arrange for pretrial release for defendants even before first appearance and then supervise them after release; and others become closely involved with defendants, obtaining substance abuse treatment for them and coordinating educational and employment activities.

Programs that supervise defendants can be thought of as an additional type of pretrial release. *See* G.S. 15A-535(b) (judge may release defendant to supervision of pretrial services program, with defendant's consent, in lieu of other types of pretrial release). Defendants supervised by a pretrial services program often do not have to post bond and may obtain release more quickly than they otherwise could. Defendants may have to comply with various conditions, such as reporting periodically to a pretrial services caseworker, obtaining substance abuse treatment, etc. If the defendant complies with the conditions of supervised release, the pretrial services caseworker may be a helpful witness at sentencing. If the defendant fails to comply with the conditions, the pretrial services program may discontinue supervision and recommend that the court revoke pretrial release and set new conditions.

Check with your local program to determine the eligibility criteria for supervised release. Some use a rating system that does not depend on the nature of the charged offense; others have a list of "excluded offenses."

1.6 Law Governing Judge's Discretion

Although judges have considerable discretion in specifying conditions of pretrial release, some constraints exist.

A. Factors

G.S. 15A-534(c) lists several factors that judicial officials must consider in setting pretrial release conditions. They are:

- the nature and circumstances of the offense charged;
- the weight of the evidence against the defendant;
- the defendant's family ties, employment, financial resources, character, and mental condition;
- whether the defendant is so intoxicated that he or she would be endangered if released without supervision;
- the length of the defendant's residence in the community;
- the defendant's record of convictions;
- the defendant's history of flight to avoid prosecution or failure to appear at court proceedings; and
- any other evidence relevant to pretrial release.

Judicial officials often concentrate on the nature of the offense in determining pretrial release. G.S. 15A-534(c), however, requires judicial officials to consider all of the above factors. *But cf. State v. Gilbert*, 139 N.C. App. 657 (2000) (although judicial official must consider these factors, burden is on the defendant to demonstrate that the judicial official did not do so); *State v. Haas*, 131 N.C. App. 113 (1998) (even if factors were all in defendant's favor, they did not mandate particular bond); *State v. Eliason*, 100 N.C. App. 313 (1990) (magistrate's failure to consider all factors did not warrant dismissal of

charges). Studies have indicated that the seriousness of the charged offense does not necessarily predict whether the defendant will fail to appear for court or commit a new crime. *See, e.g.*, STEVENS H. CLARKE ET AL., REDUCING THE PRETRIAL JAIL POPULATION AND THE RISKS OF PRETRIAL RELEASE: A STUDY OF CATAWBA COUNTY, NORTH CAROLINA (UNC Institute of Government, 1988).

B. Restrictions on Activities

Generally. In addition to imposing one of the five types of pretrial release, a judicial official may place restrictions on travel, associations, conduct, and place of abode. *See* G.S. 15A-534(a) (general restrictions); G.S. 15A-534.1 (restrictions for certain domestic violence offenses); G.S. 15A-534.4 (restrictions for certain sex offenses and crimes of violence against children). The restrictions must be reasonable and must relate to the goals of pretrial release. *See* G.S. 15A-534(b) (identifying goals of pretrial release).

Practice note: Defense counsel should be prepared to suggest to the court and prosecutor suitable non-financial conditions in lieu of a secured bond.

Continuous alcohol monitoring. Effective for offenses committed on or after December 1, 2012, G.S. 15A-534(a) allows judicial officials to include as a condition of pretrial release for any criminal offense that the defendant abstain from alcohol consumption, as verified by the use of a continuous alcohol monitoring (CAM) system of a type approved by the Division of Adult Correction, and that any violation be reported by the monitoring provider to the district attorney. G.S. 15A-534.1, which prescribes special pretrial release procedures for domestic violence offenses, authorizes the same condition. The revisions to these statutes were part of a larger act authorizing CAM in a range of circumstances, including as a condition of probation, as part of a sentence for impaired driving, and in civil custody cases. 2012 N.C. Sess. Laws Ch. 146 (H 494), as amended by 2012 N.C. Sess. Laws Ch. 194 (S 847).

Previously, CAM was authorized as a pretrial release condition under G.S. 15A-534(i) for certain impaired driving offenses only; that statute was repealed with enactment of the broader authorization for CAM in amended G.S. 15A-534(a). Imposition of CAM as a pretrial release condition for offenses in which alcohol use is not a factor may raise constitutional issues. *See Berry v. District of Columbia*, 833 F.2d 1031 (D.C. Cir. 1987) (under Fourth Amendment, drug testing as condition of pretrial release is permissible only if it is based on individualized suspicion of drug use and is reasonably related to goals of pretrial release); *cf.* G.S. 15A-1343(a1)(4a), (b1)(2c) (CAM may be imposed as condition of probation in cases not involving impaired driving only when alcohol dependency or chronic abuse has been identified by a substance abuse assessment).

The CAM legislation does not provide for assessment of costs for CAM when imposed as a condition of pretrial release. *Cf. supra* § 1.5C, Electronic House Arrest (applicable statute provides for assessment of costs for EHA in specified circumstances); G.S. 15A-1343.3(b) (statute provides for payment of CAM costs to provider when CAM is imposed as condition of probation). The Administrative Office of the Courts has taken the position

that in the absence of statutory authorization, costs may not be assessed for CAM as a condition of pretrial release. As a practical matter, however, the CAM provider is unlikely to agree to put a defendant on CAM unless the provider receives payment. A defendant's inability to pay may give counsel a basis for arguing for alternative conditions of release that do not impose a financial barrier to release.

C. Secured Bond as Last Resort

The judicial official must impose one of the less onerous types of pretrial release (written promise to appear, unsecured bond, or custody release) unless he or she determines that such release "will not reasonably assure the appearance of the defendant as required; will pose a danger of injury to any person; or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses." G.S. 15A-534(b); *see also State v. Labinski*, 188 N.C. App. 120 (2008) (finding substantial statutory violation by setting of secured bond where there was no evidence that defendant would pose injury to another person without a secured bond, but upholding denial of motion to dismiss charges because defendant was not prejudiced in preparation of her defense); *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc) (incarceration of those who cannot afford money bail, without meaningful consideration of other forms of pretrial release, violates due process and equal protection); COMMISSION FOR THE FUTURE OF JUSTICE AND THE COURTS IN NORTH CAROLINA, WITHOUT FAVOR, DENIAL OR DELAY: A COURT SYSTEM FOR THE 21ST CENTURY at 54 (1996) (as part of recommendations for criminal justice system, Futures Commission recommended that officials setting conditions of pretrial release "should be encouraged to follow present law favoring release on conditions that do not require a secured bond"). If local policy requires it, a judicial official must make written findings when imposing a secured bond instead of other types of pretrial release. *See* G.S. 15A-535(a); *State v. O'Neal*, 108 N.C. App. 661 (1993) (lack of findings in record did not establish that court failed to consider appropriate factors in imposing secured bond).

D. Amount of Secured Bond

Some judicial districts have secured bond schedules, with recommended amounts for different offenses. The judicial official is still required to consider the facts of the particular case, however. The amount of a secured bond is supposed to be based primarily on the risk of nonappearance by the defendant, not on potential dangerousness or risk of harm; potential dangerousness is supposed to be taken into consideration in deciding whether to impose a secured bond at all. *See State v. Jones*, 295 N.C. 345 (1978) (relying in part on art. I, sec. 27 of the North Carolina Constitution, which prohibits excessive bail, court notes that primary purpose of appearance bond is to assure defendant's presence at trial); G.S. 15A-534 Official Commentary; *see also Stack v. Boyle*, 342 U.S. 1 (1951) (bail set in amount higher than reasonably necessary to assure defendant's appearance excessive under Eighth Amendment); 4 LAFAVE, CRIMINAL PROCEDURE § 12.2(a), (b), at 26–37 (discussing potential limits on amount of money bail and impact of defendant's poverty). Studies have indicated a weak relationship between the size of the bond and whether the defendant will appear in court. *See* STEVENS H. CLARKE & MIRIAM

S. SAXON, PRETRIAL RELEASE IN DURHAM, NORTH CAROLINA (UNC Institute of Government, 1987) (so finding).

As a practical matter, judicial officials may set a high secured bond, one the defendant is unlikely to make, when they believe the defendant would pose a danger if released. Such a practice arguably amounts to a form of preventive detention not specifically authorized by statute. *See supra* § 1.4, Exceptions to Eligibility for Pretrial Release. It may be difficult, however, for a defendant to establish that a high bond was not for the purpose of assuring his or her appearance at trial. *See* 4 LAFAVE, CRIMINAL PROCEDURE § 12.3(a), at 41–42 (noting "sub rosa character" [covert nature] of high bail as a means of imposing preventive detention).

E. Type of Security

G.S. 15A-534(a) appears to provide that when a judicial official requires a secured bond, the judicial official may not dictate the type of security the defendant must provide. The statute allows the judicial official to choose among the five different forms of pretrial release (written promise to appear, unsecured bond, etc.); but, if the judicial official chooses a secured bond, a defendant may satisfy the bond by any of the indicated forms of security (cash, mortgage, or surety). Nevertheless, some judicial officials specify that defendants must post all cash to satisfy a secured bond. G.S. 15A-531(4) ameliorates the potential hardship of an all-cash bond by providing that a cash bond may be satisfied by the posting of a secured bond by a "surety bondsman" (a licensed agent of an insurance company) except in child support contempt proceedings. A "professional bondsman," however, may not post a secured bond when a cash bond is required. For a discussion of these two types of commercial bondsmen, see *supra* § 1.5B, Types Requiring Security. Check with the clerk of court for a list of surety and professional bondsmen registered to practice in your district. *See* G.S. 58-71-140 (surety and professional bondsmen must register with superior court clerk in counties where they write bail bonds).

Some districts require the posting of cash if the judicial official employs a variant of the term cash, such as "U.S. currency," "cash money," or "green money." This practice appears inconsistent with the above statutory provisions on the posting of bond by a surety bondsman in lieu of cash.

Legislative note: Effective December 1, 2013, S.L. 2013-139 (H 762) amends G.S. 15A-531(4) to provide that a bail bond signed by either a surety bondsman or a professional bondsman is the same as a cash deposit. (A cash bond in a child support contempt matter still must be satisfied by cash.)

F. Source of Funds for Secured Bond

The court may refuse to accept money or property offered as security where the State proves by the preponderance of the evidence that the security, because of its source, will not reasonably assure the appearance of the defendant. *See* G.S. 15A-539(b). This issue may arise, for example, in a drug case where the evidence shows that a "kingpin" is

trying to post "drug money" for the release of a defendant who is a smaller player in the drug trade.

1.7 Investigation and Preparation for Bond Reduction Motion

Preparation is key to a successful bond reduction motion. During the initial interview with your client, focus on obtaining information that demonstrates his or her ties to the community, such as employment, family, etc. Find out the amount of bond your client can afford and the people who might be available for a custody release. If your county has a pretrial services program, coordinate your efforts if possible. The factors mandated for judicial consideration by G.S. 15A-534(c) (*see supra* § 1.6A, Factors) will dictate the structure of your arguments to the prosecutor or judge, but you need not limit your information gathering to those factors. An interview checklist appears at the end of this chapter as Appendix 1-1.

After the client interview, verify as much information as possible and talk to people who might supervise your client. Your client's position is immeasurably improved if you can attest to the information. Before contacting employers and others, however, be sure that your client is willing to have them informed of the pending criminal charges.

Before making the motion, determine whether the prosecutor will agree to a bond reduction. The information you've gathered may prove useful in meeting any concerns the prosecutor may have about a bond reduction, particularly if you can suggest suitable non-financial conditions of pretrial release. For example, if the prosecutor is concerned about problems your client has had with substance abuse, participation in a treatment program might be an acceptable condition of pretrial release.

If the motion is contested, have key witnesses attend the hearing, particularly anyone willing to supervise the defendant on a custody release. Plan to flesh out your arguments with specific facts—for example, proposals for your client's constructive use of time, suggested educational or employment situations, ways to maintain frequent contact between your client and the supervising party, etc. Also, obtain your client's criminal record and be prepared to respond to the prosecutor's argument that your client is at risk of reoffending if released.

1.8 Procedure for Bond Reduction Motion

A. Who Hears the Motion

Case pending in district court. As long as the case remains in district court, a district court judge may modify a release order of a magistrate or clerk or an order entered by him or her. *See* G.S. 15A-534(e) (authorizing district court judge to modify pretrial release conditions except when superior court judge has ruled on prosecutor's application

for revocation or modification of pretrial release under G.S. 15A-539). In a felony case, the district court retains jurisdiction to review a defendant's pretrial release conditions even upon finding probable cause to bind the defendant over to superior court. *See* G.S. 15A-614 (requiring judge to review the defendant's conditions of pretrial release upon binding the defendant over to superior court).

A district court judge appears able to modify a pretrial release order entered by another district court judge. Although G.S. 15A-534(e) states that a district court judge may modify a release order "entered by him," case law establishes that one judge may modify an interlocutory order (that is, an order that's not final) of another judge when the order involves the exercise of discretion and circumstances have changed. *See State v. Turner*, 34 N.C. App. 78 (1977) (stating general principle). Pretrial release orders clearly entail the exercise of discretion; and counsel should be prepared to argue that new circumstances have arisen, allowing one district court judge to modify a release order entered by another.

Case pending in superior court. After a case is before the superior court, a superior court judge may modify the pretrial release order of a magistrate, clerk, or district court judge, or any order entered by him or her. *See* G.S. 15A-534(e). Here, again, general case law (discussed above) would appear to allow one superior court judge to modify a pretrial release order entered by another superior court judge when circumstances have changed.

Appeal of pretrial release determinations. A defendant may seek superior court review of a district court judge's pretrial release order (or refusal to modify pretrial release conditions) by written application to a superior court judge. *See* G.S. 15A-538(a). Alternatively, the defendant may petition the superior court for a writ of habeas corpus. *See* G.S. 15A-547 (pretrial release statutes do not abridge right of habeas corpus).

A defendant may seek appellate review of a superior court's pretrial release order, but such relief may be difficult to obtain. *See generally* G.S. 7A-32 (setting out types of remedial writs); *In re Reddy*, 16 N.C. App. 520 (1972) (treating motion to review bond in appellate court as petition for writ of habeas corpus). *See also* 2 NORTH CAROLINA DEFENDER MANUAL Ch. 35 (Appeals, Post-Conviction Litigation, and Writs) (UNC School of Government, 2d ed. 2012).

B. Uncontested Bond Reductions

Many bond reductions are the result of a negotiated agreement between the defense attorney and prosecutor. A form bond reduction motion, with a place for the prosecutor to stipulate to the reduction, appears in the non-capital trial motions bank at www.ncids.org.

C. Contested Bond Hearings

Filing and scheduling. There is no time limit on the filing of a bond reduction motion; however, the court and prosecutor may be more receptive to a bond reduction at certain

points in the case, such as when counsel first enters the case, at the time of a scheduled probable cause hearing in a felony case, or after some time has passed without the case coming to trial.

G.S. 15A-951, which governs motions practice in general, provides that pretrial motions must be in writing and served on the prosecutor. Oral bond motions may be permissible at certain stages of the case, such as at a first appearance in district court. *See* G.S. 15A-605 (directing district court judge to review pretrial release at first appearance). In most instances, and in all felony cases, a written motion is advisable. A sample bond motion may be found in the non-capital trial motions bank at www.ncids.org.

Local practice varies on how much notice should be given to the prosecutor and how bond motions are scheduled for hearing.

Hearing. The rules of evidence do not apply at pretrial release hearings. *See* G.S. 15A-534(g). Counsel usually presents the information rather than offering testimony. If relatives, friends, or employers of the defendant attend the hearing, defense counsel can tender them to the court or prosecutor for questioning rather than have them formally sworn.

As the seriousness of the charged offense increases, so may the degree of formality of the hearing. Consider having the hearing recorded if you believe that a witness may make statements that you later may be able to use for impeachment or other purposes.

In most cases, you will want the defendant to be present. It is generally inadvisable, however, for the defendant to make any statements at the hearing because the prosecutor may seek to use such statements at trial.

Audio-visual transmission. Some counties have facilities for audio-visual transmission between the jail and courthouse. An initial appearance before the magistrate may be conducted by audio-visual transmission. *See* G.S. 15A-511(a1). Pretrial release hearings thereafter in noncapital cases may be conducted by audio-video transmission unless the defendant makes a motion objecting to the procedure. The transmission must allow for counsel and the defendant to confer fully and confidentially during the proceeding. *See* G.S. 15A-532(b).

D. Successive Motions

There is no limit on how often a defendant may seek modification of a pretrial release order, although counsel should be prepared to argue that changed circumstances justify reconsideration of pretrial release conditions. For example, a continuance of proceedings at the prosecutor's request may provide grounds for reconsideration of pretrial release conditions.

1.9 Post-Release Issues

A. Modification of Pretrial Release Conditions

On prosecutor's motion. Under G.S. 15A-539, the prosecutor may apply to an appropriate district or superior court judge for revocation or modification of a release order. *See also* G.S. 15A-534(f) (any judge may revoke release order for good cause). The prosecutor may not apply ex parte for revocation or bond modification. *See* N.C. State Bar, 2001 Formal Ethics Opinion 15 (2002) (so stating); *see also State v. Hunt*, 123 N.C. App. 762 (1996) (grand jury issued indictment against defendant who was represented by counsel on other charges, and prosecutor asked judge to issue arrest order and set bond for charges in indictment; court found that prosecutor's request was not improper ex parte contact since charges were new, implying that prosecutor may not proceed ex parte for bond modification on pending charges). Just as prosecutors usually insist on advance notice of a bond reduction hearing, defense counsel should request sufficient time (24 hours, for example) to investigate and prepare to meet a motion to modify or revoke.

The factors the judge must consider in initially setting pretrial release conditions (*see supra* § 1.6A, Factors) also may bear on a prosecutor's motion to revoke or modify. If the judge revokes a release order, the defendant has the right to have new conditions of pretrial release determined, and counsel should request that they be set. *See* G.S. 15A-534(f).

In habitual felon cases. In cases in which a person charged with a felony is later indicted as a habitual felon, judicial officials sometimes will issue an order for arrest and set additional release conditions when the defendant is taken into custody. This practice does not appear to be permissible. Being a habitual felon is a status, not a crime. If the prosecutor believes that stricter release conditions are appropriate in light of the habitual felon indictment, the proper practice would be for the prosecutor to make a motion, with proper notice to the defendant as in other cases, to modify the existing pretrial release conditions. *See also* Jeff Welty, *North Carolina's Habitual Felon, Violent Habitual Felon, and Habitual Breaking and Entering Laws*, ADMINISTRATION OF JUSTICE BULLETIN No. 2013/07, at 19–21 (UNC School of Government, Aug. 2013) (favoring this approach), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1307.pdf. In considering a request to modify pretrial release conditions, counsel should ask that the court consider the factors discussed *supra* in § 1.6A, Factors, and not rely solely on the nature of the charges. Counsel also may argue that the State made the court aware of the defendant's prior record when it previously set bond, and the State's subsequent charging decision does not constitute a change that warrants modification, particularly if the defendant has made his or her prior court appearances.

B. Consequences of Violation of Conditions

Generally. A judicial official may revoke a pretrial release order and issue an order for a defendant's arrest if (1) the defendant violates conditions in the order, such as a

requirement to stay away from a particular location; and (2) the judicial official has jurisdiction over the case. *See* G.S. 15A-534(d) (arrest may be ordered for violation); G.S. 15A-534(e) (describing when judicial official has jurisdiction to modify pretrial release order). Thus, if a defendant violates pretrial release conditions before he or she appears in court for the first time, a magistrate may revoke pretrial release and issue an order for arrest. *See* G.S. 15A-534(e). Thereafter, a judge at the level of court in which the case is then pending (district or superior) has jurisdiction to revoke release and issue an order for arrest.

Upon arrest, whether ordered by a magistrate or judge, the defendant must be taken before a magistrate for an initial appearance, at which the magistrate must set new pretrial release conditions. *See* G.S. 15A-511(a)(1).

Warrantless arrests. Effective for violations of pretrial release conditions occurring on or after December 1, 2011, G.S. 15A-401(b) authorizes law enforcement officers to make a warrantless arrest for any violation of a pretrial release order under G.S. 15A-534, the general provision on pretrial release. Officers may make a warrantless arrest on this basis regardless of whether the violation occurs in or out of their presence. *See* G.S. 15A-401(b)(1); G.S. 15A-401(b)(2)f.

G.S. 15A-401(b) also authorizes law enforcement officers to make a warrantless arrest for a violation of a pretrial release condition under G.S. 15A-534.1(a)(2), which sets out certain conditions that may be imposed in domestic violence cases, such as a "stay away" condition. These provisions predate the broader authorization for warrantless arrests, discussed immediately above, and now appear redundant. A defendant arrested for a violation of a pretrial release condition in a domestic violence case is *not* subject to the 48-hour law applicable to domestic violence offenses because the 48-hour requirements, in G.S. 15A-534.1, apply only when a defendant is *charged* with one of the offenses listed in that statute. A violation of pretrial release conditions is not itself a new offense, and pretrial release conditions must be set as in other cases. For a further discussion of pretrial release in domestic violence cases, including remedies for improper holds, see *infra* § 1.11B, Domestic Violence Cases.

Contempt. Some magistrates issue arrest warrants for contempt for violations of pretrial release conditions. This practice is improper. It is unclear whether violation of a pretrial release order would constitute a contempt at all. A pretrial release order authorizes release of the defendant on condition that he or she comply with the terms of the order. The remedy provided for a violation is revocation of release and the setting of new or modified conditions (higher bond, stricter conditions, etc.). *See* G.S. 15A-534(e), (f). There is no specific provision for contempt, unlike in other statutes. *See* G.S. 5A-11(a)(9a) (providing that a willful refusal to comply with a term of probation is a form of contempt as well as a ground for revoking probation); 18 U.S.C. 3148 (specifically authorizing contempt for violation of pretrial release conditions in federal criminal cases). *But see* G.S. 15A-546 (stating that article on bail does not affect exercise by court of its contempt powers); G.S. 5A-11(a)(3) (authorizing contempt for violation of court order).

Assuming that a violation of a pretrial release condition could be prosecuted as a contempt, it would be improper for a magistrate to issue an arrest warrant for the "offense" of criminal contempt (as a magistrate could do for criminal offenses in general). Specific procedures must be followed for contempt. If a violation of a pretrial release condition could be considered a contempt, it would be an indirect criminal contempt because committed outside the presence of the court; proceedings for indirect criminal contempt must begin with an order to show cause against the person (which may or may not be accompanied by an order for arrest). *See* G.S. 5A-15; G.S. 5A-16. Magistrates ordinarily have no authority to institute indirect criminal contempt proceedings. *See* G.S. 7A-292(2) (authorizing magistrates to punish for direct criminal contempt only); *cf.* G.S. 50B-4(a) (providing that an authorized magistrate may schedule a show cause hearing in district court for a violation of a domestic violence protective order in certain circumstances).

For a further discussion of contempt, including the right to counsel in contempt proceedings, see *infra* § 12.3D, Contempt.

Violation of conditions before release. In setting pretrial release conditions, some judges set conditions that purportedly apply while the defendant is still in custody—for example, a condition in a domestic violence case that the defendant not communicate with the victim before or after release from jail. Because conditions of pretrial release take effect only when the defendant is released, pre-release conditions may be unenforceable. Other procedures, such as a motion for and entry of a domestic violence protective order prohibiting the defendant from contacting the victim, may be necessary. *See State v. Orlik*, 595 N.W.2d 468 (Wis. Ct. App. 1999) (holding that statutes governing conditions of release did not authorize court to impose conditions, including no-contact order, on defendant who remained incarcerated pending trial; court had authority under other statutes to enter protective order for safety of victims and witnesses if supported by sufficient evidence and findings); *see also State v. Tavis*, 978 A.2d 465, 467–68 (Vt. 2009) (noting that state legislature amended pretrial release statute in response to earlier decision by court holding that "conditions of release under the prior statute were enforceable only when a defendant was, in fact, released from custody"; current statute specifies that a no-contact order takes effect immediately "regardless of whether the defendant is incarcerated or released"). *But cf. State v. Gandhi*, 989 A.2d 256 (N.J. 2010) (holding that compliance with court order is required, regardless of its deficiencies, until set aside; therefore, incarcerated defendant's violation of no-contact condition in bail order could be basis for elevating stalking offense to higher degree).

C. Consequences of Failure to Appear

Several consequences may follow from a defendant's failure to appear for court, including:

- issuance of order for arrest (G.S. 15A-305(b)(2));
- setting of secured bond in an amount required by statute (G.S. 15A-534(d1));
- surrender by surety (G.S. 15A-540);

- filing of criminal charge of failure to appear (G.S. 15A-543);
- forfeiture of bond (G.S. 15A-544.1 through G.S. 15A-544.8);
- contempt proceedings for failing to appear (G.S. 15A-546; G.S. 5A-11(a)(3)); and
- in motor vehicle cases, revocation of the defendant's license to drive (G.S. 20-24.1, 20-24.2).

In most instances, a failure to appear results in an order forfeiting any previous bond and an order for arrest; the defendant is then taken into custody by a law enforcement officer or surrendered by a surety (bail bondsman) on the bond. The bond amount following arrest or surrender is set by statute. If no bond is described in the order for arrest, the magistrate must set a bond in at least twice the previous amount of the bond and make it secured. If the defendant was not under bond, the magistrate must impose at least a $500 secured bond. G.S. 15A-534(d1). [*Legislative note*: Effective for proceedings to determine pretrial release conditions on or after December 1, 2013, the minimum amount is $1,000 if there was not a previous bond. S.L. 2013-298 (S 316).] Defense counsel may take some steps, discussed in subsection D., below, to address these consequences.

In motor vehicle cases in which the defendant fails to appear, the court may report the failure to the Division of Motor Vehicles, which will revoke the defendant's driver's license. *See* G.S. 20-24.1; G.S. 20-24.2. A defendant who has failed to appear and had his or her license revoked has the right to have the matter recalendared for trial. *See* G.S. 20-24.1(b1). This provision was added because in some districts the State would not recalendar the case, leaving the defendant's license revoked indefinitely, unless the defendant agreed to plead guilty. The cited statute gives the defendant the right to plead not guilty and proceed to trial, regardless of the passage of time. *See also Klopfer v. North Carolina*, 386 U.S. 213 (1967) (finding unconstitutional North Carolina's former nolle prosequi procedure, under which the prosecutor could take an indefinite dismissal with leave and the defendant had no means to obtain a dismissal or have the case restored to the calendar for trial).

D. Orders for Arrest

When a person on pretrial release fails to appear, the court may issue an order for the person's arrest. Defense counsel should consider the following steps if a client fails to appear.

- Try to avoid having the court issue an arrest order. Ask for time to find your client and get him or her to court that day.
- If the court orders the client's arrest, notify the client and ask him or her to contact you immediately.
- If you reach the client before he or she is arrested (or surrendered by a surety on the bond), make a motion to strike the arrest order and bond forfeiture and to reinstate the previous pretrial release conditions. Have your client present for the motion and be prepared to explain why he or she was unable to appear at the scheduled time—for example, the client was sick, was told the wrong court date, or otherwise was not at fault. A form motion to strike can be found in the non-capital trial motions bank at

www.ncids.org. In this situation, you should advise your client that he or she may be taken into custody upon entering the courtroom and will be taken to jail if the judge refuses to strike the order.

- If the client has been arrested and new pretrial release conditions have not been set, move to have pretrial release conditions set. *See* G.S. 15A-534(f) (upon application after revocation of pretrial release, defendant entitled to have new conditions determined). If conditions have already been set under G.S. 15A-534(d1), under which the magistrate must set a secured bond according to the minimums in that subsection, you may move to reduce the bond, showing why a reduction is appropriate.

E. Bond Forfeitures

Appointed counsel's role. Appointed counsel typically plays a limited role with respect to bond forfeitures for failure to appear. If counsel locates the client before arrest, counsel typically files a single motion asking the court to strike the order for arrest, reinstate the previous conditions of pretrial release, and strike the bond forfeiture. Because counsel usually makes this motion soon after a failure to appear, the motion ordinarily falls within the rules for striking forfeiture orders, discussed below.

After arrest, appointed counsel ordinarily is not involved in the question of bond forfeiture. Nevertheless, counsel may need to inform the client (or family members or others who have posted security) of the procedure for dealing with a bond forfeiture.

Striking forfeiture order. If the defendant (called the "principal") fails to appear, the court enters an order forfeiting the bond. *See* G.S. 15A-544.3. The forfeiture order must be served on the defendant and any surety listed on the bond by first-class mail within thirty days of entry of forfeiture. *See* G.S. 15A-544.4.

A forfeiture may only be set aside for one of the following reasons:

- the defendant's failure to appear has been stricken;
- the charges for which the defendant was under bond have been disposed;
- a surety has surrendered the defendant;
- an order for arrest has been served on the defendant;
- the defendant has died;
- the defendant was imprisoned in the North Carolina Division of Adult Correction or in a unit of the Federal Bureau of Prisons located in North Carolina at the time of the failure to appear; or
- the defendant was incarcerated anywhere else in the country and the district attorney for the county where the charges were pending received notice of this and the defendant remained in custody for ten days after receipt of the notice.

G.S. 15A-544.5(b). If one of the reasons listed in G.S. 15A-544.5(b) applies, the court must set aside the forfeiture.

The judge may enter an order setting aside a forfeiture at the time he or she strikes a failure to appear and recalls any order for arrest. *See* G.S. 15A-544.5(c); *see also* G.S. 15A-544(b) (forfeiture *must* be set aside if court strikes failure to appear and recalls order for arrest). Otherwise, the defendant or any surety may make a written motion to set aside a forfeiture within 150 days of notice of forfeiture, stating the applicable reason under G.S. 15A-544.5(b). *See* G.S. 15A-544.5(d)(1). The motion must be served on the district attorney and the attorney for the county board of education. *See* G.S. 15A-544.5(d)(2).

If neither the district attorney nor the local board of education files an objection to the motion by the twentieth day after it was served, the clerk must enter an order setting aside the forfeiture, "regardless of the basis for relief asserted in the motion, the evidence attached, or the absence of either." G.S. 15A-544.5(d)(4). Only if the district attorney or the board of education objects is a hearing held. *See* G.S. 15A-544.5(d)(5).

Relief from final judgment of forfeiture. If the forfeiture order is not set aside, it becomes a final judgment of forfeiture. *See* G.S. 15A-544.5(d)(7); G.S. 15A-544.6. The defendant or surety may only get relief from the final judgment if not given proper notice of forfeiture or other extraordinary circumstances exist. *See* G.S. 15A-544.8(b). A motion for relief must be filed within three years of the date the judgment of forfeiture became final. *See* G.S. 15A-544.8(c)(1).

Revocation of driver's license. In certain motor vehicle cases, an unvacated forfeiture of a cash bond may result in revocation of a defendant's license to drive. *See* G.S. 20-4.01(4a) (defining that event as a conviction); G.S. 20-24 (requiring that report of conviction be sent to DMV).

F. Surrender by Surety

Surrender of a defendant by a surety is governed by G.S. 15A-540 and G.S. 58-71-20 through G.S. 58-71-30. To the extent Chapter 15A and Chapter 58 conflict, Chapter 15A controls. *See* G.S. 58-71-195 (so stating). G.S. 58-71-30 allows a surety to request a judicial official to order the arrest of a defendant for the purpose of surrendering him or her, but a judicial official may issue the order only if it is authorized by G.S. 15A-305, which gives the grounds for orders for arrest. While a surety may surrender a defendant who has failed to pay the agreed-on premium to the surety (*see* G.S. 58-71-20), a private financial dispute of that kind would not appear to satisfy any of the grounds for issuance of an order for arrest (OFA) under G.S. 15A-305. If grounds exist for arrest under G.S. 15A-305 and the defendant has already appeared in court, a surety would have to request an arrest order from a judge, not a magistrate. *See supra* "Generally" in § 1.9B, Consequences of Violation of Conditions (discussing limits on magistrates' jurisdiction to revoke pretrial release conditions); *see also* Smith at 44–45 (cautioning magistrates about issuing orders for arrest on surety requests), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0908.pdf.

If a surety decides to go off a bond and surrender the defendant before a failure to appear by the defendant, the original pretrial release conditions should remain the same,

although the defendant will have to arrange for a new surety or other security on the bond to obtain release. If a surety surrenders the defendant after a failure to appear, the defendant is entitled to have new conditions of pretrial release determined. *See* G.S. 15A-540(c). The rules on doubling and securing the bond come into play in that instance, however. *See supra* § 1.4F, Certain Release Conditions Required: Failures to Appear, Probation, and Other Cases.

Sometimes confusion arises when a surety surrenders a defendant after an OFA has been issued for the defendant's failure to appear. If the surety surrenders the defendant *before* he or she is arrested by a law enforcement officer, the OFA is supposed to be stricken. The reason is that the surrender accomplishes the purpose of the OFA—that is, the defendant is returned to custody and new pretrial release conditions are set. If the OFA is still outstanding, counsel should move to strike it to prevent the defendant's rearrest. If a surety surrenders a defendant *after* the defendant is arrested by a law enforcement officer, there should be no effect on the defendant's pretrial release conditions, which a magistrate or other judicial official should have redetermined when the defendant was arrested.

G. Return of Security

G.S. 15A-534(h) provides that a bail bond is binding on the obligor until one of the listed circumstances occurs. Unless forfeited, cash or other security posted by a defendant must be returned to him or her in the described circumstances. *See also* G.S. 15A-547.1.

Generally, a bail bond terminates on conclusion of the proceedings at the trial level. *See* AOC Form AOC-CR-201, "Appearance Bond for Pretrial Release," Side Two (Mar. 2009) (so stating). If the defendant has posted cash, the clerk of court in some counties automatically sends the defendant a check. In other counties, the defendant must apply to the clerk for return of the money and must present the receipt previously issued by the clerk. *See also* G.S. 58-74-10 (providing for cancellation of mortgage executed as security on bond). Defendants posting a cash bond may not get their money back, however, if they have unpaid obligations in the case because the appearance bond form (AOC-CR-201) requires defendants to agree that any cash posted by them may be used to satisfy their obligations in the case. *See supra* § 1.5B, Types Requiring Security. For a further discussion of the procedures followed by clerks in returning cash bonds, see 1 JOAN G. BRANNON & ANN M. ANDERSON, NORTH CAROLINA CLERK OF SUPERIOR COURT PROCEDURES MANUAL at 20.15 (UNC School of Government, 2012).

Defendants who pay a percentage of the bond amount to a bondsman ordinarily do not get their money back at the end of the case. *Cf.* G.S. 58-71-20 (indicating that defendant is entitled to return of premium paid to bondsman who surrenders defendant before a breach except in specified circumstances). If the defendant's bond is reduced after the defendant and surety enter into an agreement, the surety is not required to return any portion of the premium to the defendant. *See* G.S. 58-71-16.

H. Post-Release Issues Affecting Noncitizen Clients

Noncitizen clients who have been arrested may be subject to a detainer by Immigration and Customs Enforcement (ICE). If a noncitizen client makes bond in the state criminal case but ICE has issued a detainer (also called a hold), the client is taken into custody by ICE on the client's release from jail and, unless released by ICE, may not be available to appear in and defend the criminal case. As a result, the client may be called and failed in the state criminal case, be the subject of an order for arrest, and, most important for this discussion, have the bond forfeited. If after making bond the client is never going to be able to appear in the criminal case, there is little benefit for the client or a family member to pay a bondsman to post bond. It also may be difficult for the client or a family member who posts cash or a property bond to set aside a forfeiture of the bond and obtain return of the security. *See* G.S. 15A-544.5(b) (setting forth reasons to set aside forfeiture).

In light of these concerns, if an ICE detainer has already been issued, it has been recommended that the client *not* post bond in the state criminal case unless concurrent arrangements are made for release from ICE custody (through an immigration bond or release on the client's own recognizance). Appointed counsel in the criminal case should coordinate with an immigration attorney about the possibility of obtaining pretrial release in the state criminal case and release from ICE custody. *See* North Carolina Justice Center & Southern Coalition for Social Justice, *Picked Up: A Guide for Immigrants Detained in North Carolina*, at 13 (2010), *available at* www.ncjustice.org/docs/PickedUpEng.pdf; *see also* SEJAL ZOTA & JOHN RUBIN, IMMIGRATION CONSEQUENCES OF A CRIMINAL CONVICTION IN NORTH CAROLINA Ch. 7 (Procedures Related to Removal) (UNC School of Government, 2008), available at www.ncids.org (select "Training & Resources," then "Reference Manuals"). If the client is not contesting removal by ICE or does not want to proceed on the criminal charges, the client may want to post bond in the state criminal case and move ahead with the immigration case.

1.10 Release Pending Appeal

A. Appeal from District Court Conviction

District court's authority to modify. When a defendant appeals a district court conviction to superior court, the pretrial release conditions in place in district court remain in effect pending a trial de novo unless modified. G.S. 15A-1431(e). In other words, a bond in superior court is not an appeal bond but rather a continuation of the defendant's pretrial release conditions pending trial de novo. *See generally State v. Sparrow*, 276 N.C. 499, 507 (1970) (when a defendant appeals and exercises his or her right to be tried by a jury, the district court conviction "is completely annulled and is not thereafter available for any purpose").

The statutes raise a jurisdictional question about the district court judge's authority to modify a bond of a defendant who has requested a trial de novo. The pertinent statutes conflict on this question. *Compare* G.S. 15A-534(e)(1) (district court judge may modify

pretrial release order until "noting of an appeal") *with* G.S. 7A-290 and 15A-1431(c) (if defendant appeals, clerk transfers case to superior court ten days after date of district court judgment).

As a result of the conflict in the statutes, three interpretations have arisen as to district court judges' authority to modify pretrial release conditions after an appeal: (1) the judge loses authority over the case as soon as the defendant appeals; (2) the judge loses authority at the end of that day's session even if the defendant appeals during the session (by analogy to the limits on the judge's authority to modify judgments after the end of the session, discussed *infra* in § 10.8B, Session and Term: Length, Type, and Assignment); or (3) the judge loses authority at the expiration of ten days from the date of the judgment in district court.

Because of this uncertainty, some defense attorneys have adopted the practice of filing appeals with the clerk of court on or shortly before the tenth day following the district court's judgment when they are concerned about how a district court judge may react to an appeal. *See* G.S. 15A-1431(c), (d) (providing that within ten days of entry of judgment, notice of appeal may be given in writing to clerk if defendant has not yet complied with judgment). In some districts, the clerk of court will notify the district court judge that an appeal has been filed, who then reviews the defendant's bond. Assuming the district court has the authority to modify the defendant's bond after the giving of appeal and before the expiration of ten days from judgment, there are a number of potential constraints on this practice. First, the district court would appear to have no jurisdiction to act after ten days have passed from the date of the judgment even if the clerk notifies the district court of the appeal within ten days. (The State may still apply to a superior court judge to modify the bond if necessary.) Second, there does not appear to be authority for the defendant automatically to be held in custody pending the holding of a hearing in district court to review pretrial release conditions; the conviction itself does not provide a basis for the defendant's detention because, once appealed, the conviction is vacated. Third, the district court may not have the authority to review and modify the defendant's bond ex parte and without at least notice and an opportunity to be heard by counsel for the defendant. *Cf.* N.C. State Bar, 2001 Formal Ethics Opinion 15 (2002) (prosecutor may not apply ex parte for bond modification or revocation); *see also* 2 NORTH CAROLINA DEFENDER MANUAL § 21.1 (Right to Be Present) (UNC School of Government, 2d ed. 2012). Fourth, the defendant has a statutory and constitutional right to appeal for a trial de novo before a jury; any increase in bond because of the defendant's exercise of those rights is considered presumptively vindictive for the reasons discussed below.

In some districts, judges have set anticipatory bonds, to take effect if the defendant appeals. Generally, however, a court may not make an anticipatory ruling on bond or other matters; rather, the courts have indicated that if a judge wishes to address the possibility, he or she must do so in the form of a recommendation only. *See Little v. Wachovia Bank & Trust Co.*, 252 N.C. 229 (1960) (stating generally that courts have no power to enter anticipatory judgments); *State v. Hilbert*, 145 N.C. App. 440 (2001) (disapproving of setting of anticipatory bond in probation judgment in event defendant

violates; if judge addresses matter at time of probationary judgment, better practice would be to make recommendation only). Such a recommendation would not affect the defendant's release conditions, which would remain the same until a judge, considering the issue after the filing of appeal, modified the conditions. An anticipatory ruling, even in the form of a recommendation, also could have an impermissible chilling effect on the defendant's exercise of his or her rights, discussed next.

Constitutional limits. The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 24 of the North Carolina Constitution guarantee defendants in criminal cases the right to a trial by jury. Pursuant to G.S. 7A-290 and G.S. 15A-1431(b), defendants have a statutory right to appeal a district court conviction to superior court for trial de novo. This statutory right to appeal for trial de novo provides the mechanism by which defendants in misdemeanor cases assert their constitutional right to trial by jury. It is impermissible for a court to increase a defendant's bond because of a defendant's invocation of his or her statutory right to appeal and, thus, constitutional right to a trial by jury. *See Blackledge v. Perry*, 417 U.S. 21 (1974) (person convicted of offense in district court in North Carolina is entitled to pursue right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one; due process requires that such a potential for vindictiveness must not enter into North Carolina's two-tiered trial division process); *North Carolina v. Pearce*, 395 U.S. 711 (1969) (due process prohibits judge from increasing sentence on retrial to discourage appeal; very threat of such a punitive policy serves to chill the exercise of basic constitutional rights), *overruled in part on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989); *see also In re Renfer*, 345 N.C. 632 (1997) (Judicial Standards Commission recommended removal of district court judge from office for, among other things, improperly raising defendant's bond in response to appeal).

Note: For a further discussion of these issues, see Alyson Grine, *I Want a New Trial! Now What? A District Court Judge's Authority to Act Following Entry of Notice of Appeal for Trial De Novo (Parts I & II)*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Feb. 22 & 23, 2010), http://nccriminallaw.sog.unc.edu/?p=1081 & http://nccriminallaw.sog.unc.edu/?p=1086. For a sample motion raising these issues, see the non-capital trial motions bank on the IDS website at www.ncids.org.

B. Appeal from Superior Court Conviction

Once a defendant's guilt is established in superior court, the judge may (but is not required to) set conditions of release pending sentencing or appeal. *See* G.S. 15A-536(a) (release after conviction in superior court); *see also* G.S. 15A-1353(b) (order setting release conditions pending appeal must be forwarded to agency having custody of defendant); G.S. 15A-1451(a) (confinement is stayed when defendant appeals to appellate division and has been released on bail). The court does not automatically consider setting release conditions; defense counsel must affirmatively move for release. If the superior court initially denies release, appellate counsel later may apply to the superior court to set release conditions. In exceptional cases, counsel may be able to obtain relief from the court of appeals (for example, if a superior court judge denies or

sets a high bond on appeal of a case involving a probationary sentence). A sample motion for bond pending appeal appears in the non-capital trial motions bank on the IDS website at www.ncids.org.

Legislative note: Effective for confinement imposed as punishment for criminal contempt on or after December 1, 2013, S.L. 2013-303 (H 450) establishes bail deadlines when notice of appeal is given from an order of a clerk, magistrate, district court judge, or superior court judge. As amended, G.S. 5A-17 provides that a person found in criminal contempt who has given notice of appeal may be retained in custody for not more than 24 hours from the time of imposition of confinement without a bail determination being made by a judicial official (district court judge if confinement is imposed by clerk or magistrate, superior court judge if confinement is imposed by district court judge; and superior court judge other than superior court judge who imposed confinement). If the designated judicial official has not acted within 24 hours, any judicial official is required to hold the bail hearing.

1.11 Dismissal as Remedy for Violations

A. Impaired Driving Cases

Generally. In impaired driving cases, violation of pretrial release procedures may interfere with the defendant's ability to obtain evidence for his or her defense and therefore warrant dismissal. If a person is improperly denied release or access to counsel or witnesses while in custody within the critical first hours after arrest, he or she may lose the opportunity to gather evidence (such as a blood test or opinions as to sobriety) showing that he or she was not illegally impaired. The way to raise this issue is by a motion to dismiss, known as a *Knoll* motion based on the principal North Carolina Supreme Court decision on the issue, *State v. Knoll*, 322 N.C. 535 (1988). A sample *Knoll* motion is available in the non-capital trial motions bank on the IDS website, www.ncids.org. In district court, the defendant should ordinarily make the motion before trial. *See* G.S. 20-38.6 (motions to dismiss or suppress must be made before trial in implied-consent cases in district court if supporting facts are known to the defendant).

The essential question to be decided on a *Knoll* motion is whether the defendant was denied the opportunity to obtain evidence for his or her defense. The *Knoll* case itself actually involved three separate cases with three defendants arrested for impaired driving. In all three cases, the state supreme court dismissed the charges because the defendants were denied the opportunity to obtain evidence for their defense by the failure to allow them to have access to witnesses while in custody, the failure to allow their release, or a combination of the two. In reaching this result, the court in *Knoll* drew on its previous decision in *State v. Hill*, 277 N.C. 547 (1971), which for similar reasons required dismissal of an impaired driving case in which the defendant had been denied release and denied access to counsel and witnesses. *See also United States v. Canane*, 622 F. Supp. 279 (W.D.N.C. 1985) (failure to allow defendant's father to see him after arrest warranted dismissal of charges), *aff'd,* 795 F.2d 82 (4th Cir. 1986).

A denial of the opportunity to obtain evidence may violate both the defendant's statutory and constitutional rights. *See State v. Hill*, 277 N.C. 547 (1971) (Sixth Amendment of U.S. Constitution and article I, section 23 of North Carolina Constitution give the defendant the right to have counsel and obtain witnesses on his or her behalf); *State v. Knoll*, 322 N.C. 535 (1988) (finding statutory violation). Defense attorneys who handle impaired driving cases should become familiar with the specialized post-arrest and pretrial release procedures applicable in such cases, described briefly below, which if violated may amount to a constitutional as well as statutory violation.

In 2006, the General Assembly made changes in magistrate and jail appearance procedures to reduce the potential for *Knoll* errors. *See* Shea Riggsbee Denning, *What's* Knoll *Got to Do with It? Procedures in Implied Consent Cases to Prevent Dismissals under* Knoll, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/07 (UNC School of Government, Dec. 2009), *available at* www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0907.pdf. *Knoll* violations may still occur, however, and may warrant dismissal. Defense counsel should evaluate the applicable case law as well as the receptivity of local judges to *Knoll* motions, which varies significantly around the state. Key points to keep in mind in making such motions are discussed below.

Statutory scheme. As in other criminal cases, a defendant arrested for an impaired driving offense is entitled to an initial appearance before a magistrate and is entitled to have pretrial release conditions set. *See State v. Labinski*, 188 N.C. App. 120 (2008) (recognizing these rights). But, if the magistrate finds by clear and convincing evidence that the defendant's impairment presents a danger of physical injury or damage to property, the magistrate may delay release until either: (1) the defendant is no longer impaired to the extent that he or she presents such a danger; *or* (2) a sober, responsible adult assumes responsibility for the defendant. G.S. 15A-534.2. The imposition of these conditions is known as a "DWI hold." In imposing a DWI hold, the magistrate must follow the procedures set forth in G.S. 15A-534.2 and G.S. 20-38.4 (enacted in 2006). In conjunction with a DWI hold, a magistrate also may set other conditions of pretrial release, such as a secured bond (although as discussed below an excessive bond may result in an impermissible hold and deny the defendant the opportunity to obtain evidence for his or her defense). Once a defendant satisfies the conditions of the DWI hold and any bond or other condition of pretrial release, the defendant must be released. The DWI hold must be lifted once the defendant's blood alcohol level is .05 or below (unless there is evidence that the defendant is impaired from some other substance) and in any event after 24 hours. The defendant is then only required to satisfy any bond or other condition of pretrial release. G.S. 15A-534.2.

If a defendant is unable to obtain immediate release because of an inability to meet the conditions of the DWI hold or any bond or other pretrial release condition, he or she is still entitled to meet with counsel and witnesses while in custody. The arresting officer and magistrate must advise the defendant of these rights. *See* G.S. 15A-534.2(a) (statute "may not be interpreted to impede a defendant's right to communicate with counsel and friends"); G.S. 20-38.4 (magistrate must inform defendant in writing of procedure to have others appear at jail to observe defendant's condition or administer additional chemical

analysis); G.S. 20-38.5 (requiring each district to put in place various procedures to satisfy defendant's rights); G.S. 20-139.1(d) (in-custody defendant has right to arrange for additional testing); *see also generally* G.S. 15A-501(5) (law enforcement officer must without unnecessary delay advise arrested person of right to communicate with counsel and friends and must allow reasonable time and opportunity to do so).

Potential errors. The statutory pretrial release scheme in impaired driving cases has generally been upheld by our courts. A magistrate may impose a DWI hold, as described above, and may impose other conditions of pretrial release, including a secured bond in appropriate circumstances. *See State v. Bumgarner*, 97 N.C. App. 567 (1990) (upholding detention provisions with proper findings); *see also State v. Labinski*, 188 N.C. App. 120 (2008) (court finds that secured bond was not supported by any evidence and was improper, implying that secured bond would be permissible in appropriate cases); *State v. Eliason*, 100 N.C. App. 313 (1990) (failure to consider all statutory factors in imposing secured bond in impaired driving case did not violate defendant's rights).

Various violations of pretrial release requirements may still occur, however, that prevent the defendant from obtaining evidence for his or her defense. The following are some errors you may encounter:

- A magistrate, law enforcement officer, or jailer may fail to or incorrectly advise the defendant of the right to communicate with counsel and witnesses or may improperly deny access. *See State v. Lewis*, 147 N.C. App. 274, 277 (2001) ("[t]he right to communicate with counsel and friends necessarily includes the right of access to them" (quoting *State v. Hill*, 277 N.C. 547, 552 (1971))). In *Lewis*, in which no violation was found, the evidence showed that the defendant was fully advised of his rights and did not exercise them, while in *Hill*, in which a violation was found, the evidence showed that the jailer refused to release the defendant after bond was posted and no one other than law enforcement officers had access to the defendant for the eight hours that he was in custody.
- A magistrate may not have grounds for imposing a DWI hold or the record may not reflect the grounds for a hold. *See State v. Labinski*, 188 N.C. App. 120 (2008) (magistrate automatically imposed DWI hold on defendant who had .08 reading without making required findings; however, defendant failed to show that hold denied her opportunity to obtain evidence in circumstances of case).
- The magistrate may improperly refuse to allow the defendant to be released to a particular person. *See State v. Daniel*, 208 N.C. App. 364 (2010) (majority holds that competent evidence supported finding that person attempting to secure release for defendant was not a sober, responsible person; dissent finds evidence insufficient to show that person was not sober, responsible adult); *State v. Haas*, 131 N.C. App. 113 (1998) (defendant's rights were not violated by magistrate's refusal to release defendant to passenger in car driven by defendant where evidence showed that passenger was intoxicated).
- To avoid the administrative difficulties of the specialized DWI hold procedures, some magistrates may impose a high secured bond only, with a provision that the bond

automatically converts to a lower or unsecured bond after the passage of so many hours. Such "convertible" bonds, which are evidently intended to keep the defendant in custody for a specified period of time, may prevent the defendant from obtaining evidence and therefore violate *Knoll*. Because secured bonds may improperly deny access to counsel and witnesses, some districts have a policy of not imposing secured bonds in impaired driving cases.

Prejudice. The defendant must show that a violation of impaired driving procedures resulted in "prejudice" in the sense required by the cases—that is, the defendant must show that the violation actually denied the defendant the opportunity to obtain evidence for his or her defense. For example, in *Knoll*, one defendant made several requests to call his father but was not allowed to do so for an hour. Once the defendant called his father, the father called the magistrate and said he wanted to pick up his son. The magistrate told the father that he could not pick him up for another six hours. The court found prejudice.

A defendant may have difficulty demonstrating prejudice if the defendant has access to witnesses while detained. In *State v. Labinski*, 188 N.C. App. 120 (2008), four of the defendant's friends went to the magistrate's office after her arrest, but the court found that neither the defendant nor her friends specifically asked to see or talk with each other and therefore the improper release conditions imposed by the magistrate were not the cause of the lack of access and the lost opportunity to obtain evidence. In *State v. Daniel*, 208 N.C. App. 364 (2010), a majority of the court found that competent evidence supported the finding that the defendant's friend, who sought the defendant's release, was not a sober, responsible adult and that the refusal to release the defendant to the friend was therefore not a violation of the defendant's rights; alternatively, the court found that the defendant was not prejudiced by the refusal to release her because she declined to have a witness present for the intoxilyzer test and her friend was able to meet with and observe her before the friend left the magistrate's office. (The dissent found that the magistrate should have released the defendant to the friend and that the defendant's 18-hour confinement, in which she was permitted to meet with her friend for only eight minutes, was comparable to the prejudice in *Knoll* and warranted dismissal.) *See also* Shea Denning, *State v. Daniel Tees up an Analysis of Prejudice*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Dec. 9, 2010), http://nccriminallaw.sog.unc.edu/?p=1811.

In light of the prejudice requirement as interpreted in *Knoll* and subsequent cases, defense counsel should be prepared to show how the violations denied the defendant the opportunity to obtain evidence for his or her defense. The showing of prejudice will vary with the violation and its impact. Thus, in a case in which the defendant was not advised of his or her rights, counsel may not need to show more than the failure to advise because the defendant would not have known of the steps that he or she could take. In a case in which the defendant was advised of his or her rights, counsel may need to show that the defendant sought to exercise them (for example, asked to see counsel or witnesses) and the request was not honored. In a case in which access to witnesses was allowed but release improperly denied, counsel should be prepared to show how denial of release precluded the defendant from obtaining evidence for his or her defense.

Per se impairment cases. *Knoll* stated that in cases in which the State is proceeding on a per se impairment theory—that is, on the basis of an intoxilyzer reading of .08 or more (at the time, .10 or more)—a violation of pretrial release procedures is not automatically prejudicial; the defendant must show prejudice. As applied, however, this standard does not appear to require a greater showing by the defendant in per se impairment cases than in cases in which the State is proceeding on an appreciable impairment theory. The court of appeals in *Knoll* found that per se impairment cases are different because in such cases the chemical analysis alone is sufficient to convict. 84 N.C. App. 228 (1987). The supreme court agreed that the defendants had to show prejudice in a per se impairment case and that it would not presume prejudice, as it had in its pre-*Knoll* decision in *State v. Hill*, 277 N.C. 547 (1971). In requiring the defendant to show prejudice, however, the supreme court did not appear to change its definition of prejudice. The supreme court held that the defendants in *Knoll*, all charged on a per se impairment theory, met the prejudice standard by showing that, if not for the violations, they would have obtained access to witnesses and would have been able to obtain evidence for their defense, including lay opinions about their sobriety and additional testing. The supreme court found that the loss of such evidence was prejudicial. This analysis is consistent with the supreme court's description of prejudice in *Hill*. 277 N.C. at 554 ("The evidence in this case will support no conclusion other than that defendant was denied his constitutional and statutory right to communicate with both counsel and friends at a time when the denial deprived him of any opportunity to confront the State's witnesses with other testimony. Under these circumstances, to say that the denial was not prejudicial is to assume that which is incapable of proof.").

Practice note: The prejudice requirement from the *Knoll* line of cases does *not* mean that the defendant must show that the lost evidence would have been sufficient to rebut the State's evidence of impairment, whether the State is proceeding on a per se or appreciable impairment theory. Prejudice in the *Knoll* context, as discussed above, means that the violation denied the defendant the opportunity to obtain evidence for his or her defense.

Remedy. The relief for a *Knoll* violation is generally dismissal because the violation deprives the defendant of the opportunity to obtain a range of evidence. The violation generally does not result in improper evidence for the State; therefore, suppression ordinarily does not remedy the prejudice to the defendant.

A violation related to a particular procedure, however, may warrant suppression of that procedure rather than dismissal. Thus, G.S. 20-16.2 requires an officer to give the defendant the opportunity to confer with counsel and have a witness present for a chemical analysis. Suppression of the chemical analysis may be sufficient to remedy a violation of that right. *See State v. Buckheit*, ___ N.C. App. ___, 735 S.E.2d 345 (2012) (denial of right to have witness present for intoxilyzer test warranted suppression); *State v. Hatley*, 190 N.C. App. 639 (2008) (same); *State v. Myers*, 118 N.C. App. 452 (1995) (to same effect for breathalyzer test); *see also State v. Rasmussen*, 158 N.C. App. 544 (2003) (suppression of field sobriety tests and dismissal of appreciable impairment theory by trial court cured any prejudice as a result of refusal to allow witness to observe field

sobriety tests conducted after arrest). Suppression of the particular procedure may be insufficient, however, if the violation denied the defendant access to witnesses to rebut other evidence by the State, such as observations by the authorities. *See State v. Ferguson*, 90 N.C. App. 513, 519 (1988) (in case in which defendant refused test because wife was not present and State's case rested solely on authorities' personal observations, court stated that dismissal would be required if evidence on remand showed that wife's arrival was timely and she made reasonable efforts to gain access to defendant).

Effect of 2006 legislation. In 2006, the General Assembly revised several statutes governing procedures in impaired driving cases, adding among other things Article 2D, Implied Consent Offense Procedures, in G.S. Chapter 20. These changes clarified the obligations of magistrates, officers, and jailers in impaired driving cases, but they did not fundamentally alter the principles established in *Knoll*. For example, under G.S. 20-38.4 and G.S. 20-38.5, each district must implement procedures allowing counsel and witnesses to meet with the defendant after arrest and giving the defendant written notice of these procedures. The magistrate also must follow the requirements in G.S. 15A-534.2 on DWI holds. If the statutory requirements are followed, a *Knoll* violation is less likely to occur, but if violations occur and the defendant is prejudiced, *Knoll* still would warrant dismissal.

B. Domestic Violence Cases

Generally. Pursuant to G.S. 15A-533(b), "[a] defendant charged with a noncapital offense must have conditions of pretrial release determined, in accordance with G.S. 15A-534." During the first 48 hours after arrest for certain domestic violence offenses, however, only a judge may set conditions of pretrial release. G.S. 15A-534.1(a), (b). Even though sometimes referred to as the "48-hour law," the statute does not give the State carte blanche to hold the defendant for 48 hours; rather, the defendant must be brought before a judge at the earliest reasonable opportunity. *State v. Thompson*, 349 N.C. 483 (1998). A violation of procedural due process occurs where the defendant is held without conditions of pretrial release although a judge was available to set them. *Id.* The remedy for such violations is dismissal. Further, if a judge is not available after 48 hours have passed, then a magistrate must set pretrial release conditions. G.S. 15A-534.1(b). The defendant has a *Thompson* claim for violation of procedural due process where no judge was available to set conditions and the defendant was held beyond 48 hours rather than being brought back before a magistrate. There also may be *Thompson* violations when the defendant is erroneously held under the 48-hour provisions for an offense not covered by the law. A sample *Thompson* motion is available in the non-capital trial motions bank on the IDS website, www.ncids.org.

Offenses subject to 48-hour law. The term "domestic violence" is used differently in different parts of North Carolina law. For the purpose of the 48-hour law, a domestic violence offense is defined as a crime specified in G.S. 15A-534.1(a)—assault, stalking, communicating threats, domestic criminal trespass, violation of a 50B order, or designated felonies—if the crime was committed upon "a spouse or former spouse or a person with whom the defendant lives or has lived as if married." This definition is

narrower than the definition of a "personal relationship" for the purpose of issuance of a domestic violence protective order (DVPO) under G.S. Chapter 50B. For example, the defendant is not subject to the 48-hour law where the relationship with the victim is that of parent and child or grandparent and grandchild, although that relationship would be sufficient for issuance of a DVPO. The 48-hour law covers a violation of a DVPO that has already been issued, however, even though the "personal relationship" authorizing issuance of the DVPO is one not covered by the 48-hour law. *See* G.S. 15A-534.1(a) (48-hour provisions apply to a "violation of an order entered pursuant to Chapter 50B"). The 48-hour law also covers domestic criminal trespass, which by definition requires a spousal or spouse-like relationship.

The relationship "lives or has lived as if married" creates some gray area with respect to same-sex relationships. The North Carolina courts have not determined whether a defendant in a same-sex relationship with the victim would be subject to the 48-hour law. Some have concluded that the provision would not apply to a defendant in a same-sex relationship because same-sex couples are not eligible to marry under the laws of North Carolina. *See* Joan G. Brannon, *Domestic Violence Special Pretrial Release and Other Issues*, ADMINISTRATION OF JUSTICE BULLETIN No. 2001/06, at 5–6 (UNC School of Government, Dec. 2001), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/aoj200106.pdf. Others have concluded, however, that G.S. 15A-534.1 should be interpreted as applicable to same-sex relationships. The argument is that G.S. 50B-1(b)(2) includes in the definition of a "personal relationship" for DVPO purposes "persons of *opposite sex* who live together or have lived together" (emphasis added), while no such limitation appears in G.S. 15A-534.1. *See* Jeff Welty, *Domestic Violence Cases and the 48 Hour Rule*, N. C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 7, 2011), http://nccriminallaw.sog.unc.edu/?p=2857. The latter position appears to have greater support in the statutory language and the policy reasons behind the 48-hour law.

Availability of judge. If the offense is covered by G.S. 15A-534.1, the question of whether a defendant's procedural due process rights have been violated will hinge primarily on: (1) at what point a judge was available to set conditions of pretrial release; and (2) how long after that point the defendant was held without conditions. In *Thompson*, the defendant was arrested on a Saturday at 3:45 p.m. and was not brought before a judge until Monday at 3:45 p.m., even though judges were available to set pretrial release conditions as of 9:00 a.m. on Monday. The *Thompson* court held: "The failure to provide defendant with a bond hearing before a judge at the first opportunity on Monday morning, and the continued detention of defendant well into the afternoon, was unnecessary, unreasonable, and thus constitutionally impermissible . . . ." 349 N.C. at 500.

In assessing availability, the *Thompson* court took judicial notice of both district and superior court sessions in the county and the start times of those sessions. Thus, as long as a session of either superior or district court has convened in the county, a judge is "available" for purposes of the statute. 349 N.C. at 498 (noting that district and superior court sessions had convened in the county prior to the time that conditions were set); *State v. Clegg*, 142 N.C. App. 35, 39 (2001) (same). *But see State v. Jenkins*, 137 N.C.

App. 367 (2000), below, discussing scheduling considerations. To date, cases interpreting availability have arisen in single-county districts. In a multi-county district, the defendant might argue that a judge was available for purposes of the statute where a session of either district or superior court convened within the district but in a neighboring county. The usual venue rules do not limit the authority of judges to determine pretrial release conditions in these circumstances. *See infra* "Venue for out-of-county offenses" in this subsection B.

In *State v. Malette*, 350 N.C. 52 (1999), decided one month after *Thompson*, the supreme court held that G.S. 15A-534.1(b) was applied constitutionally where the defendant was arrested on Sunday and was brought before a judge some time the next day. The court reasoned that "[t]here is no evidence here that the magistrate arbitrarily set a forty-eight-hour limit as in *Thompson* or that the State did not move expeditiously in bringing defendant before a judge." *Id.* at 55. The holding in *Malette* might have been different had a fuller record been made regarding the sessions of court that had convened that day and the time that conditions were actually set.

In *State v. Jenkins*, 137 N.C. App. 367 (2000), the court of appeals relied on the holding in *Malette* to hold that no violation of the defendant's constitutional rights occurred although the defendant was not brought before a judge at the first opportunity in the morning. The defendant in *Jenkins* was arrested at 6:15 a.m. on Friday and received a hearing before a judge at approximately 1:30 p.m. the same day. While the district court convened at 9:30 a.m. on Friday mornings, the afternoon session was typically devoted to bond hearings. The court of appeals held that "[a]lthough defendant was detained for approximately seven hours, we find his bond hearing occurred in a reasonably feasible time and promoted the efficient administration of the court system." *Id.* at 371. Thus, where the delay is short and attributable to the normal pattern of scheduling in the county, the defendant is less likely to prevail on a *Thompson* claim.

In *State v. Clegg*, 142 N.C. App. 35 (2001), the defendant was taken into custody around 7:00 p.m. on Saturday, February 28, for a charge of assault on a female. He received a hearing before a judge some time after 2:00 p.m. on Monday, March 2, although several sessions of court had convened that morning. Thus, the defendant was held for approximately 39 hours without bond. After receiving information that the victim's injuries were more serious than initially believed, the State dismissed the assault on a female charge on March 25 and charged the defendant with assault with a deadly weapon inflicting serious injury. The court of appeals held that the defendant was unconstitutionally detained in connection with the original assault on a female charge, but he was not detained on the superseding felony assault charge and, to obtain dismissal, he had to show that the detention on the misdemeanor prejudiced his defense of the felony charge. The court found no prejudice but suggested that it would have reached a different result had the State dismissed the misdemeanor charge and refiled different charges in an effort to avoid the consequences of the earlier unconstitutional detention. The court's consideration of prejudice in *Clegg* is based on the circumstances of that case, in which the defendant was not actually held on the felony charge because it had not yet been filed. In the typical case, *Thompson* does not require the defendant to demonstrate any

prejudice on the charges for which he or she was improperly detained; the defendant simply must show improper detention.

Practice note: In pursuing a *Thompson* claim, counsel should make a record of what sessions of court convened before the time that conditions were set and the nature of the sessions (whether the session was criminal or civil, whether a judge was available to set bond regardless of the session designation, whether a prosecutor was present or available, etc.). The court may be willing to take judicial notice of facts of record, such as the court schedule; otherwise, counsel should be prepared to call a witness, such as the clerk of court.

Venue for out-of-county charges. If a person is arrested on an out-of-county charge subject to the 48-hour law—for example, a defendant is arrested in New Hanover County for an offense that allegedly occurred in Buncombe County—the appropriate judicial official in New Hanover county must set pretrial release conditions as in any other domestic violence case subject to the 48 hour law (unless Buncombe county has picked up the defendant). Thus, during the first 48 hours after arrest, a judge in New Hanover County sets pretrial release conditions; after 48 hours, a magistrate in New Hanover County sets pretrial release conditions. That the defendant is being held on an out-of-county charge is not a basis for denying or delaying the setting of pretrial release conditions. *See supra* "Common Violations" in § 1.4G, Circumstances Not Justifying Delay or Denial of Pretrial Release.

Some district court judges have questioned whether they have the authority to set pretrial release conditions in these cases because ordinarily they have venue only over offenses alleged to occur within their county. G.S. 15A-131(a); *see also* G.S. 15A-131(b) (venue for pretrial proceedings in cases within original jurisdiction of superior court lies in the superior court district or set of districts embracing the county where venue for trial lies). Venue rules are not a bar because, in setting pretrial release conditions in a case subject to the 48-hour law, a judge is essentially stepping into the shoes of the magistrate and completing the initial appearance. A magistrate has venue to hold an initial appearance anywhere in North Carolina. *See* G.S. 7A-273(7) (any magistrate may hold an initial appearance); *see also* G.S. 15A-131(f) (for purposes of venue requirements, "pretrial proceedings are proceedings occurring after the initial appearance before the magistrate . . . ."). An essential part of an initial appearance is the setting of pretrial release conditions. G.S. 15A-511(e). Judges are authorized in general to hold initial appearances (G.S. 15A-511(f)) and are required to handle the pretrial release component in 48-hour cases during the first 48 hours after arrest. G.S. 15A-534.1. If a judge was available and failed to timely set pretrial release conditions on an out-of-county charge, counsel should move to dismiss under *Thompson*.

Review of criminal history report. Effective October 1, 2010, amended G.S. 15A-534.1(a) provides that the judge must direct a law enforcement officer or district attorney to provide a criminal history report on the defendant and that the judge must consider the report in setting conditions. The judge must return the report to the agency that provided the report; it is not placed in the case file. The revised statute prohibits unreasonable

delay in the setting of conditions for the purpose of reviewing the criminal history report. These requirements also appear to apply to magistrates who set pretrial conditions under the 48-hour statute because G.S. 15A-534.1(b) states that if a judge has not acted within 48 hours of arrest, the magistrate must set conditions under the provisions of G.S. 15A-534.1.

Ex parte DVPOs. A violation of a DVPO entered under G.S. Chapter 50B, including a violation of an ex parte DVPO, appears to be subject to the 48-hour law because the law applies to "violation of an order entered pursuant to Chapter 50B." G.S. 15A-534.1(a) (so stating). The 48-hour law does not appear to exclude ex parte DVPOs.

In *State v. Byrd*, 363 N.C. 214 (2009), the supreme court ruled that a violation of an ex parte DVPO did not trigger certain criminal consequences because the wording of the particular DVPO statutes did not then cover ex parte orders. The General Assembly has since revised the pertinent statutes to make them applicable to ex parte DVPOs. *See* G.S. 50B-4(f) (stating that a "valid protective order" includes an ex parte order); G.S. 50B-4.1(h) (to same effect); *see generally* John Rubin, *2009 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/09, at 6–7 (UNC School of Government, Dec. 2009), *available at* www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0909.pdf.

The court in *Byrd* also expressed concerns about the constitutionality of imposing criminal consequences for a violation of an ex parte order, which is necessarily entered without notice to the defendant and an opportunity to be heard. As of this writing, the state supreme court had not revisited the potential constitutional issues.

Hold for risk of injury or intimidation. G.S. 15A-534.1(a)(1) allows a judge to delay setting pretrial release conditions for a reasonable period of time if the defendant's immediate release poses a danger of injury to the victim or another person or is likely to result in intimidation of the victim, and an appearance bond is inadequate to protect against the injury or intimidation. Thus, where the defendant has been brought before a judge at the earliest, reasonable opportunity within 48 hours after arrest in compliance with *Thompson*, the judge still may hold the defendant in custody without bond for a reasonable additional period. *See State v. Gilbert*, 139 N.C. App. 657, 669 (2000) (defendant was received at a detention facility around 9:00 p.m. and received a hearing before a judge at 9:00 a.m. the next morning, at which the judge imposed an unsecured bond but ordered that the defendant not be released until after 2:00 p.m. that afternoon; court held that additional five-hour delay was not an unconstitutional application of G.S. 15A-534.1). This type of hold predated the General Assembly's enactment of the 48-hour law and, as a practical matter, should now be used sparingly because the defendant will already have been held for some time before appearing before a judge or magistrate.

C. Other Holds

Outside of the impaired driving and domestic violence contexts, the courts have been reluctant to order dismissal for pretrial release violations. *See, e.g., State v. Pruitt*, 42

N.C. App. 240 (1979) (disapproving of failure to hold first appearance for defendant charged with felony and incarcerated for almost a month, but finding no prejudice). Violation of the defendant's pretrial release in other contexts may still provide a basis for dismissal or other remedies if the defendant can show prejudice (per the *Knoll* line of cases discussed in subsection A., above), a violation of due process (per the *Thompson* line of cases, discussed in subsection B., above), or a violation of other statutory or constitutional requirements. *See also* G.S. 15A-954(a)(4) (dismissal warranted if defendant prejudiced by violation of constitutional rights). Defense counsel should continue to bring to the court's attention improper holds and delays resulting in a deprivation of the defendant's liberty. Even if you cannot obtain a remedy in the specific case, you may reduce the incidence of such violations in the future. You also may want to discuss problematic practices with your local bar committee and, in public defender or contract districts, the chief public defender or regional defender. They may be able to bring such practices to the attention of the senior resident superior court and chief district court judges, who are charged under G.S. 15A-535(a) with adopting local rules on pretrial release.

Appendix 1-1
Interview Checklist for Bond Hearing

The following information may be useful both for preparing for a bond hearing and for locating the client later.

1. Identifying Information (name, aliases, social security #, citizenship, date and place of birth)

2. Length of residence (in North Carolina and _____County)

3. Family ties in North Carolina (spouse, children, other relatives and dependents) and the names of neighbors, friends, and others who can verify information about the client (with work and home telephone numbers for each)

4. Present address, length of residence at that address, telephone number, and names and relationship to client of people living there

5. Prior addresses and length of residence at each

6. Present employment status, length of employment and job responsibilities, telephone number of employers, and job prospects if unemployed

7. Prior employment information

8. Education

9. Current and past military service

10. Health information (medical or mental health problems, alcohol or drug problems, and past or present treatment providers or programs)

11. Probation, post-release supervision, or parole status, including names and telephone numbers of previous attorney and probation officer

12. Other pending charges and name of attorney (if any), conditions of release, and other pertinent information

13. Prior convictions, prior release status in other cases, and whether there have been any past failures to appear

14. Financial resources for bond (client or willing relatives, friends, others). What bond could client make, if any?

15. Relatives, friends, or others who might agree to custody release

16. Client's priorities with regard to pretrial release conditions (keep job, care for children, continue medical treatment, get substance abuse treatment, etc.)

17. If not already determined, client's citizenship status.

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Blueprint *for* Smart Justice
North Carolina

ACLU SMART JUSTICE

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Executive Summary

Over the past five decades, the United States has dramatically increased its reliance on the criminal justice system as a way to respond to drug addiction, mental illness, poverty, and underfunded schools. As a result, the United States today incarcerates more people, in both absolute numbers and per capita, than any other nation in the world. Millions of lives have been upended and families torn apart. This mass incarceration crisis has fractured American society, damaged families and communities, and wasted trillions of taxpayer dollars.

We all want to live in safe and healthy communities, and our criminal justice policies should be focused on the most effective approaches to achieving that goal. But the current system has failed us. It's time for the United States to dramatically reduce its reliance on incarceration and invest instead in alternatives to prison, including approaches better designed to break the cycle of crime and recidivism by helping people rebuild their lives.

The ACLU's Campaign for Smart Justice is committed to transforming our nation's criminal justice system and building a new vision of safety and justice. The Campaign is dedicated to cutting the nation's incarcerated population in half and combating racial disparities in the criminal justice system.

To advance these goals, the Campaign partnered with the Urban Institute to conduct a two-year research project to analyze the kinds of changes needed to cut the number of people in prison in each state by half and reduce racial disparities in incarceration. In every state, Urban Institute researchers identified primary drivers of incarceration. They then predicted the impact of reducing prison admissions and length of stay on state prison populations, state budgets, and the racial disparity of those imprisoned.

The analysis was eye-opening.

In every state, we found that reducing the prison population by itself does little to diminish racial disparities in incarceration — and in some cases would worsen them. In North Carolina — where, as of 2016, the per capita adult imprisonment rate of Black people is 4.5 times higher than that of white people[1] — reducing the number of people imprisoned will not on its own reduce racial disparities within the prison system. This finding confirms for the Campaign that urgent work remains for advocates, policymakers, and communities across the nation to focus on efforts like policing and prosecutorial reform that are specific to combating these disparities.

North Carolina's prison population has more than doubled between 1980 and 2016,[2] and it is projected to exceed capacity by 2025.[3] As of June 2018, 37,104 people were imprisoned across the state.[4] The war on drugs continues to fuel North Carolina's mass incarceration crisis — while the number of people admitted to prison every year for a drug offense decreased between 2008 and 2018, non-trafficking drug offenses still made up 18 percent of all prison admissions in fiscal year 2018.[5] People with mental health or substance use disorders continue to suffer in North Carolina prisons: A screening sample of sentenced people in 2016 established that 71 percent self-reported a need for intermediate or long-term substance-use disorder treatment,[6] and the state estimates that 25,000 people with severe mental illness are in jail every year.[7]

In an effort to address the growing prison population and to decrease admissions, North Carolina enacted the Justice Reinvestment Act (House Bill 642) in June 2011. These reforms included limiting the circumstances under which a person can be sentenced and imprisoned for a misdemeanor, which contributed to a 19 percent decline in prison admissions between

2011 and 2016.[8] In spite of this progress, the size of North Carolina's prison population remained nearly static over the same time period. While the Justice Reinvestment Act was undoubtedly a step in the right direction, North Carolina's incarcerated population remains untenably large.

And all that incarceration is expensive — in 2016, North Carolina spent $1.9 billion of its general fund on corrections.[9]

So what's the path forward?

Reducing the time people serve in North Carolina's prisons through sentencing reform is an essential step in reducing the prison population. People age 50 and older accounted for nearly one in five people (17.9 percent) imprisoned in 2016,[10] a trend that is at odds with overwhelming evidence that this group poses little risk to public safety and is unlikely to recidivate.[11] To reduce the aging prison population, the North Carolina Legislature should reform its current structured sentencing grid, which calculates time served based on a defendant's charge and criminal history.[12] The state should limit mandatory minimum sentences, remove sentencing enhancements, and expand its compassionate release program in order to address its rapidly aging prison population.

Further, North Carolina lawmakers should channel more funding into alternatives to incarceration that can reduce criminal activity, such as mental health care and housing. Funding should be increased for programs already in use in North Carolina that divert people away from the criminal justice system, such as the Law Enforcement Assisted Diversion and Crisis Intervention Team training.

If North Carolina were to adopt the changes outlined in this Smart Justice 50-State Blueprint's forecaster chart the state could save a staggering $1 billion by 2025 — money that could be better spent on schools, infrastructure, and services for North Carolinians.

Ultimately, the answer is up to North Carolina's voters, policymakers, communities, and criminal justice reform advocates as they move forward with the urgent work of ending North Carolina's obsession with mass incarceration.

The State of the North Carolina Prison System

The North Carolina prison population has more than doubled between 1980 and 2016[13] — reaching a peak of 41,030[14] people in 2011 — and the state had the 13th-largest prison population in the country as of the most recently available national data (2016).[15]

In 2011, the state passed the Justice Reinvestment Act, a policy reform law that contributed to significant reductions in its prison population. However, additional reforms are still urgently needed. As of June 2018, 37,104 people were imprisoned across the state,[16] and North Carolina's Department of Public Safety projects the state's prison population will grow in the near future, exceeding current capacity by 2025.[17]

AT A GLANCE

NORTH CAROLINA PRISONS

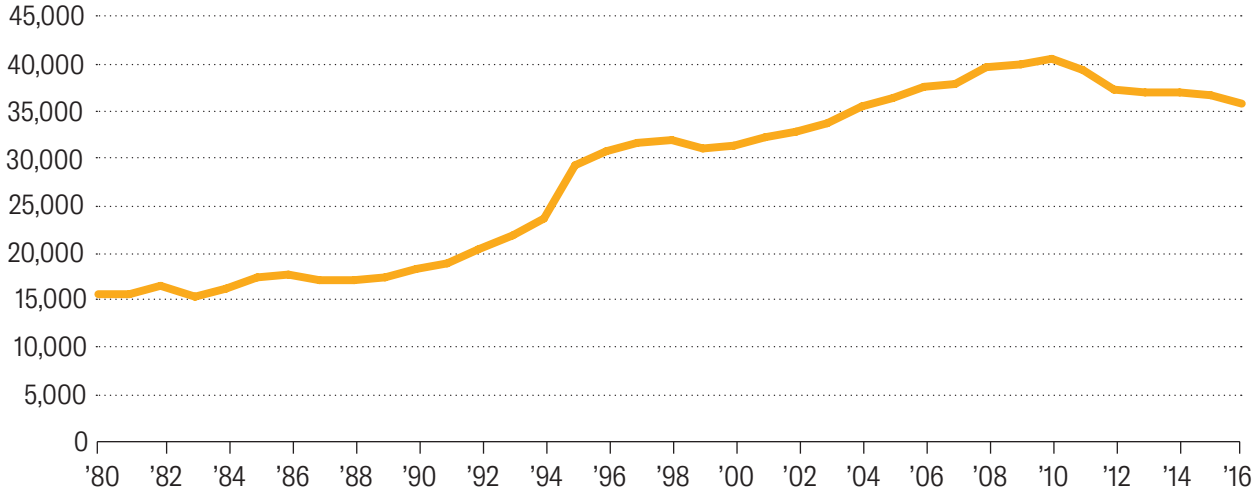
41,030 people were imprisoned in North Carolina at its prison population peak in 2011.

North Carolina's state prisons are expected to exceed current capacity by **2025**.

What Is Driving People Into Prison?

A litany of offenses drives people into North Carolina's prisons, with non-trafficking drug offenses making up 18 percent of all prison admissions in fiscal year 2018.

NORTH CAROLINA PRISON POPULATION



While overall admissions for drug offenses dropped by 15 percent between 2008 and 2018, they still accounted for more than one in five admissions to North Carolina prisons in fiscal year 2018. Other top conviction offenses for prison admissions in 2018 were breaking and entering (12 percent), larceny (11 percent), assault (7 percent), and fraud (7 percent).[18] In fiscal year 2018, North Carolina admitted 25,217 people to state prisons.[19]

More than half (56.7 percent) of people admitted to prison in 2016 had committed violations of probation and other forms of community supervision, including for technical reasons such as missing an appointment, while only 39.1 percent were admitted to prison with new sentences. As of the most recently available data (2015), nearly half (44.9 percent) of people admitted to prison had no prior history of incarceration for a felony conviction.[20]

The state took a big step toward reducing admissions into the prison system when it enacted the Justice Reinvestment Act (HB 642) in June 2011, a law that limited the circumstances under which a person could be sentenced to prison for a misdemeanor. These reforms contributed to an overall decline of 13.7 percent in admissions to North Carolina prisons between 2006 and 2016—largely driven by a 76.5 percent decline in misdemeanor admissions.[21]

In an effort to address persistently high probation revocation rates, reforms in the Justice Reinvestment Act also limited the circumstances under which a person could return to prison from probation and expanded alternatives to prison for people who violate parole, probation, and other forms of community supervision. Since enacting these reforms, admissions

AT A GLANCE

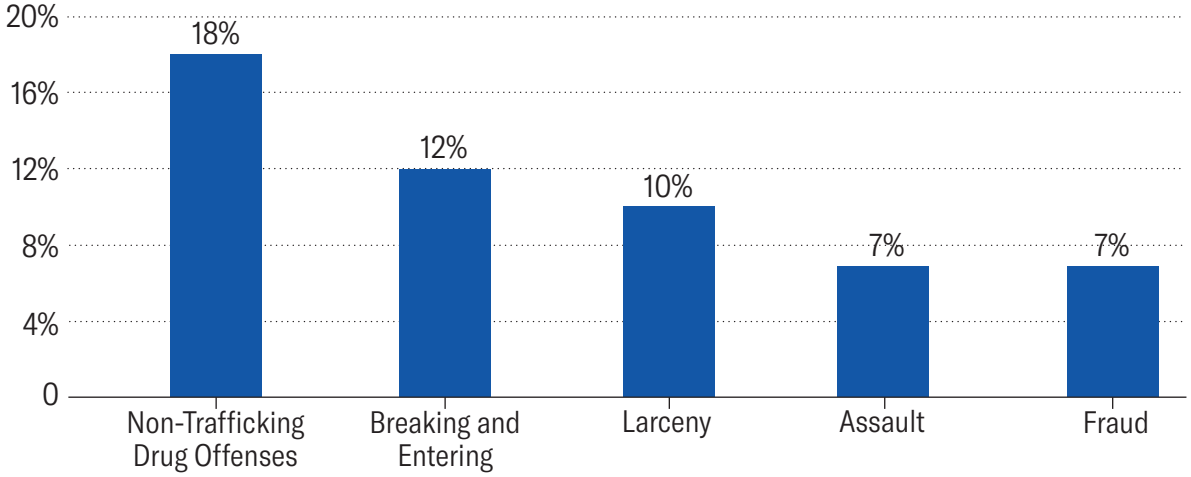
NORTH CAROLINA PRISON AND COUNTY JAIL POPULATION

16,871 people were incarcerated in county jails in North Carolina in 2015.

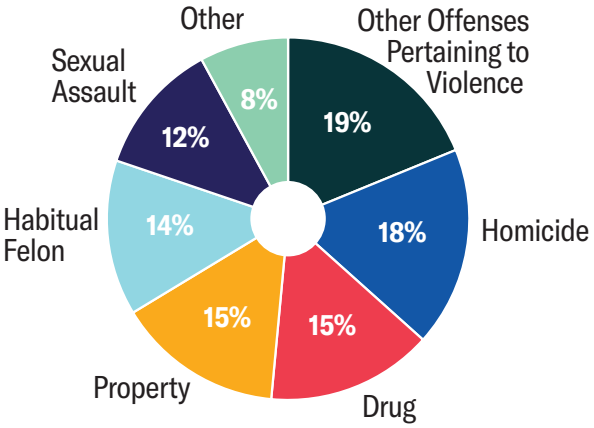
Nearly **90 percent** of people in county jail in 2015 had not been convicted of a crime.

Nearly **1 in 3** people imprisoned in North Carolina was serving time for a drug or property offense as of May 2018.

NORTH CAROLINA PRISON ADMISSIONS BY TOP OFFENSE TYPES (FY 2018)



NORTH CAROLINA PRISON POPULATION BY OFFENSE (2018)



to prison for probation revocations plummeted—decreasing by 45.6 percent between 2011 and 2016.[22]

Despite these reforms, significant work remains. In 2016, admissions for misdemeanor offenses still made up 9.1 percent of prison admissions, while admissions for felony offenses grew by 18.2 percent between 2006 and 2016.[23] Of 2016 admissions, community supervision revocations accounted for 56.7 percent, and 4.2 percent had not been convicted of any crime and were sent to prison either for diagnostic testing requested by a judge or for "safekeeping"—when detention in a local jail is determined by a judge to pose potential danger to the individual.[24]

The Current Prison and Jail Population[25]

North Carolina incarcerated an estimated 16,871 people in county jails in 2015. Nearly 90 percent of those serving time in county jail were being held pretrial and had not been convicted of a crime.[26] While most states hold people convicted of a misdemeanor in county jails, people convicted of a misdemeanor with sentences longer than 90 days can be sent to North Carolina's prisons, and people with sentences longer than six months must serve their full sentence in prison.[27]

As of June 2018, 37,104 people were imprisoned across the state.[28] Nearly one in three was serving time for a drug or property offense.[29]

Why Do People Stay in Prison for So Long?

Between 2006 and 2016, the number of people entering North Carolina prisons each year declined by 13.7 percent. However, the total prison population remained nearly constant, driven primarily by two factors: an increase in the average amount of time people spend in prison and a decrease in the number of people released from prison every year.

During this time period, the number of people released from prison each year dropped by 22.2 percent, while the average amount of time served continued to climb: In 2015, a person serving time in North Carolina had served an average of 29.4 percent more time than just a decade earlier. This can partially be explained by an increase in the average amount of time served for drug offenses, which jumped by 63.2 percent during that time period.[30]

North Carolina's criminal code includes harsh sentencing laws that can trigger long prison sentences and mandate prison time for people who would otherwise be eligible for probation or other alternatives to prison. For example, under a policy known as the "Habitual Offender Law," a person convicted of three or more felony offenses is automatically sentenced

AT A GLANCE

LENGTH OF IMPRISONMENT

The number of people released from prison each year dropped by **22 percent** between 2006 and 2016.

The average amount of time someone in prison had served for drug offenses jumped by **63 percent** between 2006 and 2016.

at a felony class that is four levels above the actual offense they were convicted for, potentially adding years to their prison sentence.[31] Further, if a person is convicted of more than one violent felony—defined as any Class A through Class E felony, which includes crimes ranging from murder to arson—judges are required to hand down a sentence of life without the possibility of parole.[32]

Other similar sentencing laws include a status offense for breaking and entering, in which a person must be sentenced as a Class E felon if they have committed one or more previous breaking and entering felonies and proceeds to commit another.[33] And a "two strikes" law requires that anyone who has already committed one or more felonies involving a firearm must be punished for the second felony at the Class C level, with a mandatory minimum of 120 months' active time.[34]

The Structured Sentencing Act, enacted in 1994, established specific maximum and minimum sentences, or structured sentences, based on crime type and criminal history, which has contributed to longer prison terms. The act was supported by many progressive prison reform advocates as a way to reduce racial disparities in sentencing; however, data regarding the impact of structured sentencing on disparity is mixed, with one study indicating that non-white people receive more severe punishment than do white people under structured sentencing.[35] Further, data shows that people released in 2016 after serving structured felony sentences served 53.9 percent more time on average than people serving structured felony sentences released in 2006. And people released for structured misdemeanor sentences served an average of 35.8 percent more time in prison.[36] These delineated maximums and minimums have been affected by enhancements that have been added or adjusted since the Structured Sentencing Act, such as the enhancement for a felony involving a firearm or deadly weapon. That particular enhancement was expanded in 2013 to apply to all classes of felonies, increasing its scope.[37] In addition, sentencing enhancements were recently added for felonies related to gang activity.[38]

The 1994 legislation also effectively eliminated the state's parole system. Under the law, every person sentenced to prison in North Carolina must serve at least 100 percent of their minimum sentence and 85 percent of their maximum sentence. This means they can earn only 15 percent off their maximum sentence for participation in treatment and other alternative programs, which have been shown to improve reentry outcomes.[39] In 2016, people admitted to prison for structured felony sentences had served an average of 109 percent of their minimum sentence upon release.[40]

Who Is Imprisoned

Black North Carolinians: As of 2017, North Carolina's Black per capita adult imprisonment rate is 4.5 times higher than its white adult per capita imprisonment rate. While Black people accounted for 52.9 percent of the 2016 prison population, they made up only 21.5 percent of the state's adult population, resulting in one in 40 Black men in the state imprisoned.[41]

Disabled North Carolinians: Seventy-one percent of people who were incarcerated and screened for substance abuse in 2016 reported a need for intermediate or long-term substance use disorder treatment.[42] The state estimates that 25,000 people with severe mental illness end up in North Carolina jails annually.[43]

Female North Carolinians: From 2006 and 2016, the number of women imprisoned in North Carolina grew

AT A GLANCE

DEMOGRAPHICS

1 in 40 Black men in North Carolina were imprisoned as of 2016.

71 percent of screened people who are incarcerated reported having a substance use disorder requiring intermediate or long-term treatment.

The population of people over age 50 in prison grew by nearly **105 percent** between 2006 and 2016.

by 5.8 percent, while the number of men declined by 0.5 percent. Based on the most recently available data, women account for one in 14 people (7.6 percent) in North Carolina prisons (2016)[44] and one in seven people (13.5 percent) in county jails (2015).[45]

Older North Carolinians: North Carolina's prison population is also rapidly aging, due in part to an increase in the average amount of time served. The prison population age 50 and older more than doubled — a 104.8 percent increase — between 2006 and 2016. In addition, people age 50 and older accounted for nearly one in five people (17.9 percent) imprisoned in 2016, despite accounting for only 8 percent of all people admitted to prison that year.[46] This trend is egregious given the overwhelming evidence showing that people older than 50 pose a negligible risk to public safety and are the least likely to return to prison for new offenses upon release.[47]

Budget Strains

As the North Carolina prison population has risen, so has the cost burden. In 2015, North Carolina spent $1.7 billion of its general fund on corrections, accounting for 8.4 percent of the state's general fund expenditures. General fund spending on corrections has grown 254 percent since 1986, far outpacing growth in other state spending priorities, like education.[48] As of 2016, imprisoning one person in North Carolina cost an average of $89.30 per day.[49]

AT A GLANCE

BUDGETS

North Carolina spent **$1.7 billion** of its general fund on corrections in 2015.

General fund spending on corrections has increased by **254 percent** between 1986 and 2016.

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Ending Mass Incarceration in North Carolina: A Path Forward

There are many potential policy changes that can help North Carolina end its mass incarceration crisis, but it will be up to the people and policymakers of North Carolina to decide which changes to pursue. To reach a 50 percent reduction, policy reforms will need to reduce the amount of time people serve in prisons and/or reduce the number of people entering prison in the first place.

Reducing Admissions

To end mass incarceration, North Carolina must break its overreliance on prison as a response to social problems. Evidence indicates that prisons seldom offer adequate solutions to wrongful behavior. In fact, imprisonment can be counterproductive—increasing cycles of harm and violence, and failing to provide rehabilitation for incarcerated people and accountability to the survivors of crime.[50] Here are some strategies:

- **Eliminate cash bail:** The North Carolina Legislature can significantly reduce the state's rate of pretrial detention by eliminating its use of cash bail. Far too often, people who cannot afford their bail will end up in jail for weeks, months, or, in some cases, years as they wait for their day in court.[51] When this happens, the criminal justice system leaves them with a difficult choice: take a plea deal or fight the case from behind bars. While detained pretrial, research shows many people face significant collateral damage, such as job loss or interrupted education.[52] After even a short stay in jail, taking a plea deal can sound less burdensome than losing everything, which is likely why evidence shows that pretrial detention significantly increases a defendant's risk of conviction.[53] The current cash bail system harms people of color in particular. Research shows that people of color are detained at higher rates across the country when unable to meet bail, and that courts set significantly higher bail amounts for them.[54] Notably, even when the inability to post bail was controlled for, Black people spent more than double the time than whites spent in detention.[55] In order to significantly reduce pretrial detention and combat racial disparities, the North Carolina Legislature should eliminate cash bail and limit pretrial detention to the rare cases where a person poses a serious, clear threat to another person. Mecklenburg County was the first in the state to change its policies and processes around pretrial detention to try to combat this problem. In lieu of cash bail, the county instituted a risk assessment tool, which it uses to assess the danger to public safety and flight risk that the defendant poses pretrial. This is a potentially viable path forward, and two other counties are testing similar systems.[56] However, it is important to keep in mind that risk assessments can replicate or even exacerbate racial disparities, as they inevitably rely on generalizations about identity, geography, and socioeconomic characteristics.[57]
- **Alternatives to incarceration:** The good news is that alternatives exist. Several types of alternative-to-imprisonment programs have shown great success in reducing criminal activity. Programs offering support services

such as substance use disorder treatment, mental health care, employment, housing, health care, and vocational training — often with some element of community service requirement — can significantly reduce recidivism rates for participants. North Carolina's Legislature should channel more funding to diversion and other alternatives to incarceration, and ensure that diversion or another alternative is the presumptive option where it is available. Should a judge wish to instead incarcerate a person convicted of a crime, they should be required to write a statement explaining why incarceration is the more appropriate option for the case at hand. The state has already invested in a number of such options, particularly at the pre-arrest stage. The Legislature should increase funding for programs already in use, like Law Enforcement Assisted Diversion and Crisis Intervention Team training, which teach law enforcement officers to better address behavioral health issues and proactively divert people to treatment or other support services. Prosecutor-led diversion efforts should also be encouraged.

- **Alternatives to incarceration — mental health treatment:** Mental health diversion can be an effective way to redirect people with disabilities out of the criminal legal system and into supportive community treatment. Diversion programs have been shown to be effective for people charged with both nonviolent and violent offenses.[58] When implemented effectively, diversion reduces arrests, encourages voluntary treatment in the community, and saves money.[59] Effective diversion programs coordinate with community services that provide a wide range of substantial, quality wraparound treatment and support for people with disabilities to access housing, employment, and intensive, individualized supports in the community. After an initial investment in community supports, diversion programs have the potential to save jurisdictions large amounts of money.[60]

- **Alternatives to incarceration — substance use disorder treatment:** North Carolina should expand its use of and funding for diversion programs that specifically treat substance use issues. Diversion programs that offer treatment for substance use disorders can reduce the collateral damage of incarceration, while also addressing the underlying causes of the criminal offense. The opioid epidemic, which continues to ravage the state, has increased public interest in alternatives to arrest and incarceration that focus instead on treatment. In response, the North Carolina Legislature recently established a task force to examine the prevalence of addiction and mental illness in state prisons and jails to search for better ways forward, and to examine whether changes should be made to sentences for opioid-related drug crimes.[61] The task force should not only recommend the use of diversion programs to treat underlying causes of crime, it should also urge the Legislature to sufficiently fund successful programs to avoid long waits before diversion from jail, as a typical wait is three to six months.[62]

- **Probation and parole violations:** Though the 2011 Justice Reinvestment Act lowered admissions to prison for probation and parole revocations by providing officers with more non-incarceration responses to technical violations, further reform is necessary.[63] In 2016, supervision revocations still accounted for over half of all prison admissions.[64] The state Legislature should build on its 2011 reforms by eliminating re-incarceration as an option for all parole and probation technical violations. The state should further invest the dollars that would otherwise have been spent on incarceration into increased education for parole and probation officers regarding evidence-based alternative responses to supervision violations, as well as accommodations for parolees with disabilities. People with disabilities are twice as likely to have their parole or probation revoked, likely due to the inability or unwillingness of supervision officers to accommodate their

disabilities.[65] Parole and probation officers are required to provide reasonable accommodations so that parolees with disabilities have an equal opportunity to comply with the requirements of supervision. Proper training of parole officers, and greater awareness of, and advocacy for, these requirements could reduce the number of technical violations. Savings from reducing incarceration for technical parole violations could also be channeled toward reentry programming and services, which would contribute to reducing incarceration levels along with new prison admissions in the state.

Reducing Time Served

Reducing the amount of time people serve, even by just a few months, can lead to thousands of fewer people in North Carolina's prisons. Here's how:

- **Sentencing reform — general:** The state's 1994 Structured Sentencing Act created maximum and minimum sentences calculated according to the crime and the defendant's criminal history.[66] These lengthy sentences have contributed toward longer prison terms and an aging prison population. The North Carolina Legislature should reform its structured sentencing grid to reduce the prevalence of long prison stays, beginning by eliminating mandatory minimums for all drug offenses, including drug trafficking. This first step would significantly alter the state's prison population, as people serving time for drug offenses represented 14 percent of this population in 2015, and drug trafficking offenses accounted for nearly 15 percent of 2015 admissions.[67]

- **Sentencing Reform — enhancements:** The North Carolina Legislature should remove sentencing enhancements that lead to overly severe sentences. A primary example: Under its habitual felon law, when someone is convicted of a third felony offense, this triggers a charge up to four times more severe than the principal offense.[68] Additionally, if a person is convicted of more than one violent felony, the law requires judges to sentence that person to life without the possibility of parole, eliminating any chance of future release and rehabilitation.[69] Similarly, "habitual" breaking and entering triggers a more severe charge and often significantly longer punishment when a person has just one previous similar conviction.[70] These examples of increased sentence lengths are part of the reason why there are fewer people released from prison every year despite a decline in overall admissions.[71] Worse still, these enhancements do not serve the ostensible goals of the justice system. Studies have shown that long sentences are not correlated to increased deterrence, with any slight effect completely leveled out for punishments over several years long.[72] Researchers have also failed to find a correlation between long sentences and lower rates of recidivism.[73] Even if the state's prison admissions continue to decline, North Carolina will not be able to make a significant change in the overall size of the prison population if sentencing enhancements like these are not eliminated.

- **Parole reform:** The Legislature should adopt presumptive parole statewide. In 1994, North Carolina effectively eliminated parole by mandating that people serve 85 percent of their maximum sentence before they are eligible for parole — even where a judge would have used their discretion to issue a lower sentence.[74] Without sufficient parole opportunities, fewer people are released every year and the elderly population in prisons continues to grow. By moving to a system of presumptive parole, the law would require the parole board to justify denying release when someone is eligible for parole. Increasing parole opportunities allows more people to reintegrate into society, saving taxpayer dollars every year. Research shows that presumptive parole will also reduce recidivism after release while promoting safety inside of correctional facilities.[75]

Compassionate release: The North Carolina Legislature should expand access to compassionate release from prison. The state's prison population is rapidly aging, in large part due to increases in average sentence lengths and severely curtailed opportunities for parole. From 2006 to 2016, the number of incarcerated persons over 50 more than doubled — a level of growth that will only continue to accelerate if nothing is done.[76] Currently, people who are incarcerated are eligible for release if they are 1) permanently, totally disabled; 2) likely to pass away within six months from a terminal illness; or 3) at least 65 years old and are incapacitated to the point that they do not pose any threat to public safety.[77] The Legislature should expand eligibility for compassionate release by eliminating the restrictions on age-based early release and expanding the range of people who qualify based on disability and serious illness. Further, the Legislature should allot specific funding to educate the Department of Public Safety and Post-Release Supervision as well as the Parole Commission on how to effectively incorporate these changes into the release process. Keeping aging and seriously injured or ill people incarcerated significantly taxes prison resources and does not serve the goal of incapacitation, particularly as studies have clearly shown that as people age their propensity to commit crime significantly declines.[78]

Combating violence behind bars: For the past several years, the state has been dealing with high levels of violence and disciplinary issues inside prisons.[79] Several policy reforms can help address this urgent problem without relying on further incarceration. The Department of Corrections should expand access to "earned time" opportunities, through which credits for earlier release are earned through good behavior and participation in programming. This would help to reduce violence and disorder in prisons, as researchers noted an increase in disciplinary infractions for those sentenced after the state's severe scaling back of early release opportunities in 1994.[80] This change points to the behavioral benefits derived from the hope and incentive structures created by early release. State legislators should also expand funding for mental health care offered behind bars, including funding improved mental health screenings, hiring more psychologists and psychiatrists, conducting better training, and reforming policies that have been proven to damage mental health. For example, North Carolina prisons often put mentally ill persons who act out into solitary confinement,[81] which can further aggravate or even trigger mental illness.[82] These changes in early release opportunities and mental health care could go a long way toward improving safety in prisons while supporting people in rehabilitation and reentry.

Reducing Racial Disparities

Reducing the number of people who are imprisoned in North Carolina will not on its own significantly reduce racial disparities in the prison system.

People of color (especially Black, Latino, and Native American people) are at a higher risk of becoming involved in the justice system, including living under heightened police surveillance and being at higher risk for arrest. This imbalance cannot be accounted for by disparate involvement in illegal activity, and it grows at each stage in the justice system, beginning with initial law enforcement contact and increasing at subsequent stages such as pretrial detention, conviction, sentencing, and postrelease opportunity.[83] Focusing on only one of the factors that drives racial disparity does not address issues across the whole system.

Racial disparity is so ingrained in the system that it cannot be mitigated by solely reducing the scale of mass incarceration. Shrinking the prison population across the board will likely result in lowering imprisonment rates for all racial and ethnic populations, but it will not address comparative disproportionality across populations. For example, focusing on reductions to prison admissions and length of stay in prison is critically important, but those reforms do not address the policies and practices among police, prosecutors, and judges that contribute greatly to the racial disparities that plague the prison system.

New Jersey, for example, is often heralded as one of the most successful examples of reversing mass incarceration, passing justice reforms that led to a 26 percent decline in the state prison population between

1999 and 2012.[84] However, the state did not target racial disparities in incarceration and, in 2016, Black people in New Jersey were still more than 12 times as likely to be imprisoned as white people — the highest disparity of any state in the nation.[85]

Ending mass incarceration is critical to eliminating racial disparities, but not sufficient without companion efforts that take aim at other drivers of racial inequities outside of the criminal justice system. Reductions in disparate imprisonment rates require implementing explicit racial justice strategies.

Some examples include:

- Ending overpolicing in communities of color
- Evaluating prosecutors' charging and plea-bargaining practices to identify and eliminate bias
- Investing in diversion/alternatives to detention in communities of color
- Reducing the use of pretrial detention and eliminating wealth-based incarceration
- Ending sentencing enhancements based on location (drug-free school zones)
- Reducing exposure to reincarceration due to revocations from supervision
- Requiring racial impact statements before any new criminal law or regulation is passed and requiring legislation to proactively rectify any potential disparities that may result with new laws or rules
- Fighting discriminatory gang sentencing enhancements that disproportionately target people of color
- Addressing any potential racial bias in risk assessment instruments used to assist decision-making in the criminal justice system

TAKING THE LEAD

Prosecutors: They decide on what charges to bring and which plea deals to offer. They can decide to divert more people to treatment programs (for example, drug or mental health programs) rather than send them to prison. And they can decide to charge enhancements that require the imposition of prison sentences.

State lawmakers: They decide which offenses to criminalize, how long sentences can be, and when to take away judges' discretion. They can change criminal laws to remove prison as an option when better alternatives exist and they can also fund the creation of new alternatives, including diversion programs that provide supportive housing, treatment, and vocational training. They can also decide to sufficiently fund mental health and substance abuse treatment so that it is available for people who need it before they encounter the criminal legal system.

Parole boards: They decide when to allow people to leave prison. In North Carolina, the parole board is an especially important player when it comes to reforming how long people spend in prison. If parole board members are trained to consider and accommodate disability issues, they may recognize and release more people who have disciplinary issues in their records that are due to lack of disability accommodations during incarceration.

Judges: They often have discretion over pretrial conditions imposed on defendants, which can make a difference. For example, individuals who are jailed while awaiting trial are more likely to plead guilty and accept longer prison sentences than people who are not held in jail pretrial. Judges can also have discretion in sentencing and should consider alternatives to incarceration when possible.

- Shifting funding from law enforcement and corrections to community organizations, job creation, schools, drug and mental health treatment, and other social service providers

Reducing Disability Disparities

The rate of people with disabilities in the criminal justice system is two to six times that of the general population.[86] In particular, people with psychiatric disabilities are dramatically overrepresented in jails and prisons across the country.[87]

People showing signs of mental illness are twice as likely to be arrested as people without mental illness for the same behavior.[88]

People with mental illness are sentenced to prison terms that are, on average, 12 percent longer than those of other people in prison.[89]

People with mental illness stay in prison longer because they frequently face disciplinary action from conduct that arises due to their illness — such as attempted suicide — and they seldom qualify for early release because many are not able to participate in rehabilitative programming, such as educational or vocational classes.[90]

Furthermore, sentencing reforms appear to leave people with psychiatric disabilities who are incarcerated behind. In recent years, the prison population in California has decreased by more than 25 percent, but the number of people with a serious mental disorder has increased by 150 percent[91] — an increase in both the rate and the absolute number of incarcerated people with psychiatric disabilities.

Screening tools to evaluate psychiatric disabilities vary by state and jurisdiction, but the most reliable data indicates that more than half of jail populations and close to half of prison populations have mental health disabilities.[92] The fact that people with mental health disabilities are arrested more frequently, stay incarcerated longer, and return to prisons faster is not due to any inherent criminality related to psychiatric disabilities. It arises in part because of the lack of accessible and appropriate mental health treatment in the community; in part because of a perception of dangerousness by police, prosecutors, and judges; and in part because prison staff and probation officers fail to recognize and accommodate disability.

> "Merely reducing sentence lengths, by itself, does not disturb the basic architecture of the New Jim Crow. So long as large numbers of African Americans continue to be arrested and labeled drug criminals, they will continue to be relegated to a permanent second-class status upon their release, no matter how much (or how little) time they spend behind bars. The system of mass incarceration is based on the prison label, not prison time."[95]
>
> —From *The New Jim Crow,* Michelle Alexander

Many people of color in jails and prisons are also people with disabilities, and efforts to reduce racial disparities must go hand in hand with efforts to reduce disability disparities.[93] Not surprisingly, many of the strategies to reduce disability disparities are similar to approaches that reduce racial disparities. Some examples include:

- Investing in pre-arrest diversion:
    - Creating behavioral health centers, run by state departments of health, as alternatives to jails, or emergency rooms for people experiencing mental health crises or addiction issues.
    - Training dispatchers and police to divert people with mental health issues who commit low-level nuisance crimes to these behavioral health centers. Jurisdictions that have followed this approach have significantly reduced their jail populations.[94]

- Ending arrest and incarceration for low-level public order charges, such as being drunk in public, urinating in public, loitering, trespassing, vandalism, and sleeping on the street. If needed, refer people who commit these crimes to behavioral health centers.
- Requiring prosecutors to offer diversion for people with mental health and substance abuse disabilities who are charged with low-level crimes
- Evaluating prosecutors' charging and plea-bargaining practices to identify and eliminate disability bias
- Investing in diversion programs and alternatives to detention designed for people with disabilities, including programs that provide supportive housing, Assertive Community Treatment, wraparound services, and mental health supports
- Reducing the use of pretrial detention while increasing reminders of court dates and other supports to ensure compliance with pretrial requirements
- Reducing reincarceration due to parole or probation revocations through intensive case management, disability-competent training for officers on alternatives to incarceration and reasonable modifications to requirements of supervision, and no return to incarceration for technical violations
- Addressing bias against mental disabilities in risk assessment instruments used to assist decision-making in the criminal justice system
- Shifting funding away from law enforcement and corrections into supportive housing, intensive case management, schools, drug and mental health treatment, community organizations, job creation, and other social service providers

Forecaster Chart

There are many pathways to cutting the prison population in North Carolina by 50 percent. To help end mass incarceration, communities and policymakers will need to determine the optimal strategy to do so. This table presents one potential matrix of reductions that can contribute to cutting the state prison population in half by 2025. The reductions in admissions and length of stay for each offense category were selected based on potential to reduce the prison population, as well as other factors. To chart your own path to reducing mass incarceration in North Carolina, visit the interactive online tool at https://urbn.us/ppf.

CUTTING BY 50%: PROJECTED REFORM IMPACTS ON POPULATION, DISPARITIES, AND BUDGET

Impact Compared to 2025 Baseline*				
Offense category**	**Policy outcome**	**Prison population impact**	**Impact on racial and ethnic makeup of prison population*****	**Cost savings******
Public order offenses***	• Reduce average time served by 70% (from 3.64 to 1.09 years) • Institute alternatives that reduce admissions by 50% (893 fewer people admitted)	14.76% reduction (5,314 fewer people)	White: 2.6% increase Black: 3.8% decrease Hispanic/Latino: 15.2% increase Native American: 4.7% increase Asian: 14.4% increase Hawaiian/Pacific Islander: 10.7% increase Other: 13.4% increase	$101,068,928
Drug offenses	• Reduce average time served for drug distribution by 70% (from 1.65 to 0.49 years) • Institute alternatives that reduce admissions for drug distribution by 60% (1,709 fewer people admitted) • Institute alternatives that end all admissions for drug possession (880 fewer people admitted)	12.56% reduction (4,522 fewer people)	White: 0.6% decrease Black: 2.7% increase Hispanic/Latino: 25.4% decrease Native American: 8.0% increase Asian: 1.3% increase Hawaiian/Pacific Islander: 9.0% decrease Other: 0.4% increase	$92,980,562
Burglary	• Reduce average time served by 50% (from 1.12 to 0.56 years) • Institute alternatives that reduce admissions by 40% (1,029 fewer people admitted)	5.59% reduction (2,012 fewer people)	White: 1.2% decrease Black: 0.7% increase Hispanic/Latino: 4.1% increase Native American: 5.8% decrease Asian: 3.2% increase Hawaiian/Pacific Islander: 3.3% decrease Other: 3.2% increase	$40,400,983

Impact Compared to 2025 Baseline*				
Offense category**	**Policy outcome**	**Prison population impact**	**Impact on racial and ethnic makeup of prison population*****	**Cost savings******
Robbery	• Reduce average time served by 50% (from 2.05 to 1.02 years) • Institute alternatives that reduce admissions by 40% (485 fewer people admitted)	4.97% reduction (1,791 fewer people)	White: 2.6% increase Black: 2.2% decrease Hispanic/Latino: 3.0% increase Native American: No change Asian: 1.7% increase Hawaiian/Pacific Islander: 0.6% increase Other: 1.9% decrease	$33,647,760
Theft	• Reduce average time served by 60% (from 0.79 to 0.31 years) • Institute alternatives that reduce admissions by 50% (892 fewer people admitted)	3.12% reduction (1,124 fewer people)	White: 1.4% decrease Black: 0.8% increase Hispanic/Latino: 2.7% increase Native American: 1.3% decrease Asian: 0.8% increase Hawaiian/Pacific Islander: 1.4% increase Other: 3.2% increase	$22,905,040
Fraud	• Reduce average time served by 60% (from 0.83 to 0.33 years) • Institute alternatives that reduce admissions by 50% (775 fewer people admitted)	2.85% reduction (1,026 fewer people)	White: 1.7% decrease Black: 1.0% increase Hispanic/Latino: 2.3% increase Native American: 0.4% increase Asian: 2.2% increase Hawaiian/Pacific Islander: 0.3% increase Other: 2.2% increase	$21,070,289

Impact Compared to 2025 Baseline*				
Offense category**	**Policy outcome**	**Prison population impact**	**Impact on racial and ethnic makeup of prison population*****	**Cost savings******
DWI	• Reduce average time served by 70% (from 0.68 to 0.20 years) • Institute alternatives that reduce admissions by 50% (689 fewer people admitted)	2.20% reduction (794 fewer people)	White: 1.1% decrease Black: 0.9% increase Hispanic/Latino: 0.4% decrease Native American: No change Asian: 2.4% decrease Hawaiian/Pacific Islander: 12.1% decrease Other: 0.9% increase	$17,552,938
Assault	• Reduce average time served by 50% (from 1.39 to 0.69 years) • Institute alternatives that reduce admissions by 40% (317 fewer people admitted)	2.14% reduction (772 fewer people)	White: 0.2% increase Black: 0.3% decrease Hispanic/Latino: 1.4% increase Native American: 0.1% increase Asian: 1.0% decrease Hawaiian/Pacific Islander: 0.7% decrease Other: 2.2% increase	$15,753,137
Weapons offenses*****	• Reduce average time served by 60% (from 0.98 to 0.39 years)	2.02% reduction (729 fewer people)	White: 0.3% increase Black: 0.3% decrease Hispanic/Latino: 0.8% increase Native American: 0.3% decrease Asian: 0.3% increase Hawaiian/Pacific Islander: 0.7% increase Other: 1.5% increase	$12,912,004

*The baseline refers to the projected prison population based on historical trends, assuming that no significant policy or practice changes are made.

**The projections in this table are based on the offense that carries the longest sentence for any given prison term. People serving prison terms may be convicted of multiple offenses in addition to this primary offense, but this model categorizes the total prison term according to the primary offense only.

***This column represents the percent change in the share of the prison population made up by each racial/ethnic group. It compares the proportion of the population made up by a group in the 2025 baseline prison population to the proportion of the population made up by that group when the reform scenario is applied. We then calculate the percent change between those two proportions. Racial and ethnic disproportionality is traditionally measured by comparing the number of people in prison — of a certain race — to the number of people in the state's general population of that same race. For example, nationally, Black people comprise 13 percent of the population, while white people comprise 77 percent. Meanwhile, 35 percent of people in state or federal prison are Black, compared to 34 percent who are white. While the proportion of people in prison who are Black or white is equal, Black people are incarcerated at nearly three times their representation in the general population. This is evident in North Carolina, where Black people make up 52.9 percent of the prison population but constitute only 21.5 percent of the state's total adult population.

****Cost impact for each individual policy change represents the effect of implementing that change alone and in 2015 dollars. The combined cost savings from implementing two or more of these changes would be greater than the sum of their combined individual cost savings, since more capital costs would be affected by the population reductions.

*****Some public order offenses include drunk or disorderly conduct, escape from custody, obstruction of law enforcement, court offenses, failure to comply with sex offense registration requirements, prostitution, and stalking, as well as other uncategorized offenses.

******Some weapons offenses include unlawful possession, sale, or use of a firearm or other type of weapon (e.g., explosive device).

Total Fiscal Impact

If North Carolina were to carry out reforms leading to the changes above, 18,085 fewer people would be in prison in North Carolina by 2025, a 50.21 percent decrease. This would lead to a total cost savings of $1,076,500,450 by 2025.

Methodology Overview

This analysis uses prison term record data from the National Corrections Reporting Program to estimate the impact of different policy outcomes on the size of North Carolina's prison population, racial and ethnic representation in the prison population, and state corrections spending. First, trends in admissions and exit rates for each offense category in recent years are analyzed and projected out to estimate a baseline state prison population projection through 2025, assuming recent trends will continue. Then, a mathematical model is used to estimate how various offense-specific reform scenarios (for example, a 10 percent reduction in admissions for drug possession or a 15 percent reduction in length of stay for robbery) would change the 2025 baseline projected prison population. The model allows for reform scenarios to include changes to the number of people admitted to prison and/or the average length of time served for specific offenses. The model then estimates the effect that these changes would have by 2025 on the number of people in prison, the racial and ethnic makeup of the prison population, and spending on prison. The analysis assumes that the changes outlined will occur incrementally and be fully realized by 2025.

All results are measured in terms of how outcomes under the reform scenario differ from the baseline projection for 2025. Prison population size impacts are measured as the difference between the 2025 prison population under the baseline scenario and the forecasted population in that year with the specified changes applied. Impacts on the racial and ethnic makeup of the 2025 prison population are measured by comparing the share of the prison population made up by a certain racial or ethnic group in the 2025 baseline population to that same statistic under the reform scenario, and calculating the percent change between these two proportions. Cost savings are calculated by estimating the funds that would be saved each year based on prison population reductions relative to the baseline estimate, assuming that annual savings grow as less infrastructure is needed to maintain a shrinking prison population. Savings relative to baseline spending are calculated in each year between the last year of available data and 2025, and then added up to generate a measure of cumulative dollars saved over that time period.

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The Hidden Costs of Pretrial Detention

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EXECUTIVE SUMMARY

In the criminal justice system, the time between arrest and case disposition is known as the pretrial stage. Each time a person is arrested and accused of a crime, a decision must be made as to whether the accused person, known as the defendant, will be detained in jail awaiting trial or will be released back into the community. But pretrial detention is not simply an either-or proposition; many defendants are held for a number of days before being released at some point before their trial.

The release-and-detention decision takes into account a number of different concerns, including protecting the community, the need for defendants to appear in court, and upholding the legal and constitutional rights afforded to accused persons awaiting trial. It carries enormous consequences not only for the defendant but also for the safety of the community.

Little is known about the impact of pretrial detention on pretrial outcomes and post-disposition recidivism. Some researchers and legal professionals believe there is a relationship between the number of days spent in pretrial detention and the defendant's community stability (e.g., employment, finances, residence, family), especially for lower-risk defendants. Specifically, the defendant's place in the community becomes more destabilized as the number of days of pretrial detention increases. This destabilization is believed to lead to an increase in risk for both failure to appear and new criminal activity. While this purported relationship makes intuitive sense, there has been no empirical evidence in existence to support or refute this idea. Beyond the relationship between length of pretrial detention and pretrial outcomes, there is an additional underdeveloped area of research — the impact of pretrial detention on post-disposition recidivism.

Using data from the Commonwealth of Kentucky, this research investigates the impact of pretrial detention on 1) pretrial outcomes (failure to appear and arrest for new criminal activity); and 2) post-disposition recidivism.

REPORT HIGHLIGHTS:

- Detaining low- and moderate-risk defendants, even just for a few days, is strongly correlated with higher rates of new criminal activity both during the pretrial period and years after case disposition; as length of pretrial detention increases up to 30 days, recidivism rates for low- and moderate-risk defendants also increases significantly.
- When held 2-3 days, low-risk defendants are almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours.
- When held 8-14 days, low-risk defendants are 51 percent more likely to commit another crime within two years after completion of their cases than equivalent defendants held no more than 24 hours.

Data on 153,407 defendants booked into a jail in Kentucky between July 1, 2009, and June 30, 2010, were used to answer two broad research objectives: 1) Investigate the relationship between the length of pretrial detention and pretrial outcome; and 2) Investigate the relationship between pretrial detention, as well as the length of pretrial detention, and new criminal activity post-disposition. Depending on the research objective and its associated research questions, subsamples of cases were drawn from this larger dataset of 153,407 defendants.

Multivariate models were generated that controlled for relevant factors including risk level, supervision status, offense type, offense level, time at risk in the community, demographics, and other factors. Three critical findings related to the impact of pretrial detention were revealed.

1. **Length of Pretrial Detention and Failure to Appear (FTA)** — Longer pretrial detentions, up to a certain point, are associated with the likelihood of FTA pending trial. This finding seems to be more consistent for defendants deemed to be low risk.

2. **Length of Pretrial Detention and New Criminal Activity (NCA)** — Longer pretrial detentions are associated with the likelihood of NCA pending trial. This is particularly true for defendants deemed to be low risk. The longer low-risk defendants are detained, the more likely they are to have new criminal activity pending trial. Defendants detained 2 to 3 days are 1.39 times more likely to have NCA than defendants released within a day; those detained 31 or more days are 1.74 times more likely.

3. **Pretrial Detention and Post-Disposition Recidivism** — Being detained pretrial for two days or more is related to the likelihood of post-disposition recidivism. Generally, as the length of time in pretrial detention increases, so does the likelihood of recidivism at both the 12-month and 24-month points.

INTRODUCTION

Study Description

The current study investigates the correlation of pretrial detention with 1) pretrial outcomes (failure to appear, hereafter FTA, and arrest for new criminal activity, hereafter NCA); and 2) post-disposition recidivism (new criminal activity post-disposition, hereafter NCA-PD).

Research Objectives and Questions

The study includes two (2) research objectives and 8 related research questions, as shown below.

1. **Investigate the relationship between the length of pretrial detention and pretrial outcome.**
    a. Is the length of pretrial detention related to the likelihood of pretrial FTA once other relevant statistical controls are considered?
    b. Do the observed effects (of days spent in detention when predicting FTA) differ for sub-populations of defendants?
    c. Is the length of pretrial detention related to the likelihood of pretrial NCA once other relevant statistical controls are considered?
    d. Do the observed effects (of days spent in detention when predicting NCA) differ for sub-populations of defendants?

2. **Investigate the relationship between pretrial detention, as well as the length of pretrial detention, and new criminal activity post-disposition (NCA-PD).**
    a. Is pretrial detention related to NCA-PD?
    b. Do the observed effects of pretrial detention differ for sub-populations of defendants (likelihood of 12-month NCA-PD and 24-month NCA-PD)?
    c. Is the length of pretrial detention related to NCA-PD?
    d. Do the observed effects of the length of pretrial detention differ for sub-populations of defendants (likelihood of 12-month NCA-PD and 24-month NCA-PD)?

Dataset

The sample used for the current study includes all defendants arrested and booked into a Kentucky jail between July 1, 2009, and June 30, 2010. This led to a working sample size of 153,407. The dataset does not represent unique individuals, but rather includes all bookings within the study period. (Some individuals were booked multiple times within the timeframe; calculating a unique count of individuals could not be performed reliably, as unique identifiers were missing in almost 10% of the cases.) All cases in the sample reached final case disposition. These data served as the sample of defendants used to respond to the research objectives. Depending on the research objective and its associated research questions, subsamples of cases were drawn from this larger dataset of 153,407 defendants. All bookings from July 1, 2010, to June 30, 2012, were added to the dataset to develop post-disposition measures of arrest for new criminal activity.

The measures in this study included the following:

- defendant demographics;
- defendant risk;
- offense characteristics including offense level (e.g., felony or misdemeanor) as well as felony offense class (A, B, C, D) for some analyses;
- details of pretrial status (released or detained, and length of detention);
- failure to appear and arrest for new criminal activity during pretrial release;
- time at risk in the community for both pretrial and post-disposition periods; and
- new criminal activity post-disposition (NCA-PD).

Methodology

Bivariate and multivariate models were used to complete the analysis. Most commonly used was logistic regression modeling, a procedure designed for what is generally referred to as a dichotomous or binary outcome variable. (Recidivism, for example, is typically considered either a "yes" or "no" outcome, regardless of measurement procedure.) Logistic regression, like many types of regression, allows for several variables to be entered into a model while statistically controlling for the effects of other variables. Generally, when a multivariate model is conducted, the variable of interest is highlighted (e.g., the effect of pretrial detention, or the length of pretrial detention) while controlling for the effects of other variables (such as age, race, gender, risk level, and the like).

Also incorporated in the analysis are Poisson regression models, which are typically used when the outcome variable is a discrete count (e.g., the number of months someone is sentenced to prison or jail, or the number of times someone is arrested). Counts tend to be distributed in such a way that the assumptions of linear regression are violated; therefore, an adjustment in modeling is required. Poisson regression, like logistic regression and other types of regression, allows for several variables to be entered into a model while statistically controlling for the effects of other variables. This allows for the examination of the effect of one or more variables of interest (e.g., pretrial detention and/or the length of pretrial detention).

The county of case origin, although not shown in any of the multivariate tables published here, was included in every multivariate model constructed and estimated. Robust standard error estimates were developed with clustering at the county level and were used in all multivariate analyses.

SAMPLE DESCRIPTION

The dataset described above, including 153,407 records representing all defendants arrested and booked into a Kentucky jail between July 1, 2009, and June 30, 2010, was used for the analysis.

There are 120 counties and 84 local jails in Kentucky. Table A-1 (see Appendix A) provides a jail-by-jail breakdown, identified by county location, and the number of cases originating from each jail. The number of cases is presented (N), as well as the percentage of the total that each jail comprises. Results are grouped by Pretrial, NCA-PD (12 months), and NCA-PD (24 months) samples. The vast majority of jails contributed 3% or less of the total sample, with the noted exception of Jefferson County (approximately 19%) and Fayette County (approximately 7%).

Demographics

Table 1 presents descriptive information for the entire state sample, grouped in three different categories, or models (Pretrial, NCA-PD 12 months, and NCA-PD 24 months). Taken as a whole, the sample is approximately 26% female, 74% male, 79% white, 17% black, and 4% hispanic. The average age is approximately 33, and approximately 20% reported being married.

The different samples used to answer the research questions in this report tend to be similar. In most instances, the number of defendants who are classified as hispanic or another ethnicity or race is insufficient to be included in the statistical models as control variables. Therefore, most of the analyses only include white and black as control variables.

Offense Information

Table 1 also presents the original offense types[1] for the entire sample and each sub-sample used for the different research questions. Generally, drug, traffic, theft, and driving under the influence appear to be the most frequent offense types across the three samples.

1 It is important to note that defendants could contribute more than one offense to the offense type categorizations.

Risk Level

Kentucky currently uses a research-based and validated assessment tool (Kentucky Pretrial Risk Assessment [KPRA]) to assess the risk of pretrial failure (FTA and NCA). The KPRA consists of 12 risk factors, including measures of offense class, criminal justice status, criminal history, failure to appear, and community stability, with each risk factor having a corresponding weight (or points). The weights are summed for a total risk score. The risk scores are categorized into three levels of risk — low, moderate, and high. For the sample, the largest risk category was low risk, with 53% to 67% falling into that level across the five models. The moderate risk level ranged between 29% and 40%, and the high risk level ranged between 3% and 7%.

Days in Pretrial Detention

Table 1 also presents information across the three models regarding days spent in pretrial detention. Cases in the Pretrial model had the lowest average (6.38 days). This fact makes intuitive sense as the pretrial sample included only those defendants who were, at some point, released pretrial. The other models included defendants who were released as well as those who were detained for the entire pretrial period.

Outcomes

Rates of FTA and NCA were presented for the Pretrial model only, with an 11% FTA rate and a 10% NCA rate. Other outcomes include the 12-month and 24-month recidivism rates for the NCA-PD 12 month and NCA-PD 24 month models. The recidivism rate is 24% at 12 months and 34% at 24 months.

Table 1. Descriptive Statistics for Three Models

	PRETRIAL MODEL		NCA-PD 12 MONTH MODEL		NCA-PD 24 MONTH MODEL	
	N	% or $\overline{X}$	N	% or $\overline{X}$	N	% or $\overline{X}$
Age	111688	33.18	142193	33.47	120962	33.44
Female	111623	27.96	142145	26.12	120942	25.94
White	110653	80.59	141092	79.62	120027	79.35
Black	110653	17.21	141092	18.01	120027	18.06
Hispanic	91153	5.00	117917	5.30	99711	5.82
Married	108371	21.15	138607	19.96	112868	19.74
Risk Level						
Low	79901	67.22	98707	62.36	82916	63.06
Moderate	79901	29.42	98707	32.89	82916	32.44
High	79901	3.36	98707	4.07	82916	4.50
Offense Type						
Drugs	112030	24.54	142571	23.24	121299	22.24
Violent	112030	4.15	142571	4.36	121299	4.12
Domestic Violence	112030	6.71	142571	7.09	121299	6.86
Sex Offense	112030	0.62	142571	0.45	121299	0.38
Firearm	112030	2.01	142571	1.90	121299	1.78

Theft	112030	18.44	142571	18.96	121299	18.59
Traffic	112030	30.10	142571	28.11	121299	28.72
Driving Under the Influence	112030	22.37	142571	20.68	121299	20.55
Felony	112030	27.15	142571	26.61	121299	24.16
Time at Risk	109841	103.89				
Days Spent In Detention						
1 Day	112030	42.34	141676	32.92	120505	33.19
2 to 3 Days	112030	35.61	141676	33.58	120505	34.27
4 to 7 Days	112030	8.42	141676	10.16	120505	10.46
8 to 14 Days	112030	5.99	141676	9.85	120505	10.16
15 to 30 Days	112030	3.34	141676	5.20	120505	5.25
31+ Days	112030	4.31	141676	8.29	120505	6.67
Mean Days	112030	6.38	141676	12.44	120505	9.20
Detained Pretrial Yes/No	112030	0.00	142571	25.32	121300	26.87
FTA	112030	11.12				
NCA	112030	10.33				
Sentence in Months						
12 Month Recidivism			142571	23.65		
24 Month Recidivism					121300	33.51

RESEARCH OBJECTIVE ONE:

Investigate the relationship between the length of pretrial detention and pretrial outcome

Research Questions

1a. Is the length of pretrial detention related to the likelihood of pretrial FTA once other relevant statistical controls are considered?

1b. Do the observed effects (of days spent in detention when predicting FTA) differ for sub-populations of defendants?

1c. Is the length of pretrial detention related to the likelihood of pretrial NCA once other relevant statistical controls are considered?

1d. Do the observed effects (of days spent in detention when predicting NCA) differ for sub-populations of defendants?

Primary Findings

Overall, when other relevant statistical controls are considered, defendants who are detained 2 to 3 days pretrial are slightly more likely to FTA than defendants who are detained 1 day (1.09 times more likely). Examining sub-populations of defendants revealed significant differences, however, in the impact of length of pretrial detention when considering defendant risk level. Specifically, low-risk defendants are more likely to FTA if they are detained 2 to 3 days (1.22 times more likely than low-risk defendants detained 1 day or less), 4 to 7 days (1.22 times more likely), and 15 to 30 days (1.41 times more likely).

The analysis of the relationship between length of pretrial detention and NCA revealed that longer pretrial detention periods were associated with an increase in NCA for each category. Similar to FTA, examining sub-populations of defendants revealed significant differences in the impact of length of pretrial detention when considering defendant risk level.

- All categorizations of days spent in detention are associated with significant increases in the likelihood of NCA for low-risk defendants when compared to low-risk defendants detained for 1 day or less.
- The longer low-risk defendants are detained, the more likely they are to have new criminal activity pretrial (1.39 times more likely when held 2 to 3 days, increasing to 1.74 when held 31 days or more).
- For moderate-risk defendants, the lowest three categories of days spent in detention (2 to 3 days, 4 to 7 days, and 8 to 14 days) are associated with significant increases in the likelihood of NCA.
- None of the days-in-detention categories are significant predictors of NCA for high-risk defendants.

Methods and Analysis Results

Bivariate models as well as multivariate logistic regression models predicting FTA and NCA were used to investigate these questions. Control items included length of pretrial detention, length of time in the community (time at risk), defendant risk, demographics, and offense characteristics. The analysis was repeated for sub-populations of defendants (i.e., gender, race, offense type, offense level and risk level).

RESEARCH QUESTION 1A

Is the length of pretrial detention related to the likelihood of pretrial FTA once other relevant statistical controls are considered?

To determine whether there was a relationship between the length of pretrial detention and the likelihood of pretrial FTA, a multivariate logistic regression was estimated (see Table 2). The model included 66,014 cases and controlled for age, gender, race, ethnicity, marital status, risk level, supervision status, offense type, offense level, and time at risk. Several variables in the model revealed a statistically significant relationship with outcome; however, the variable "days spent in detention" was of particular interest in light of the research question. Days spent in detention was categorized in an ascending fashion (e.g., 1 day, 2 to 3 days, 4 to 7 days, 8 to 14 days, and so on). Including days spent in detention into the model in this fashion allows for the examination of each particular length of time as a predictor.

According to the odds ratio, the category 2 to 3 days was statistically and significantly ($p < .05$) related to FTA. Further, having an odds ratio above 1.00 means detentions of 2 to 3 days (when compared to 1 day) were associated with an increase in the likelihood of FTA. The categories 4 to 7 days, 8 to 14 days, and 15 to 30 days were not statistically related to FTA. The category 31 or more days was statistically related to FTA but had an odds ratio of less than 1.00, which indicates that defendants detained for that amount of time had a significant reduction in the likelihood of FTA.[2]

2 The reason for this is unknown, yet it is likely that defendants detained more than 31 days have fewer court dates to attend while in the community, thereby reducing the number of opportunities defendants may have to fail to appear.

Table 2. Multivariate Logistic Regression Predicting Pretrial FTA

	ANY FTA	
	ODDS RATIO	P
Age	0.99	0.00
Female	1.08	0.01
White	1.03	0.81
Black	1.24	0.11
Hispanic	1.40	0.00
Married	0.88	0.00
Risk Level (Reference = Low)		
Moderate	1.83	0.00
High	2.63	0.00
On Probation or Parole	1.08	0.05
Offense Type		
Drugs	0.98	0.47
Violent	0.70	0.00
Domestic Violence	0.51	0.00
Sex Offense	0.26	0.00
Firearm	0.82	0.04
Theft	1.41	0.00
Traffic	1.59	0.00
Driving Under the Influence	0.50	0.00
Felony	0.54	0.00
Time at Risk	1.00	0.00
Days Spent in Detention (Reference = 1 Day)		
2 to 3 Days	1.09	0.01
4 to 7 Days	1.01	0.81
8 to 14 Days	1.00	0.95
15 to 30 Days	0.95	0.53
31 or more Days	0.80	0.01
Constant	0.05	0.00
N	66014	
Model X2	3819.16	

RESEARCH QUESTION 1B

Do the observed effects (of days spent in detention when predicting FTA) differ for sub-populations of defendants?

To determine whether the effects of days spent in detention differ for sub-populations of defendants, several additional logistic regression models were calculated (see Table 3). Separate models were calculated for the following sub-populations: whites, blacks, males, females, charged with a felony, charged with a misdemeanor, low risk, medium risk and high risk.

The analysis was conducted for all defendants released at some point pending trial. When interpreting the results, defendants released within one day were used as the reference or comparison group. For white defendants, even short periods in detention (2 to 3 days and 4 to 7 days), when compared to 1 day, were associated with increases in the odds of FTA, while longer periods were not related to FTA. The same held true for black defendants held 2 to 3 days, with longer periods of time not relating to the likelihood of FTA.

Male and female defendants were similar in that even short amounts of time in detention, when compared to 1 day, were statistically associated with increases in the likelihood of FTA (2 to 3 days for males, and both 2 to 3 days and 4 to 7 days for females).

The 2-to-3-day category was associated with a significant increase in the likelihood of FTA for both felony and misdemeanor defendants. The 4-to-7-day category was significantly related to FTA for misdemeanor defendants (but not felony defendants), while the 8-to-14-day category was significantly related to an increase in the likelihood of FTA for felony defendants only.

For low-risk defendants, every category of detention except 8 to 14 days was associated with a significant increase in the likelihood of FTA. For moderate-risk defendants, a short amount of time in detention (2 to 3 days) was associated with a significant increase in the likelihood of FTA, while longer amounts of time (15 to 30 days and 31 or more days) were associated with significant decreases in likelihood of FTA. For high-risk defendants, only one categorization (31 or more days) was statistically predictive of FTA, indicating a decrease in the likelihood.

Table 3. Parameter Estimates for Logistic Regression Analyses Predicting FTA

SUBGROUP	DAYS SPENT IN DETENTION (Reference = 1 day)	ODDS RATIO	P	LOWER 95% CI	UPPER 95% CI
White					
53,135	2 to 3 Days	1.17	0.00	1.09	1.25
	4 to 7 Days	1.17	0.01	1.04	1.31
	8 to 14 Days	1.03	0.66	0.90	1.18
	15 to 30 Days	1.05	0.62	0.87	1.25
	31 or more Days	0.87	0.20	0.71	1.07
Black					
11,676	2 to 3 Days	1.17	0.02	1.03	1.33
	4 to 7 Days	0.99	0.93	0.77	1.27
	8 to 14 Days	1.17	0.19	0.93	1.47
	15 to 30 Days	0.90	0.56	0.64	1.27
	31 or more Days	0.98	0.92	0.68	1.42
Male					
47,200	2 to 3 Days	1.14	0.00	1.06	1.22
	4 to 7 Days	1.11	0.10	0.98	1.25
	8 to 14 Days	1.04	0.56	0.91	1.20
	15 to 30 Days	0.91	0.30	0.75	1.09
	31 or more Days	0.89	0.29	0.73	1.10
Female					
18,581	2 to 3 Days	1.27	0.00	1.13	1.42
	4 to 7 Days	1.24	0.03	1.03	1.50
	8 to 14 Days	1.14	0.25	0.91	1.43
	15 to 30 Days	1.29	0.08	0.97	1.72
	31 or more Days	0.91	0.62	0.64	1.30
Felony					
11,249	2 to 3 Days	1.26	0.03	1.02	1.55
	4 to 7 Days	1.15	0.29	0.88	1.51
	8 to 14 Days	1.34	0.02	1.05	1.71
	15 to 30 Days	1.30	0.08	0.97	1.74
	31 or more Days	1.10	0.56	0.80	1.51
Misdemeanor					
46,454	2 to 3 Days	1.17	0.00	1.09	1.25
	4 to 7 Days	1.14	0.04	1.01	1.29
	8 to 14 Days	0.99	0.91	0.83	1.18
	15 to 30 Days	0.85	0.21	0.66	1.10
	31 or more Days	0.78	0.13	0.56	1.08

Low					
44,379	2 to 3 Days	1.22	0.00	1.13	1.33
	4 to 7 Days	1.22	0.01	1.05	1.43
	8 to 14 Days	1.06	0.55	0.87	1.29
	15 to 30 Days	1.41	0.01	1.10	1.79
	31 or more Days	1.31	0.05	1.00	1.72
Moderate					
19,300	2 to 3 Days	1.12	0.03	1.01	1.24
	4 to 7 Days	1.08	0.29	0.93	1.26
	8 to 14 Days	1.06	0.48	0.90	1.25
	15 to 30 Days	0.78	0.03	0.62	0.98
	31 or more Days	0.77	0.05	0.60	0.99
High					
2,161	2 to 3 Days	0.88	0.39	0.65	1.18
	4 to 7 Days	0.84	0.38	0.57	1.24
	8 to 14 Days	0.82	0.31	0.55	1.21
	15 to 30 Days	0.75	0.26	0.45	1.23
	31 or more Days	0.41	0.00	0.22	0.74

RESEARCH QUESTION 1C

Is the length of pretrial detention related to the likelihood of pretrial NCA once other relevant statistical controls are considered?

The analysis discussed in Research Question 1a was replicated using NCA as the dependent variable. As before, the variable of particular interest was length of days spent in detention. Every category of days spent in detention was significantly related to the likelihood of NCA. Every category in ascending order (2 to 3 days through 31 or more days) was associated with a significant increase in the likelihood of NCA; however, the impact of 31 or more days was not as large as the impact of other detention time periods.[3]

3 The argument can be made that at least some of the detained defendants would have recidivated regardless of the time in pretrial detention, and that the decision to detain those defendants was appropriate given their higher propensity to reoffend.

Table 4. Multivariate Logistic Regression Predicting Pretrial NCA

	ANY NCA	
	ODDS RATIO	P
Age	0.98	0.00
Female	0.77	0.00
White	0.98	0.91
Black	1.09	0.59
Hispanic	0.44	0.00
Married	0.89	0.00
Risk Level (Reference = Low Risk)		
Moderate	2.16	0.00
High	3.29	0.00
On Probation or Parole	1.24	0.00
Offense Type		
Drugs	1.26	0.00
Violent	1.04	0.59
Domestic Violence	1.01	0.89
Sex Offense	0.75	0.11
Firearm	1.14	0.11
Theft	1.39	0.00
Traffic	1.04	0.21
Driving Under the Influence	0.97	0.46
Felony	0.94	0.05
Time at Risk	1.00	0.00
Days Spent in Detention (Reference = 1 day)		
2 to 3 Days	1.26	0.00
4 to 7 Days	1.34	0.00
8 to 14 Days	1.41	0.00
15 to 30 Days	1.23	0.00
31 or more Days	1.15	0.03
Constant	0.05	0.00
N	66024	
Model X2	4145.67	

RESEARCH QUESTION 1D

Do the observed effects (of days spent in detention when predicting NCA) differ for sub-populations of defendants?

The analyses discussed in Research Question 1b were replicated using NCA as the dependent variable. As before, the variable of particular interest was length of days spent in detention. The relationship between length of days spent in detention and NCA was tested for each of several subgroups.

Table 5 contains the results for all subgroups. For white defendants, each successive categorization of days spent in detention was associated with a significant increase in the likelihood of NCA. A similar trend was also noted for black defendants.

For male defendants, only detention periods up to 14 days were associated with significant increases in the likelihood of NCA. For female defendants, detention periods up to 30 days were associated with a significant increase in the likelihood of NCA.

For felony defendants, two categories of days spent in detention (2 to 3 days and 8 to 14 days) were associated with significant increases in the likelihood of NCA. For misdemeanor defendants, all categories of days spent in detention were associated with a significant increase in the likelihood of NCA.

For low-risk defendants, all categories of days spent in detention were associated with significant increases in the likelihood of NCA. In fact, the longer low-risk defendants were detained, the more likely they were to have new criminal activity pretrial (1.39 times more likely for defendants detained 2 to 3 days, increasing to 1.74 times when detained 31 or more days). For moderate-risk defendants, the first three categories (2 to 3 days, 4 to 7 days, and 8 to 14 days) were associated with significant increases in the likelihood of NCA. None of the categories were significant predictors of NCA for high-risk defendants.

Table 5. Parameter Estimates for Logistic Regression Analyses Predicting NCA

SUBGROUP	DAYS IN SPENT DETENTION (Reference = 1 day)	ODDS RATIO	P	LOWER 95% CI	UPPER 95% CI
White					
52,916	2 to 3 Days	1.28	0.00	1.19	1.38
	4 to 7 Days	1.37	0.00	1.24	1.52
	8 to 14 Days	1.48	0.00	1.32	1.67
	15 to 30 Days	1.28	0.00	1.10	1.49
	31 or more Days	1.20	0.03	1.02	1.42
Black					
11,805	2 to 3 Days	1.19	0.02	1.03	1.38
	4 to 7 Days	1.27	0.05	1.00	1.61
	8 to 14 Days	1.23	0.08	0.98	1.54

	15 to 30 Days	1.18	0.28	0.87	1.60
	31 or more Days	0.91	0.60	0.65	1.29
Male					
47,209	2 to 3 Days	1.26	0.00	1.17	1.36
	4 to 7 Days	1.31	0.00	1.17	1.46
	8 to 14 Days	1.44	0.00	1.28	1.62
	15 to 30 Days	1.16	0.07	0.99	1.36
	31 or more Days	1.11	0.22	0.94	1.32
Female					
18,712	2 to 3 Days	1.32	0.00	1.16	1.50
	4 to 7 Days	1.47	0.00	1.21	1.77
	8 to 14 Days	1.36	0.01	1.09	1.70
	15 to 30 Days	1.62	0.00	1.23	2.11
	31 or more Days	1.23	0.19	0.91	1.67
Felony					
11,334	2 to 3 Days	1.20	0.05	1.00	1.44
	4 to 7 Days	1.22	0.08	0.98	1.51
	8 to 14 Days	1.50	0.00	1.23	1.84
	15 to 30 Days	1.09	0.50	0.85	1.39
	31 or more Days	1.01	0.94	0.78	1.31
Misdemeanor					
46,337	2 to 3 Days	1.26	0.00	1.17	1.35
	4 to 7 Days	1.38	0.00	1.22	1.56
	8 to 14 Days	1.50	0.00	1.28	1.77
	15 to 30 Days	1.52	0.00	1.22	1.89
	31 or more Days	1.35	0.03	1.03	1.79
Low					
44,468	2 to 3 Days	1.39	0.00	1.27	1.52
	4 to 7 Days	1.50	0.00	1.30	1.72
	8 to 14 Days	1.56	0.00	1.33	1.85
	15 to 30 Days	1.57	0.00	1.26	1.95
	31 or more Days	1.74	0.00	1.39	2.18
Moderate					
19,368	2 to 3 Days	1.12	0.03	1.01	1.24
	4 to 7 Days	1.20	0.01	1.05	1.38
	8 to 14 Days	1.28	0.00	1.10	1.48
	15 to 30 Days	1.03	0.76	0.85	1.25
	31 or more Days	0.86	0.18	0.70	1.07

RESEARCH OBJECTIVE TWO:

Investigate the relationship between pretrial detention, as well as the length of pretrial detention, and new criminal activity post-disposition (NCA-PD)

Research Questions

2a. Is pretrial detention related to NCA-PD?

2b. Do the observed effects of pretrial detention differ for sub-populations of defendants (likelihood of 12-month NCA-PD and 24-month NCA-PD)?

2c. Is the length of pretrial detention related to NCA-PD?

2d. Do the observed effects of the length of pretrial detention differ for sub-populations of defendants (likelihood of 12-month NCA-PD and 24-month NCA-PD)?

Primary Findings

Being detained for the entire pretrial period is related to the likelihood of post-disposition recidivism. When other relevant statistical controls are considered, pretrial detention had a statistically significant and positive (meaning increasing) effect on 12-month NCA-PD and 24-month NCA-PD. Defendants detained pretrial were 1.3 times more likely to recidivate compared to defendants who were released at some point pending trial. This association could indicate that there are unknown factors that cause both detention and recidivism, but it is an association worthy of further exploration.

Each category of days spent in pretrial detention had a significant increase in the likelihood of both 12- and 24-month NCA-PD, with the exception of 31 or more days (which was not statistically significant). The results suggest that the longer an individual stays in pretrial detention, the higher the likelihood of 12-month and 24-month NCA-PD.

When examining sub-populations, the relationship between pretrial detention and post-disposition recidivism is strongest for low-risk defendants.

- Each category of days spent in pretrial detention, except 31 or more, revealed a statistically significant and increasing effect on the likelihood of 12-month NCA-PD for low-risk defendants.
- Generally, as the length of time in pretrial detention increases, so does the likelihood that 12-month NCA-PD will occur for low-risk defendants (1.16 times more likely to recidivate if detained 2 to 3 days, increasing to 1.43 times if detained 15 to 30 days).

- Each category of days spent in pretrial detention was associated with a significant increase in the likelihood of 24-month NCA-PD for low-risk defendants (1.17 times more likely to recidivate if detained 2 to 3 days, increasing to 1.46 times if detained 15 to 30 days).

Methods and Analysis Results

Multivariate logistic regression models were constructed to investigate the relationship between pretrial detention and NCA post-disposition. Control items included risk level, supervision status, offense type, offense class, incarceration history, and demographics. The analysis was repeated for sub-populations of defendants (i.e., gender, race, offense type, offense level and risk level).

RESEARCH QUESTION 2A

Is pretrial detention related to NCA-PD?

NCA-PD was assessed at both 12-months and 24-months post-disposition. Table 6 presents the results of multivariate logistic regression models that test the effects of pretrial detention when predicting NCA-PD while controlling for age, gender, race, ethnicity, marital status, risk level, supervision status, offense type, offense class, and incarceration history. Two models were calculated, one predicting 12-month NCA-PD and one predicting 24-month NCA-PD.

Being detained pretrial significantly increased the likelihood of 12-month and 24-month NCA-PD (1.3 times more likely to recidivate within both time periods), while controlling for all other variables in the model.

Table 6. Multivariate Logistic Regression Predicting Post-Disposition Recidivism

	12 MONTH NCA-PD		24 MONTH NCA-PD	
	ODDS RATIO	P	ODDS RATIO	P
Age	0.99	0.00	0.99	0.00
Female	0.83	0.00	0.83	0.00
White	1.44	0.00	1.40	0.00
Black	1.52	0.00	1.50	0.00
Hispanic	0.56	0.00	0.49	0.00
Married	0.86	0.00	0.87	0.00
Risk Level (Reference = Low Risk)				
Moderate	1.56	0.00	1.58	0.00
High	1.75	0.00	1.78	0.00
On Probation or Parole	1.04	0.06	1.11	0.00
Offense Type				
Drugs	1.10	0.00	1.12	0.00
Violent	0.98	0.62	0.99	0.76
Domestic Violence	0.97	0.33	0.99	0.87
Sex Offense	0.75	0.02	0.79	0.07
Firearm	0.98	0.71	0.96	0.53

Theft	1.17	0.00	1.17	0.00
Traffic	0.96	0.06	0.94	0.00
Driving Under the Influence	0.77	0.00	0.81	0.00
Felony	0.83	0.00	0.89	0.00
Incarceration	1.09	0.00	1.14	0.00
Detained Pretrial	1.30	0.00	1.29	0.00
Constant	0.32	0.00	0.59	0.00
N	84,999		71,062	
Model X2	3010.15		3056.05	

RESEARCH QUESTION 2B

Do the observed effects of pretrial detention differ for sub-populations of defendants (likelihood of 12-month NCA-PD and 24-month NCA-PD)?

Table 7 presents the results of several logistic regression models that estimate the effects of pretrial detention on 12-month NCA-PD, while controlling for age, gender, race, ethnicity, marital status, risk level, supervision status, offense type, offense class, and incarceration history. The results are divided into subgroups as in previous analyses (white, black, male, female, felony, misdemeanor, low risk, moderate risk, and high risk). Pretrial detention was statistically significant and had a positive (increasing) effect on the likelihood of 12-month NCA-PD for all models with the exception of felony defendants.

Similar results were revealed for 24-month NCA-PD (see Table 8). Pretrial detention was a statistically significant and positive (increasing) predictor of 24-month NCA-PD while controlling for all other aforementioned variables. Similar results were observed for all subgroups, with the exception of felony defendants, where pretrial detention was not a significant predictor of 24-month NCA-PD.

Table 7. Parameter Estimates for Logistic Regression Analyses Predicting 12-Month Recidivism

SUBGROUP	N	ODDS RATIO	P	LOWER 95% CI	UPPER 95% CI
White	67885	1.32	0.00	1.26	1.38
Black	15817	1.21	0.00	1.10	1.32
Male	62109	1.31	0.00	1.25	1.37
Female	22884	1.25	0.00	1.15	1.36
Felony	14845	1.00	0.95	0.91	1.10
Misdemeanor	59333	1.45	0.00	1.38	1.52
Risk Level					
Low	52303	1.27	0.00	1.20	1.35
Moderate	28452	1.32	0.00	1.24	1.40
High	4238	1.33	0.00	1.15	1.54

Table 8. Parameter Estimates for Logistic Regression Analyses

Predicting 24 Month Recidivism

SUBGROUP	N	ODDS RATIO	P	LOWER 95% CI	UPPER 95% CI
White	56688	1.32	0.00	1.26	1.38
Black	13202	1.20	0.00	1.09	1.31
Male	51914	1.30	0.00	1.25	1.36
Female	19147	1.23	0.00	1.13	1.34
Felony	11402	0.97	0.56	0.88	1.07
Misdemeanor	51399	1.43	0.00	1.36	1.50
Risk Level					
Low	44241	1.28	0.00	1.21	1.35
Moderate	23462	1.30	0.00	1.23	1.38
High	3350	1.28	0.00	1.09	1.49

RESEARCH QUESTION 2C

Is the length of pretrial detention related to NCA-PD?

Similar logistic regression models predicting 12-month NCA-PD and 24-month NCA-PD are presented in Table 9, although the length of days spent in pretrial detention is broken out by category, as before (2 to 3 days, 4 to 7 days, 8 to 14 days, 15 to 30 days, and 31 or more days). Each category of days spent in pretrial detention had a significant increase in the likelihood of both 12- and 24-month NCA-PD, with the exception of 31 or more, which was not statistically significant. In addition, the results suggest that the longer an individual stays in pretrial detention, the higher the likelihood of NCA-PD at both the 12- and 24-month points. These results were observed while controlling for all other variables in the model (age, gender, race, ethnicity, marital status, risk level, supervision status, offense type, offense class, and incarceration history) and represent a general pattern, with some exceptions, for length of time spent in pretrial detention.

Table 9. Multivariate Logistic Regression Predicting Post-Disposition Recidivism

	12 MONTH NCA-PD ODDS RATIO	P	24 MONTH NCA-PD ODDS RATIO	P
Age	0.99	0.00	0.99	0.00
Female	0.82	0.00	0.82	0.00
White	1.44	0.00	1.41	0.00
Black	1.52	0.00	1.51	0.00
Hispanic	0.57	0.00	0.50	0.00
Married	0.86	0.00	0.87	0.00
Risk Level (Reference = Low Risk)				
Moderate	1.56	0.00	1.57	0.00
High	1.81	0.00	1.80	0.00
On Probation or Parole	1.06	0.02	1.11	0.00
Offense Type				
Drugs	1.09	0.00	1.11	0.00
Violent	0.97	0.48	0.98	0.56
Domestic Violence	0.94	0.06	0.96	0.28
Sex Offense	0.76	0.03	0.79	0.06
Firearm	0.97	0.64	0.95	0.37
Theft	1.16	0.00	1.16	0.00
Traffic	0.96	0.06	0.94	0.00
Driving Under the Influence	0.76	0.00	0.81	0.00
Felony	0.81	0.00	0.86	0.00
Incarceration	1.11	0.00	1.16	0.00
Days in Spent Detention (Reference = 1 day)				
2 to 3 Days	1.15	0.00	1.16	0.00
4 to 7 Days	1.31	0.00	1.31	0.00
8 to 14 Days	1.41	0.00	1.42	0.00
15 to 30 Days	1.36	0.00	1.37	0.00
31 or more Days	0.96	0.25	1.06	0.10
Constant	0.30	0.00	0.55	0.00
N	84,443		70,565	
Model X2	3056.05		3402.06	

RESEARCH QUESTION 2D.

Do the observed effects of the length of pretrial detention differ for sub-populations of defendants (likelihood of 12-month NCA-PD and 24-month NCA-PD)?

Table 10 presents the results for several logistic regression models predicting the likelihood of 12-month NCA-PD. The results are divided by defendant subgroup (race, gender, offense level and risk type). In addition, the effects of each amount of time are presented categorically (e.g., 2 to 3 days, 4 to 7 days, and so on).

In general, it appears that the longer a defendant spends in pretrial detention, the more likely 12-month NCA-PD is to occur. For white defendants, each category of days in pretrial detention was statistically significant when predicting 12-month NCA-PD, with the exception of 31 or more days. For black defendants, a similar pattern was observed, but the lowest length of pretrial detention (2 to 3 days) approached, but did not reach, statistical significance.

Male and female defendants were nearly identical in that each category of days spent in pretrial detention, except 31 or more days, was statistically significant and positive (increasing) in predicting the likelihood of 12-month NCA-PD.

For felony defendants, only the categories of 4 to 7 days and 8 to 14 days reached statistical significance when predicting 12-month NCA-PD. Both categories had an increasing effect on the likelihood of 12-month NCA-PD while all other categories were not significantly predictive.

For misdemeanor defendants, each category of days spent in pretrial detention, with the exception of 31 or more days, revealed statistically significant and positive (increasing) effects on the likelihood of 12-month NCA-PD.

When low-risk defendants were isolated, each category of days spent in pretrial detention, with the exception of 31or more days, revealed a statistically significant and positive (increasing) effect on the likelihood of 12-month NCA-PD.

When moderate-risk defendants were isolated, the lowest length of pretrial detention lost significance. Further, while the ensuing lengths of pretrial detention (4 to 7 days, 8 to 14 days, 15 to 30 days) revealed a statistically significant and increasing likelihood of 12-month NCA-PD, the final category (31 or more days) reversed the previously established trend. Those detained 31 or more days were significantly less likely to have 12-month NCA-PD.

For high-risk defendants, none of the categories of days spent in pretrial detention were predictive of 12-month NCA-PD, except for the category of 31 or more days. Defendants who were detained for 31 or more days had a significantly lower likelihood of 12-month NCA-PD.

Table 11 presents similar results to those that were presented in Table 10, although the outcome variable was NCA-PD at the 24-month point.

For white, black, female and male defendants, each category of days spent in detention, except 31 or more days, was associated with a significant increase in the likelihood that NCA-PD will occur at the 24-month point. In addition, it appears that generally the strength of the relationship may increase with each increase in the amount of time spent in pretrial detention.

For felony defendants, the middle three categories (4 to 7 days, 8 to 14 days, and 15 to 30 days) were statistically related to 24-month NCA-PD. Each of these three time categories was associated with a significant increase in the likelihood of-24 month NCA-PD.

The same pattern that was observed above for white, black, male and female defendants was also revealed for misdemeanor defendants, with each category of days spent in pretrial detention, except 31 or more days, being associated with a significant increase in the likelihood of 24-month NCA-PD. Likewise, the strength of the relationship may increase with each increase in the amount of time.

For low-risk defendants, each category of days spent in detention was associated with a significant increase in the likelihood of 24-month NCA-PD. The strength of the relationship appears to increase with each increase in the amount of pretrial detention time but drops at 31 days or more.

For moderate-risk defendants, all categories of days spent in detention pretrial, except 31 or more, was associated with a significant increase in the likelihood of 24-month NCA-PD. As was observed in several examples before, the strength of the relationship generally appears to increase as the amount of time spent in pretrial detention increases.

For high-risk defendants, only 31 or more days spent in detention pretrial was significantly associated with 24-month NCA-PD, and the relationship was negative. In other words, defendants who spent 31 or more days in pretrial detention had a statistically significant reduction in the likelihood of NCA-PD at the 24-month point.

Table 10. Parameter Estimates for Logistic Regression Analyses Predicting 12 Month Recidivism

SUBGROUP	DAYS IN SPENT DETENTION (REFERENCE = 1 DAY)	ODDS RATIO	P	LOWER 95% CI	UPPER 95% CI
White					
67,885	2 to 3 Days	1.16	0.00	1.11	1.22
	4 to 7 Days	1.33	0.00	1.25	1.43
	8 to 14 Days	1.42	0.00	1.32	1.52
	15 to 30 Days	1.38	0.00	1.27	1.50
	31 or more Days	0.97	0.50	0.90	1.05
Black					
15,817	2 to 3 Days	1.09	0.07	0.99	1.21
	4 to 7 Days	1.19	0.02	1.02	1.37
	8 to 14 Days	1.31	0.00	1.15	1.50
	15 to 30 Days	1.21	0.03	1.02	1.43
	31 or more Days	0.86	0.06	0.74	1.01
Male					
62,109	2 to 3 Days	1.15	0.00	1.09	1.21
	4 to 7 Days	1.31	0.00	1.22	1.40

	8 to 14 Days	1.45	0.00	1.35	1.56
	15 to 30 Days	1.39	0.00	1.27	1.51
	31 or more Days	0.97	0.44	0.90	1.05
Female					
22,884	2 to 3 Days	1.16	0.00	1.07	1.26
	4 to 7 Days	1.29	0.00	1.15	1.46
	8 to 14 Days	1.27	0.00	1.12	1.45
	15 to 30 Days	1.26	0.01	1.07	1.48
	31 or more Days	0.92	0.29	0.80	1.07
Felony					
14,845	2 to 3 Days	1.10	0.18	0.96	1.27
	4 to 7 Days	1.24	0.01	1.05	1.46
	8 to 14 Days	1.40	0.00	1.20	1.62
	15 to 30 Days	1.16	0.10	0.97	1.38
	31 or more Days	0.97	0.67	0.83	1.13
Misdemeanor					
59,333	2 to 3 Days	1.15	0.00	1.10	1.21
	4 to 7 Days	1.31	0.00	1.22	1.40
	8 to 14 Days	1.44	0.00	1.32	1.56
	15 to 30 Days	1.36	0.00	1.24	1.50
	31 or more Days	0.94	0.23	0.85	1.04
Low					
52,303	2 to 3 Days	1.16	0.00	1.10	1.23
	4 to 7 Days	1.32	0.00	1.21	1.43
	8 to 14 Days	1.45	0.00	1.33	1.59
	15 to 30 Days	1.43	0.00	1.28	1.61
	31 or more Days	1.09	0.11	0.98	1.21
Moderate					
28,452	2 to 3 Days	1.07	0.10	0.99	1.15
	4 to 7 Days	1.21	0.00	1.10	1.34
	8 to 14 Days	1.28	0.00	1.16	1.41
	15 to 30 Days	1.23	0.00	1.10	1.38
	31 or more Days	0.88	0.02	0.79	0.98
High					
4,238	2 to 3 Days	0.96	0.78	0.74	1.25
	4 to 7 Days	1.04	0.79	0.78	1.39
	8 to 14 Days	1.21	0.19	0.91	1.61
	15 to 30 Days	1.18	0.31	0.86	1.61
	31 or more Days	0.68	0.01	0.51	0.91

Table 11. Parameter Estimates for Logistic Regression Analyses Predicting 24 Month Recidivism

SUBGROUP	DAYS SPENT IN DETENTION (Reference = 1 day)	ODDS RATIO	P	LOWER 95% CI	UPPER 95% CI
White					
56,688	2 to 3 Days	1.17	0.00	1.12	1.23
	4 to 7 Days	1.35	0.00	1.26	1.44
	8 to 14 Days	1.45	0.00	1.35	1.55
	15 to 30 Days	1.40	0.00	1.29	1.53
	31 or more Days	1.06	0.17	0.98	1.15
Black					
13,202	2 to 3 Days	1.12	0.02	1.02	1.23
	4 to 7 Days	1.16	0.04	1.00	1.35
	8 to 14 Days	1.28	0.00	1.12	1.46
	15 to 30 Days	1.21	0.03	1.02	1.43
	31 or more Days	1.04	0.62	0.89	1.22
Male					
51,914	2 to 3 Days	1.15	0.00	1.10	1.21
	4 to 7 Days	1.30	0.00	1.22	1.39
	8 to 14 Days	1.42	0.00	1.32	1.52
	15 to 30 Days	1.39	0.00	1.28	1.52
	31 or more Days	1.07	0.10	0.99	1.16
Female					
19,147	2 to 3 Days	1.19	0.00	1.10	1.29
	4 to 7 Days	1.33	0.00	1.18	1.49
	8 to 14 Days	1.40	0.00	1.23	1.58
	15 to 30 Days	1.25	0.01	1.07	1.47
	31 or more Days	1.03	0.72	0.88	1.20
Felony					
11,402	2 to 3 Days	1.11	0.14	0.97	1.28
	4 to 7 Days	1.28	0.00	1.09	1.51
	8 to 14 Days	1.42	0.00	1.22	1.64
	15 to 30 Days	1.26	0.01	1.06	1.50
	31 or more Days	1.11	0.19	0.95	1.30
Misdemeanor					
51,399	2 to 3 Days	1.16	0.00	1.11	1.21
	4 to 7 Days	1.30	0.00	1.21	1.39
	8 to 14 Days	1.46	0.00	1.34	1.58
	15 to 30 Days	1.36	0.00	1.23	1.49
	31 or more Days	1.05	0.33	0.95	1.17

Low					
44,241	2 to 3 Days	1.17	0.00	1.11	1.24
	4 to 7 Days	1.35	0.00	1.25	1.46
	8 to 14 Days	1.51	0.00	1.39	1.65
	15 to 30 Days	1.46	0.00	1.31	1.63
	31 or more Days	1.16	0.01	1.04	1.29
Moderate					
23,462	2 to 3 Days	1.09	0.04	1.01	1.18
	4 to 7 Days	1.20	0.00	1.09	1.32
	8 to 14 Days	1.26	0.00	1.14	1.39
	15 to 30 Days	1.21	0.00	1.08	1.36
	31 or more Days	0.99	0.83	0.88	1.10
High					
3,350	2 to 3 Days	0.86	0.30	0.65	1.14
	4 to 7 Days	0.89	0.46	0.65	1.21
	8 to 14 Days	1.06	0.73	0.77	1.44
	15 to 30 Days	1.10	0.60	0.78	1.54
	31 or more Days	0.69	0.03	0.50	0.95

	PRETRIAL		NCA-PD 12		NCA-PD 24	
JAIL BY COUNTY	N	%	N	%	N	%
ADAIR	588	0.52	638	0.45	525	0.43
ALLEN	475	0.42	515	0.36	368	0.3
BALLARD	282	0.25	346	0.24	299	0.25
BARREN	1,595	1.42	1,787	1.25	1,383	1.14
BELL	1,253	1.12	1,376	0.97	1,117	0.92
BOONE	3,219	2.87	3,608	2.53	3,198	2.64
BOURBON	508	0.45	683	0.48	560	0.46
BOYD	1,388	1.24	2,132	1.5	1,929	1.59
BOYLE	1,080	0.96	1,474	1.03	1,269	1.05
BRECKINRIDGE	439	0.39	498	0.35	398	0.33
BULLITT	1,698	1.52	1,792	1.26	1,307	1.08
BUTLER	259	0.23	249	0.17	213	0.18
CALDWELL	410	0.37	479	0.34	393	0.32
CALLOWAY	608	0.54	749	0.53	666	0.55
CAMPBELL	1,993	1.78	2,756	1.93	2,535	2.09
CARROLL	1,371	1.22	1,625	1.14	1,358	1.12
CARTER	783	0.7	941	0.66	757	0.62
CASEY	398	0.36	456	0.32	394	0.32
CHRISTIAN	2,314	2.07	3,399	2.38	2,838	2.34
CLARK	746	0.67	1,195	0.84	1,051	0.87
CLAY	633	0.57	1,003	0.7	902	0.74
CLINTON	210	0.19	224	0.16	169	0.14
CRITTENDEN	183	0.16	251	0.18	201	0.17
DAVIESS	2,703	2.41	3,266	2.29	2,874	2.37
ESTILL	296	0.26	390	0.27	324	0.27
FAYETTE	6,971	6.22	10,868	7.62	9,901	8.16
FLOYD	1,079	0.96	1,541	1.08	1,270	1.05
FRANKLIN	1,661	1.48	2,077	1.46	1,753	1.45
FULTON	325	0.29	415	0.29	359	0.3
GRANT	739	0.66	928	0.65	799	0.66
GRAVES	1,201	1.07	1,434	1.01	1,172	0.97
GRAYSON	777	0.69	858	0.6	676	0.56

GREENUP	462	0.41	796	0.56	694	0.57
HARDIN	2,335	2.08	2,887	2.02	2,560	2.11
HARLAN	1,305	1.16	1,618	1.13	1,344	1.11
HART	390	0.35	520	0.36	417	0.34
HENDERSON	1,341	1.2	2,067	1.45	1,900	1.57
HICKMAN	113	0.1	145	0.1	125	0.1
HOPKINS	1,456	1.3	1,901	1.33	1,686	1.39
JACKSON	263	0.23	371	0.26	316	0.26
JEFFERSON	22,189	19.81	27,095	19	22,910	18.89
JESSAMINE	1,449	1.29	1,937	1.36	1,652	1.36
JOHNSON	2,896	2.59	3,287	2.31	2,722	2.24
KENTON	5,015	4.48	6,540	4.59	5,929	4.89
KNOX	1,019	0.91	1,319	0.93	1,184	0.98
LARUE	212	0.19	293	0.21	241	0.2
LAUREL	1,637	1.46	2,270	1.59	1,976	1.63
LEE	923	0.82	1,210	0.85	986	0.81
LESLIE	274	0.24	357	0.25	301	0.25
LETCHER	715	0.64	788	0.55	652	0.54
LEWIS	185	0.17	248	0.17	203	0.17
LINCOLN	638	0.57	852	0.6	721	0.59
LOGAN	604	0.54	818	0.57	720	0.59
MADISON	1,804	1.61	2,405	1.69	2,145	1.77
MARION	709	0.63	878	0.62	722	0.6
MARSHALL	619	0.55	671	0.47	585	0.48
MASON	1,033	0.92	1,198	0.84	972	0.8
MCCRACKEN	1,933	1.73	2,606	1.83	2,333	1.92
MCCREARY	501	0.45	612	0.43	497	0.41
MEADE	445	0.4	529	0.37	422	0.35
MONROE	220	0.2	258	0.18	214	0.18
MONTGOMERY	1,136	1.01	1,382	0.97	1,106	0.91
MUHLENBERG	605	0.54	816	0.57	678	0.56
NELSON	826	0.74	955	0.67	821	0.68
OHIO	635	0.57	703	0.49	606	0.5
OLDHAM	805	0.72	872	0.61	713	0.59
PERRY	1,147	1.02	1,420	1	1,062	0.88
PIKE	2,328	2.08	2,599	1.82	2,054	1.69
POWELL	400	0.36	640	0.45	558	0.46
PULASKI	1,605	1.43	2,056	1.44	1,693	1.4
ROCKCASTLE	584	0.52	806	0.57	664	0.55
ROWAN	1,111	0.99	1,310	0.92	1,055	0.87
RUSSELL	407	0.36	404	0.28	338	0.28
SCOTT	725	0.65	951	0.67	798	0.66
SHELBY	1,401	1.25	1,680	1.18	1,356	1.12
SIMPSON	540	0.48	619	0.43	450	0.37
TAYLOR	779	0.7	958	0.67	833	0.69

TODD	203	0.18	300	0.21	278	0.23
UNION	374	0.33	506	0.35	439	0.36
WARREN	3,293	2.94	4,334	3.04	3,417	2.82
WAYNE	373	0.33	424	0.3	320	0.26
WEBSTER	324	0.29	369	0.26	297	0.24
WHITLEY	1,223	1.09	1,570	1.1	1,242	1.02
WOODFORD	336	0.3	468	0.33	435	0.36

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Racial Bias in Bail Decisions*

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Abstract

This paper develops a new test for identifying racial bias in the context of bail decisions – a high-stakes setting with large disparities between white and black defendants. We motivate our analysis using Becker's model of racial bias, which predicts that rates of pre-trial misconduct will be identical for marginal white and marginal black defendants if bail judges are racially unbiased. In contrast, marginal white defendants will have higher rates of misconduct than marginal black defendants if bail judges are racially biased, whether that bias is driven by racial animus, inaccurate racial stereotypes, or any other form of bias. To test the model, we use the release tendencies of quasi-randomly assigned bail judges to identify the relevant race-specific misconduct rates. Estimates from Miami and Philadelphia show that bail judges are racially biased against black defendants, with substantially more racial bias among both inexperienced and part-time judges. We find suggestive evidence that this racial bias is driven by bail judges relying on inaccurate stereotypes that exaggerate the relative danger of releasing black defendants.

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Racial disparities exist at every stage of the U.S. criminal justice system. Compared to observably similar whites, blacks are more likely to be searched for contraband (Antonovics and Knight 2009), more likely to experience police force (Fryer 2016), more likely to be charged with a serious offense (Rehavi and Starr 2014), more likely to be convicted (Anwar, Bayer, and Hjalmarrson 2012), and more likely to be incarcerated (Abrams, Bertrand, and Mullainathan 2012). Racial disparities are particularly prominent in the setting of bail: in our data, black defendants are 3.6 percentage points more likely to be assigned monetary bail than white defendants and, conditional on being assigned monetary bail, receive bail amounts that are $9,923 greater.[1] However, determining whether these racial disparities are due to racial bias or statistical discrimination remains an empirical challenge.

To test for racial bias, Becker (1957, 1993) proposed an "outcome test" that compares the success or failure of decisions across groups at the margin. In our setting, the outcome test is based on the idea that rates of pre-trial misconduct will be identical for marginal white and marginal black defendants if bail judges are racially unbiased and the disparities in bail setting are solely due to (accurate) statistical discrimination (e.g., Phelps 1972, Arrow 1973). In contrast, marginal white defendants will have higher rates of pre-trial misconduct than marginal black defendants if these bail judges are racially biased against blacks, whether that racial bias is driven by racial animus, inaccurate racial stereotypes, or any other form of racial bias. The outcome test has been difficult to implement in practice, however, as comparisons based on average defendant outcomes are biased when whites and blacks have different risk distributions – the well-known infra-marginality problem (e.g., Ayres 2002).

In recent years, two seminal papers have developed outcome tests of racial bias that partially circumvent this infra-marginality problem. In the first paper, Knowles, Persico, and Todd (2001) show that if motorists respond to the race-specific probability of being searched, then all motorists of a given race will carry contraband with equal probability. As a result, the marginal and average success rates of police searches will be identical and OLS estimates are not biased by infra-marginality concerns. Knowles et al. (2001) find no difference in the average success rate of police searches for white and black drivers, leading them to conclude that there is no racial bias in police searches. In a second important paper, Anwar and Fang (2006) develop a test of relative racial bias based on the idea that the ranking of search and success rates by white and black police officers should be unaffected by the race of the motorist even when there are infra-marginality problems. Consistent with Knowles et al. (2001), Anwar and Fang (2006) find no evidence of relative racial bias in police searches, but note that their approach cannot be used to detect absolute racial bias.[2] However, the

[1] Authors' calculation for Miami-Dade and Philadelphia using the data described in Section II. Racial disparities in bail setting are also observed in other jurisdictions. For example, black felony defendants in state courts are nine percentage points more likely to be detained pre-trial compared to otherwise similar white defendants (McIntyre and Baradaran 2013).

[2] We replicate the Knowles et al. (2001) and Anwar and Fang (2006) tests in our data, finding no evidence of racial bias in either case. The differences between our test and the Knowles et al. (2001) and Anwar and Fang (2006) tests are that (1) we identify treatment effects for marginal defendants rather than the average defendant, and (2) we identify absolute rather than relative bias. See Section III.C for additional details on why the Knowles et al. (2001) and Anwar and Fang (2006) tests yield different results than our test.

prior literature has been critiqued for its reliance on restrictive assumptions about the unobserved risk of blacks and whites (e.g., Brock et al. 2012).

In this paper, we propose a new outcome test for identifying racial bias in the context of bail decisions. Bail is an ideal setting to test for racial bias for a number of reasons. First, the legal objective of bail judges is narrow, straightforward, and measurable: to set bail conditions that allow most defendants to be released while minimizing the risk of pre-trial misconduct. In contrast, the objectives of judges at other stages of the criminal justice process, such as sentencing, are complicated by multiple hard-to-measure objectives, such as the balance between retribution and mercy. Second, mostly untrained bail judges must make on-the-spot judgments with limited information and little to no interaction with defendants. These institutional features make bail decisions particularly prone to the kind of inaccurate stereotypes or categorical heuristics that exacerbate racial bias (e.g., Fryer and Jackson 2008, Bordalo et al. 2016). Finally, bail decisions are extremely consequential for both white and black defendants, with prior work suggesting that detained defendants suffer about $30,000 in lost earnings and government benefits alone (Dobbie, Goldin, and Yang 2018).[3]

In the first section of the paper, we formally develop two complementary estimators that use variation in the release tendencies of quasi-randomly assigned bail judges to identify the differences in pre-trial misconduct rates at the margin of release required for the Becker outcome test. Our first estimator uses the standard instrumental variables (IV) framework to identify differences in the local average treatment effects (LATEs) for white and black defendants near the margin of release. Though IV estimators are often criticized for the local nature of the estimates, we exploit the fact that the Becker test relies on (the differences between) exactly these kinds of local treatment effects to test for racial bias. In our context, our IV estimator measures the weighted average of racial bias across all bail judges with relatively few auxiliary assumptions, but at the potential cost that we cannot estimate judge-specific treatment effects and the weighting scheme underlying the IV estimator is not always policy relevant. In contrast, our second estimator uses the marginal treatment effects (MTE) framework developed by Heckman and Vytlacil (1999, 2005) to estimate judge-specific treatment effects for white and black defendants at the margin of release. Our MTE estimator therefore allows us to put equal weight on each judge in our sample, but with the estimation of the judge-specific estimates coming at the cost of additional auxiliary assumptions.

The second part of the paper tests for racial bias in bail setting using administrative court data from Miami and Philadelphia. We find evidence of significant racial bias against black defendants using both our IV and MTE estimators, ruling out statistical discrimination as the sole explanation for the racial disparities in bail. We find that marginally released white defendants are 22.2 to 23.1 percentage points more likely to be rearrested prior to disposition than marginally released black defendants using our IV and MTE estimators, respectively. Our estimates of racial bias are nearly identical if we account for other observable crime and defendant differences by race, suggesting

[3]See Dobbie et al. (2018), Gupta, Hansman, and Frenchman (2016), Leslie and Pope (2017), and Stevenson (2016) for evidence on the non-financial consequences of bail decisions.

that our results cannot be explained by black-white differences in certain types of crimes (e.g., the proportion of felonies versus misdemeanors) or black-white differences in defendant characteristics (e.g., the proportion with prior offenses versus no prior offenses). In sharp contrast to these results, naïve OLS estimates indicate, if anything, racial bias against white defendants, highlighting the importance of accounting for both infra-marginality and omitted variables when estimating racial bias in the criminal justice system.

In the final part of the paper, we explore which form of racial bias is driving our findings. The first possibility is that, as originally modeled by Becker (1957, 1993), racial animus leads judges to discriminate against black defendants at the margin of release. This type of taste-based racial bias may be a particular concern in our setting due to the relatively low number of minority bail judges, the rapid-fire determination of bail decisions, and the lack of face-to-face contact between defendants and judges. A second possibility is that bail judges rely on incorrect inferences of risk based on defendant race due to anti-black stereotypes, leading to the relative over-detention of black defendants at the margin. These inaccurate anti-black stereotypes can arise if black defendants are over-represented in the right tail of the risk distribution, even when the difference in the riskiness of the average black defendant and the average white defendant is very small (Bordalo et al. 2016). As with racial animus, these racially biased prediction errors in risk may be exacerbated by the fact that bail judges must make quick judgments on the basis of limited information, with virtually no training and, in many jurisdictions, little experience working in the bail system.

We find three sets of facts suggesting that our results are driven by bail judges relying on inaccurate stereotypes that exaggerate the relative danger of releasing black defendants versus white defendants at the margin. First, we find that both white and black bail judges exhibit racial bias against black defendants, a result that is inconsistent with most models of racial animus. Second, we find that our data are strikingly consistent with the theory of stereotyping developed by Bordalo et al. (2016). For example, we find that black defendants are sufficiently over-represented in the right tail of the predicted risk distribution, particularly for violent crimes, to rationalize observed racial disparities in release rates under a stereotyping model. We also find that there is no racial bias against Hispanics, who, unlike blacks, are not significantly over-represented in the right tail of the predicted risk distribution. Finally, we find substantially more racial bias when prediction errors of any kind are more likely to occur. For example, we find substantially less racial bias among both the full-time and more experienced part-time judges who are least likely to rely on simple race-based heuristics, and substantially more racial bias among the least experienced part-time judges who are most likely to rely on these heuristics.

Our findings are broadly consistent with parallel work by Kleinberg et al. (2018), who use machine learning techniques to show that bail judges make significant prediction errors for defendants of all races. Using a machine learning algorithm to predict risk using a variety of inputs such as prior and current criminal charges, but *excluding* defendant race, they find that the algorithm could reduce crime and jail populations while simultaneously reducing racial disparities. Their results also suggest that variables that are unobserved in the data, such as a judge's mood or a defendant's

demeanor at the bail hearing, are the source of prediction errors, not private information that leads to more accurate risk predictions. Our results complement Kleinberg et al. (2018) by documenting one specific source of these prediction errors – racial bias among bail judges.

Our results also contribute to an important literature testing for racial bias in the criminal justice system. As discussed above, Knowles et al. (2001) and Anwar and Fang (2006) are seminal works in this area. Subsequent work by Antonovics and Knight (2009) finds that police officers in Boston are more likely to conduct a search if the race of the officer differs from the race of the driver, consistent with racial bias among police officers, and Alesina and La Ferrara (2014) find that death sentences of minority defendants convicted of killing white victims are more likely to be reversed on appeal, consistent with racial bias among juries. Conversely, Anwar and Fang (2015) find no racial bias against blacks in parole board release decisions, observing that among prisoners released by the parole board between their minimum and maximum sentence, the marginal prisoner is the same as the infra-marginal prisoner. Mechoulan and Sahuguet (2015) also find no racial bias against blacks in parole board release decisions, arguing that for a given sentence, the marginal prisoner is the same as the infra-marginal prisoner. In the context of bail decisions, Ayres and Waldfogel (1994) show that bail bond dealers in New Haven charge lower prices to minority defendants, and Bushway and Gelbach (2011) find evidence of racial bias among bail judges using a parametric framework that accounts for unobserved heterogeneity across defendants.[4]

Our paper is also related to work using LATEs provided by IV estimators to obtain effects at the margin of the instrument (e.g., Card 1999, Gruber, Levine, and Staiger 1999) and work using MTEs to extrapolate to other estimands of interest (e.g., Heckman and Vyltacil 2005, Heckman, Urzua, and Vytlacil 2006, Cornelissen et al. 2016). In recent work, Brinch, Mogstad, and Wiswall (2017) show that a discrete instrument can be used to identify marginal treatment effects using functional form assumptions. Kowalski (2016) similarly shows that it is possible to bound and estimate average treatment effects for always takers and never takers using functional form assumptions. Most recently, Mogstad, Santos, and Torgovitsky (2017) show that because a LATE generally places some restrictions on unknown marginal treatment effects, it is possible to recover information about other estimands of interest.

The remainder of the paper is structured as follows. Section I provides an overview of the bail system, describes the theoretical model underlying our analysis, and develops our empirical test for racial bias. Section II describes our data and empirical methodology. Section III presents the main results. Section IV explores potential mechanisms, and Section V concludes. An online appendix provides additional results, theoretical proofs, and detailed information on our institutional setting.

[4]There is also a large literature examining racial bias in other settings. The outcome test has been used to test for discrimination in the labor market (Charles and Guryan 2008) and the provision of healthcare (Chandra and Staiger 2010, Anwar and Fang 2012), while non-outcome based tests have been used to test for discrimination in the criminal justice system (Pager 2003, Anwar, Bayer, and Hjalmarsson 2012, Rehavi and Starr 2014), the labor market (Goldin and Rouse 2000, Bertrand and Mullainathan 2004, Glover, Pallais, and Pariente 2017), the credit market (Ayres and Siegelman 1995, Bayer, Ferreira, and Ross 2016), the housing market (Edelman, Luca, and Svirsky 2017), and in sports (Price and Wolfers 2010, Parsons et al. 2011), among a variety of other settings. See Fryer (2011) and Bertrand and Duflo (2016) for partial reviews of the literature.

I. An Empirical Test of Racial Bias

In this section, we motivate and develop our empirical test for racial bias in bail setting. Our theoretical framework closely follows the previous literature on the outcome test in the criminal justice system (e.g., Becker 1957, 1993, Knowles et al. 2001, Anwar and Fang 2006, Antonovics and Knight 2009). Consistent with the prior literature, we show that we can test for racial bias by comparing treatment effects for the marginal black and marginal white defendants. We then develop two complementary estimators to identify these race-specific treatment effects using the quasi-random assignment of cases to judges. Appendix B provides additional details and proofs.

A. Overview of the Bail System

In the United States, bail judges are granted considerable discretion to determine which defendants should be released before trial. Bail judges are meant to balance two competing objectives when deciding whether to detain or release a defendant before trial. First, bail judges are directed to release all but the most dangerous defendants before trial to avoid undue punishment for defendants who have not yet been convicted of a crime. Second, bail judges are instructed to minimize the risk of pre-trial misconduct by setting the appropriate conditions for release. In our setting, pre-trial misconduct includes both the risk of new criminal activity and the risk of failure to appear for a required court appearance. Importantly, bail judges are not supposed to assess guilt or punishment at the bail hearing.

The conditions of release are set at a bail hearing typically held within 24 to 48 hours of a defendant's arrest. In most jurisdictions, bail hearings last only a few minutes and are held through a video-conference to the detention center such that judges can observe each defendant's demeanor. During the bail hearing, the assigned bail judge considers factors such as the nature of the alleged offense, the weight of the evidence against the defendant, the nature and probability of danger that the defendant's release poses to the community, the likelihood of flight based on factors such as the defendant's employment status and living situation, and any record of prior flight or bail violations, among other factors (Foote 1954). Because bail judges are granted considerable discretion in setting the appropriate bail conditions, there are substantial differences across judges in the same jurisdiction (e.g., Dobbie et al. 2018, Gupta et al. 2016, Leslie and Pope 2017, Stevenson 2016).

The assigned bail judge has a number of potential options when setting a defendant's bail conditions. For example, the bail judge can release low-risk defendants on a promise to return for all court appearances, known as release on recognizance (ROR). For defendants who pose a higher risk of flight or new crime, the bail judge can allow release but impose non-monetary conditions such as electronic monitoring or periodic reporting to pre-trial services. The judge can also require defendants to post a monetary amount to secure release, typically 10 percent of the total bail amount. If the defendant fails to appear at the required court appearances or commits a new crime while out on bail, either he or the bail surety forfeits the 10 percent payment and is liable for the remaining 90 percent of the total bail amount. In practice, the median bail amount is $6,000 in our

sample, and only 57 percent of defendants meet the required monetary conditions to secure release. Bail may also be denied altogether for defendants who commit the most serious crimes such as first- or second-degree murder.

One important difference between jurisdictions is the degree to which bail judges specialize in conducting bail hearings. In our setting, the bail judges we study in Philadelphia are full-time specialists who are tasked with setting bail seven days a week throughout the entire year. In contrast, the bail judges we study in Miami are part-time nonspecialists who assist the bail court by serving weekend shifts once or twice per year. These weekend bail judges spend their weekdays as trial court judges. We explore the potential importance of these institutional features in Section IV.

B. Model of Judge Behavior

This section develops a stylized theoretical framework that allows us to define an outcome-based test of racial bias in bail setting. We begin with a model of taste-based racial bias that closely follows Becker (1957, 1993). We then present an alternative model of racially biased prediction errors, which generates similar empirical predictions as the taste-based model.

Taste-Based Discrimination: Let i denote a defendant and $\mathbf{V}_i$ denote all case and defendant characteristics considered by the bail judge, excluding defendant race r_i. The expected cost of release for defendant i conditional on observable characteristics $\mathbf{V}_i$ and race r_i is equal to the expected probability of pre-trial misconduct $\mathbb{E}[\alpha_i|\mathbf{V}_i, r_i]$, which includes the likelihood of both new crime and failure to appear, times the cost of misconduct C, which includes the social cost of any new crime or failures to appear. For simplicity, we normalize $C = 1$, so that the expected cost of release conditional on observable characteristics is equal to $\mathbb{E}[\alpha_i|\mathbf{V}_i, r_i]$. Moving forward, we also simplify our notation by letting the expected cost of release conditional on observables be denoted by $\mathbb{E}[\alpha_i|r_i]$.

The perceived benefit of release for defendant i assigned to judge j is denoted by $t_r^j(\mathbf{V}_i)$, which is a function of observable case and defendant characteristics $\mathbf{V}_i$. The perceived benefit of release $t_r^j(\mathbf{V}_i)$ includes social cost savings from reduced jail time, private gains to defendants from an improved bargaining position with the prosecutor or increased labor force participation, and personal benefits to judge j from any direct utility or disutility from being known as either a lenient or tough judge, respectively. Importantly, we allow the perceived benefit of release $t_r^j(\mathbf{V}_i)$ to vary by race $r \in W, B$ to allow for judge preferences to differ for white and black defendants.

Definition 1. Following Becker (1957, 1993), we define judge j as racially biased against black defendants if $t_W^j(\mathbf{V}_i) > t_B^j(\mathbf{V}_i)$. Thus, for racially biased judges, there is a higher perceived benefit of releasing white defendants than releasing observably identical black defendants.

For simplicity, we assume that bail judges are risk neutral and maximize the perceived net benefit of pre-trial release. We also assume that the bail judge's sole task is to decide whether to release or detain a defendant given that this decision margin is the most important and consequential

(Kleinberg et al. 2018, Dobbie et al. 2018). In simplifying each judge's task to this single decision, we abstract away from the fact that bail judges may set different levels of monetary bail that take into account a defendant's ability to pay. We discuss possible extensions to the model that account for these features below.

Under these assumptions, the model implies that bail judge j will release defendant i if and only if the expected cost of pre-trial release is less than the perceived benefit of release:

$$\mathbb{E}[\alpha_i | r_i = r] \leq t_r^j(\mathbf{V}_i) \tag{1}$$

Given this decision rule, the marginal defendant for judge j and race r is the defendant i for whom the expected cost of release is exactly equal to the perceived benefit of release, i.e. $\mathbb{E}[\alpha_i^j | r_i = r] = t_r^j(\mathbf{V}_i)$. We simplify our notation moving forward by letting this expected cost of release for the marginal defendant for judge j and race r be denoted by α_r^j.

Based on the above framework and Definition 1, the model yields the familiar outcome-based test for racial bias from Becker (1957, 1993):

Proposition 1. If judge j is racially biased against black defendants, then $\alpha_W^j > \alpha_B^j$. Thus, for racially biased judges, the expected cost of release for the marginal white defendant is higher than the expected cost of release for the marginal black defendant.

Proposition 1 predicts that marginal white and marginal black defendants should have the same probability of pre-trial misconduct if judge j is racially unbiased, but marginal white defendants should have a higher probability of misconduct if judge j is racially biased against black defendants.

Racially Biased Prediction Errors in Risk: In the taste-based model of discrimination outlined above, we assume that judges agree on the (true) expected cost of release, $\mathbb{E}[\alpha_i | r_i]$, but not the perceived benefit of release, $t_r^j(\mathbf{V}_i)$. An alternative approach is to assume that judges disagree on their (potentially inaccurate) predictions of the expected cost of release, as would be the case if judges systematically overestimate the cost of release for black defendants relative to white defendants. We show that a model motivated by these kinds of racially biased prediction errors in risk can generate the same predictions as a model of taste-based discrimination.

Let i again denote defendants and $\mathbf{V}_i$ denote all case and defendant characteristics considered by the bail judge, excluding defendant race r_i. The perceived benefit of releasing defendant i assigned to judge j is now defined as $t(\mathbf{V}_i)$, which does not vary by judge.

The perceived cost of release for defendant i conditional on observable characteristics $\mathbf{V}_i$ is equal to the perceived probability of pre-trial misconduct, $\mathbb{E}^j[\alpha_i | \mathbf{V}_i, r_i]$, which is now allowed to vary across judges. We can write the perceived cost of release as:

$$\mathbb{E}^j[\alpha_i | \mathbf{V}_i, r_i] = \mathbb{E}[\alpha_i | \mathbf{V}_i, r_i] + \tau_r^j(\mathbf{V}_i) \tag{2}$$

where $\tau_r^j(\mathbf{V}_i)$ is a prediction error that is allowed to vary by judge j and defendant race r_i. To simplify our notation, we let the true expected probability of pre-trial misconduct conditional on

all variables observed by the judge be denoted by $\mathbb{E}[\alpha_i|r_i]$.

Definition 2. We define judge j as making racially biased prediction errors in risk against black defendants if $\tau_B^j(\mathbf{V}_i) > \tau_W^j(\mathbf{V}_i)$. Thus, judges making racially biased prediction errors systematically overestimate the true cost of release for black defendants relative to white defendants.

Following the taste-based model, bail judge j will release defendant i if and only if the benefit of pre-trial release is greater than the perceived cost of release:

$$\mathbb{E}^j[\alpha_i|\mathbf{V}_i, r_i = r] = \mathbb{E}[\alpha_i|r_i = r] + \tau_r^j(\mathbf{V}_i) \leq t(\mathbf{V}_i) \tag{3}$$

Given the above setup, it is straightforward to show that the prediction error model can be reduced to the taste-based model of discrimination outlined above if we relabel $t(\mathbf{V}_i) - \tau_r^j(\mathbf{V}_i) = t_r^j(\mathbf{V}_i)$. As a result, we can generate identical empirical predictions using the prediction error and taste-based models.

Following this logic, our model of racially biased prediction errors in risk yields a similar outcome-based test for racial bias:

Proposition 2. If judge j systematically overestimates the true expected cost of release of black defendants relative to white defendants, then $\alpha_W^j > \alpha_B^j$. Thus, for judges who make racially biased prediction errors in risk, the true expected cost of release for the marginal white defendant is higher than the true expected cost of release for the marginal black defendant.

Parallel to Proposition 1, Proposition 2 predicts that marginal white and marginal black defendants should have the same probability of pre-trial misconduct if judge j does not systematically make prediction errors in risk that vary with race, but marginal white defendants should have a higher probability of misconduct if judge j systematically overestimates the true expected cost of release of black defendants relative to white defendants.

Regardless of the underlying behavioral model that drives the differences in judge behavior, the empirical predictions generated by these outcome-based tests are identical: if there is racial bias against black defendants, then marginal white defendants will have a higher probability of misconduct than marginal black defendants. In contrast, marginal white defendants will not have a higher probability of misconduct than marginal black defendants if observed racial disparities in bail setting are solely due to statistical discrimination.[5] Of course, finding higher misconduct rates for marginal white versus marginal black defendants does have a different interpretation depending on the underlying behavioral model. We will return to this issue in Section IV when we discuss more speculative evidence that allows us to differentiate between these two forms of racial bias.

[5] In contrast to the two models we consider in this section, models of (accurate) statistical discrimination suggest that blacks may be treated worse than observably identical whites if either (1) blacks are, on average, riskier given an identical signal of risk (e.g., Phelps 1972, Arrow 1973) or (2) blacks have less precise signals of risk (e.g., Aigner and Cain 1977). In both types of (accurate) statistical discrimination models, however, judges use race to form accurate predictions of risk, both on average and at the margin of release. As a result, neither form of (accurate) statistical discrimination will lead to marginal white defendants having a higher probability of misconduct than marginal black defendants.

C. Empirical Test of Racial Bias in Bail Setting

The goal of our analysis is to empirically test for racial bias in bail setting using the rate of pre-trial misconduct for white defendants and black defendants at the margin of release. Following the theory model, let the weighted average of treatment effects for defendants of race r at the margin of release for judge j, α_r^j, for some weighting scheme, w^j, across all bail judges, $j = 1...J$, be given by:

$$\begin{aligned} \alpha_r^{*,w} &= \sum_{j=1}^{J} w^j \alpha_r^j \\ &= \sum_{j=1}^{J} w^j t_r^j \end{aligned} \tag{4}$$

where w^j are non-negative weights which sum to one that will be discussed in further detail below. By definition, $\alpha_r^j = t_r^j$, where t_r^j represents judge j's threshold for release for defendants of race r. Intuitively, $\alpha_r^{*,w}$ represents a weighted average of the treatment effects for defendants of race r at the margin of release across all judges.

Following this notation, the average level of racial bias among bail judges, $D^{*,w}$, for the weighting scheme w^j is given by:

$$\begin{aligned} D^{*,w} &= \sum_{j=1}^{J} w^j \left(t_W^j - t_B^j \right) \\ &= \sum_{j=1}^{J} w^j t_W^j - \sum_{j=1}^{J} w^j t_B^j \\ &= \alpha_W^{*,w} - \alpha_B^{*,w} \end{aligned} \tag{5}$$

From Equation (4), we can express $D^{*,w}$ as a weighted average across all judges of the difference in treatment effects for white defendants at the margin of release and black defendants at the margin of release.

Standard OLS estimates will typically not recover unbiased estimates of the weighted average of racial bias, $D^{*,w}$, for two reasons. First, characteristics observable to the judge but not the econometrician may be correlated with pre-trial release, resulting in omitted variable bias when estimating the treatment effects for black and white defendants. The second, and more important, reason OLS estimates will not recover unbiased estimates of racial bias is that the average treatment effect identified by OLS will equal the treatment effect at the margin required by the outcome test unless one is willing to assume either identical risk distributions for black and white defendants or constant treatment effects across the entire distribution of both black and white defendants (e.g., Ayres 2002). Thus, even if the econometrician observes the full set of observables known to the bail judge, OLS estimates are still not sufficient to test for racial bias without extremely restrictive

assumptions.[6]

We therefore develop two complementary estimators for racial bias that use variation in the release tendencies of quasi-randomly assigned bail judges to identify differences in pre-trial misconduct rates at the margin of release. Our first estimator uses the standard IV framework to identify the difference in LATEs for white and black defendants near the margin of release. Our IV estimator allows us to estimate a weighted average of racial bias across bail judges with relatively few auxiliary assumptions, but with the caveats that we cannot estimate judge-specific treatment effects and the weighting scheme underlying the IV estimator may not be policy relevant. In contrast, our second estimator uses the MTE framework developed by Heckman and Vytlacil (1999, 2005) to estimate judge-specific treatment effects for white and black defendants at the margin of release, allowing us to choose our own weighting scheme when calculating racial bias in our data. In practice, we choose to impose equal weights on each judge – a parameter with a clear economic interpretation – meaning that our MTE estimates can be interpreted as the average level of bias across judges in our sample.

C.1. Setup

We first briefly review the econometric properties of a race-specific estimator that uses judge leniency as an instrumental variable for pre-trial release, baseline assumptions that underlie both our IV and MTE estimators. Section II.B provides empirical tests of each assumption.

Let Z_i be a scalar measure of the assigned judge's propensity for pre-trial release for defendant-case i that takes on values ordered $\{z_0, ..., z_J\}$, where $J+1$ is the number of total judges in the bail system. For example, a value of $z_j = 0.5$ indicates that judge j releases 50 percent of all defendants. In practice, we construct Z_i using a standard leave-out procedure that captures the pre-trial release tendencies of judges. We calculate Z_i separately for white and black defendants to relax the standard monotonicity assumption that the judge ordering produced by the scalar Z_i is the same for both white and black defendants, implicitly allowing judges to exhibit different levels of racial bias.

Following Imbens and Angrist (1994), a race-specific estimator using Z_i as an instrumental variable for pre-trial release is valid and well-defined under the following three assumptions:

Assumption 1. [Existence]. Pre-trial release, $Released_i$, is a nontrivial function of the instrument Z_i such that a first stage exists:

$$Cov(Released_i, Z_i) \neq 0$$

Assumption 1 ensures that there is a first-stage relationship between our instrument Z_i and the probability of pre-trial release $Released_i$.

Assumption 2. [Exclusion Restriction]. Z_i is uncorrelated with unobserved determinants of

[6] In Appendix C, we use a series of simple graphical examples to illustrate how a standard OLS estimator suffers from infra-marginality bias whenever there are differences in the risk distributions of black and white defendants. We then use a simple two-judge example to illustrate how a judge IV estimator can alleviate the infra-marginality bias.

pre-trial misconduct Y_i:

$$Cov(Z_i, \mathbf{v}_i) = 0$$

where $\mathbf{v}_i = \mathbf{U}_i + \varepsilon_i$ consists of characteristics unobserved by the econometrician but observed by the judge, $\mathbf{U}_i$, and idiosyncratic variation unobserved by both the econometrician and judge, ε_i. Assumption 2 ensures that our instrument Z_i is orthogonal to characteristics unobserved by the econometrician, $\mathbf{v}_i$. In other words, Assumption 2 assumes that the assigned judge only affects pre-trial misconduct through the channel of pre-trial release.

Assumption 3. [Monotonicity]. The impact of judge assignment on the probability of pre-trial release is monotonic if for each z_{j-1}, z_j pair:

$$Released_i(z_j) - Released_i(z_{j-1}) \geq 0$$

where $Released_i(z_j)$ equals 1 if for a given case, the defendant is released if assigned to judge j. Assumption 3 implies that for a given case, any defendant released by a strict judge would also be released by a more lenient judge, and any defendant detained by a lenient judge would also be detained by a more strict judge.

C.2. IV Estimator for Racial Bias

Given Assumptions 1-3, we now formally define our IV estimator for racial bias, provide conditions for consistency, and discuss the interpretation of the IV weights.

Defining our IV Estimator: Let the true IV-weighted level of racial bias, $D^{*,IV}$ be defined as:

$$\begin{aligned} D^{*,IV} &= \sum_{j=1}^{J} w^j \left(t_W^j - t_B^j \right) \\ &= \sum_{j=1}^{J} \lambda^j \left(t_W^j - t_B^j \right) \end{aligned} \tag{6}$$

where $w^j = \lambda^j$, the standard IV weights defined in Imbens and Angrist (1994).

Let our IV estimator that uses judge leniency as an instrumental variable for pre-trial release be defined as:

$$\begin{aligned} D^{IV} &= \alpha_W^{IV} - \alpha_B^{IV} \\ &= \sum_{j=1}^{J} \lambda_W^j \alpha_W^{j,j-1} - \sum_{j=1}^{J} \lambda_B^j \alpha_B^{j,j-1} \end{aligned} \tag{7}$$

where λ_r^j are again the standard IV weights and each pairwise treatment effect $\alpha_r^{j,j-1}$ captures the treatment effects of compliers within each j, $j-1$ pair. As we discuss in Appendix B, compliers for judge j and $j-1$ are individuals such that $\alpha_r^{j,j-1} \in (t_r^{j-1}, t_r^j]$.

Consistency of our IV Estimator: Our IV estimator D^{IV} provides a consistent estimate of $D^{*,IV}$ under two conditions: (1) Z_i is continuous and (2) λ_r^j is constant by race. The first condition is that our judge leniency measure Z_i is continuously distributed over some interval $[\underline{z}, \bar{z}]$. Intuitively, each defendant becomes marginal to a judge as the distance between any two judge leniency measures converges to zero, i.e. the instrument becomes more continuous. Under this first condition, each race-specific IV estimate, α_r^{IV}, approaches a weighted average of treatment effects for defendants at the margin of release. In Appendix B, we discuss the potential infra-marginality bias that may result if our instrument is discrete, as is the case in our data. With a discrete instrument, each defendant is no longer marginal to a particular judge and D^{IV} may no longer provide a consistent estimate of $D^{*,IV}$ if the distribution of white compliers differs from the distribution of black compliers. We show that the maximum infra-marginality bias of our IV estimator when the instrument is discrete is given by the following formula:

$$\max_j(\lambda^j)(\alpha^{max} - \alpha^{min})$$

where α^{max} is the largest treatment effect among compliers, α^{min} is the smallest treatment effect among compliers, and λ^j are the standard IV weights. The potential for infra-marginality bias in our IV estimator therefore decreases as (1) the heterogeneity in treatment effects among compliers decreases ($\alpha^{max} \to \alpha^{min}$) and (2) the maximum of the judge weights decreases ($\max_j(\lambda^j) \to 0$), as would occur when there are more judges distributed over the range of the instrument. In practice, we find that the maximum infra-marginality bias of our IV estimator D^{IV} from $D^{*,IV}$ is 1.1 percentage points in our setting.[7]

The second condition for consistency is that the weights on the pairwise LATEs must be equal across race. This equal weights assumption ensures that the race-specific IV estimates from Equation (7), α_W^{IV} and α_B^{IV}, provide the same weighted averages of $\alpha_W^{j,j-1}$ and $\alpha_B^{j,j-1}$. See Appendix B for proofs of consistency. In Appendix B, we empirically tests whether the IV weights λ_r^j are constant by race in our data, finding that the distributions of black and white IV weights are visually indistinguishable from each other and that a Kolmogorov-Smirnov test cannot reject the hypothesis that the two estimated distributions are drawn from the same continuous distribution (p-value =

[7] To better understand why the number of judges may affect the maximum infra-marginality bias of our estimator, it is helpful to start with a simple two judge case where both judges use the same release thresholds for both white and black defendants, $t_W^j = t_B^j$, such that there is no racial bias, $D^{*,w} = 0$, under any weighting scheme w. Suppose that the more lenient judge releases defendants with an expected pre-trial misconduct rate of less than 20 percent, while the more strict judge releases defendants with an expected pre-trial misconduct rate of less than 10 percent. Then, the race-specific LATEs estimated using our IV strategy are the average treatment effects of all defendants with expected misconduct rates between 10 and 20 percent. Within this range of compliers, suppose that all black defendants have expected rates of pre-trial misconduct of 10 percent, while all white defendants have expected rates of pre-trial misconduct of 20 percent. Then, our IV estimator will yield a LATE for whites ($\alpha_W^{IV} = 0.2$) that is larger in magnitude than the LATE for blacks ($\alpha_B^{IV} = 0.1$), causing us to estimate $D^{IV} = 0.1 > 0$. Our IV estimator would thus lead us to incorrectly conclude that there was racial bias. A similar exercise can be used to show that we may find $D^{IV} = 0$ even if $D^{*,w} > 0$. Under the worst-case scenario where we assume the maximum heterogeneity in treatment effects ($\alpha^{max} - \alpha^{min} = 1$), the maximum infra-marginality bias is $\max_j(\lambda^j) = 1$ because 100 percent of compliers fall within the two judges. In this case, infra-marginality bias makes our IV estimator uninformative on the true level of racial bias. However, using the same logic, it is straightforward to show that the magnitude of this infra-marginality bias decreases when there are many judges because the share of compliers within any two judges decreases, thus decreasing $\max_j(\lambda^j)$.

0.431). The IV weights for each judge-by-year cell are also highly correlated across race, with a regression of black IV weights for each judge-by-year cell on the white IV weight in the same cell yielding a coefficient equal to 1.028 (se = 0.033).

Interpretation of the IV Weights: As discussed above, our IV estimator yields a weighted average of racial bias across bail judges, where the weights λ^j are the standard IV weights defined in Imbens and Angrist (1994). If the IV weights are uncorrelated with the level of racial bias for a given judge, then our IV estimator will estimate the average level of discrimination across all bail judges. If the IV weights are correlated with the level of racial bias, however, then our IV estimator may under or overestimate the average level of racial bias across all bail judges, but may still be of policy relevance depending on the parameter of interest (e.g., an estimate of racial bias that puts more weights on judges with higher caseloads).

To better understand the economic interpretation of an IV-weighted estimate of racial bias, Appendix B investigates the relationship between our IV weights and judge-by-year characteristics. We find that our IV weights are positively correlated with both the number of cases in a judge-by-year cell and judge-by-year specific estimates of racial bias, implying that the IV-weighted estimate of racial bias may be larger than an equal-weighted estimate of racial bias. We return to this issue below when discussing the difference between our IV and MTE estimates.

C.3. MTE Estimator for Racial Bias

Finally, we formally define our MTE estimator of racial bias and provide conditions for consistency. Without loss of generality, we focus on an estimate of racial bias that places equal weight on each bail judge.

Defining our MTE Estimator: Let the true equal-weighted MTE estimate of racial bias, $D^{*,MTE}$ be defined as:

$$\begin{aligned} D^{*,MTE} &= \sum_{j=1}^{J} w^j \left(t_W^j - t_B^j \right) \\ &= \sum_{j=1}^{J} \frac{1}{J} \left(t_W^j - t_B^j \right) \end{aligned} \tag{8}$$

where $w^j = \frac{1}{J}$, such that $D^{*,MTE}$ can be interpreted as the average level of racial bias across judges.

Let our equal-weighted MTE estimator of racial bias, D^{MTE}, be defined as:

$$D^{MTE} = \sum_{j=1}^{J} \frac{1}{J} \left(MTE_W(p_W^j) - MTE_B(p_B^j) \right) \tag{9}$$

where p_r^j is the probability that judge j releases a defendant of race r calculated using only the variation in pre-trial release due to our judge leniency measure Z_i (i.e. judge j's race-specific

propensity score). $MTE_r(p_r^j)$ is the estimated MTE at the propensity score for judge j calculated separately for each defendant race r. In Appendix B, we show that $MTE_r(p_r^j) = \alpha_r^j$ when we map each judge j's release decision under our theory model to the MTE framework developed by Heckman and Vytlacil (2005).

Consistency of our MTE Estimator: Our MTE estimator D^{MTE} provides a consistent estimate of $D^{*,MTE}$ if the race-specific MTEs are identified over the entire support of the propensity score calculated using variation in Z_i. In practice, there are two conceptually different approaches to identifying the race-specific MTEs over the entire support of the propensity score. If Z_i is continuous, the local instrumental variables (LIV) estimand provides a consistent estimate of the MTE over the support of the propensity score with no additional assumptions (Heckman and Vytlacil 2005, Cornelissen et al. 2016). With a discrete instrument, however, our MTE estimator is only consistent under additional functional form restrictions that allow us to interpolate the MTEs between the values of the propensity score we observe in the data. Following Heckman and Vytlacil (2005) and Doyle (2007), we use a local polynomial function and information from the observed values of the propensity score to estimate the MTE curve over the full support of the propensity score. In other words, we implicitly assume that the functional form of the MTE curve is specified by a local polynomial function.

Following Cornelissen et al. (2016), we test our functional form assumption by comparing race-specific MTEs weighted by the standard IV weights to race-specific LATEs estimated using two-stage least squares. In line with our functional form assumption, we recover each nonparametric LATE using the appropriately weighted MTE up to sampling error. We also find similar MTE estimates under a range of different functional form assumptions, suggesting that our estimates are not particularly sensitive to the exact parametric restriction we choose. See Appendix B for details.

D. Discussion and Extensions

In this section, we discuss the interpretation of our test of racial bias under different assumptions and extensions.

Racial Differences in Arrest Probability: Our test for racial bias assumes that any measurement error in the outcome is uncorrelated with race. This assumption would be violated if, for example, judges minimize new crime, not just new arrests, and police are more likely to rearrest black defendants conditional on having committed a new crime (Fryer 2016, Goncalves and Mello 2018). In this scenario, we will overestimate the probability of pre-trial misconduct for black versus white defendants at the margin and, as a result, underestimate the true amount of racial bias in bail setting. It is therefore possible that our estimates reflect a lower bound on the true amount of racial bias among bail judges to the extent that judges minimize new crime.[8]

[8] A related concern is that bail judges may be influenced by other court actors when making bail decisions, such as prosecutors or defense attorneys, who may themselves be racially biased against black defendants. In this scenario, it is possible that our empirical test identifies racial bias stemming from judges not overriding racially biased bail

Omitted Objectives for Release: We also assume that judges do not consider other objectives or outcomes, or what Kleinberg et al. (2018) refer to as "omitted payoff bias." We will have this kind of omitted payoff bias if, for example, bail judges consider how pre-trial detention impacts a defendant's employment status and this outcome is correlated with race. For example, if judges also minimize employment disruptions when setting bail, and white defendants at the margin of release are less likely to be employed compared to black defendants at the margin, we will again underestimate the true level of racial bias.

We explore the empirical relevance of omitted payoff bias in several ways. First, as will be discussed below, we find that our estimates are nearly identical if we measure pre-trial misconduct using only rearrests versus using rearrests or failures to appear. These results are also consistent with Kleinberg et al. (2018), who find similar evidence of prediction errors using rearrests or failures to appear. Second, as will be discussed below, we also find similar estimates when we measure pre-trial misconduct using crime-specific rearrest rates to address the concern that judges may be most concerned about reducing violent crimes. Third, we note that Dobbie et al. (2018) find that white defendants at the margin of release are no more likely to be employed in the formal labor market up to four years after the bail hearing compared to black defendants at the margin of release. This goes against the idea that judges may be trading off minimizing pre-trial misconduct with maximizing employment. Finally, as will be discussed below, we find that racial bias against black defendants is larger for part-time and inexperienced judges compared to full-time and experienced judges. There are few conceivable stories where omitted payoffs differ by judge experience.

Taken together, we therefore believe that any omitted payoff bias is likely to be small in practice. This conclusion is also supported by the fact that bail judges are required by law to make release decisions with the narrow objective of minimizing the risk of pre-trial misconduct. Bail judges are also explicitly told not to consider other objectives in deciding who to release or detain. Moreover, bail judges feel enormous political pressure to solely minimize pre-trial misconduct, in particular the risk of new crime. For example, one bail judge told NPR that elected bail judges feel enormous pressure to detain defendants, and end up setting high bail amounts rather than releasing defendants because "they will have less criticism from the public for letting someone out if that person gets out and commits another crime."[9]

Racial Differences in Ability to Pay Monetary Bail: In our model, we abstract away from the fact that bail judges may set different levels of monetary bail that, by law, should take into account a defendant's ability to pay.[10] Extending our model to incorporate these institutional details means

recommendations from these other court actors. Two pieces of evidence suggest a limited role for this possibility. First, we find substantial variation in pre-trial release tendencies across judges, a result that is inconsistent with the idea that judges "rubber-stamp" bail recommendations from other court actors. Second, we find that racial bias decreases with judge experience, a result that is inconsistent with other court actors driving the racial bias unless judge experience is correlated with the probability of overriding racially biased bail recommendations.

[9] See http://www.npr.org/2016/12/17/505852280/states-and-cities-take-steps-to-reform-dishonest-bail-system

[10] While monetary bail is not meant to operate as a *sub rosa* vehicle for detaining defendants, several courts have held that there is no constitutional right to affordable bail. See, e.g., Brangan v. Commonwealth, 80 N.E.3d 949, 9960 (Mass. 2017) ("Bail that is beyond a defendant's reach is not prohibited. Where, based on the judge's consideration

that racial bias could also be driven by judges systematically over-predicting the relative ability of black defendants to pay monetary bail at the margin. This type of racial bias could occur if, for example, judges rely on fixed bail schedules that do not account for any racial differences in the ability to pay monetary bail.

We explore the empirical relevance of racial differences in ability to pay monetary bail in two ways. First, we test whether the assignment of non-monetary bail (i.e., either ROR or non-monetary conditions) versus monetary bail has a larger impact on the probability of release for marginal black defendants.[11] If judges systematically over-predict black defendants' ability to pay monetary bail at the margin, then the assignment of non-monetary bail will increase the probability of pre-trial release more for marginal black defendants compared to marginal white defendants. To test this idea, Panel A of Appendix Table A1 presents two-stage least squares estimates of the impact of non-monetary versus monetary bail on pre-trial release using a leave-out measure based on non-monetary bail decisions as an instrumental variable. We find that the assignment of non-monetary bail versus monetary bail has a nearly identical impact on the pre-trial release rates for marginal black defendants and marginal white defendants. These results run counter to the hypothesis that judges systematically over-predict the ability of black defendants to pay monetary bail.

Second, we directly estimate racial bias in the setting of non-monetary versus monetary bail to incorporate any additional bias stemming from this margin. We estimate these effects using a two-stage least squares regression of pre-trial misconduct on non-monetary bail, again using a leave-out measure based on non-monetary bail decisions as an instrumental variable. Panel B of Appendix Table A1 presents these estimates. We find similar estimates of racial bias when focusing on the non-monetary versus monetary bail decision.[12]

Judge Preferences for Non-Race Characteristics: Another extension to our model concerns two distinct views about what constitutes racial bias. The first is that racial bias includes not only any bias due to phenotype, but also bias due to seemingly non-race factors that are correlated with, if not driven by, race. For example, bail judges could be biased against defendants charged with drug offenses because blacks are more likely to be charged with these types of crimes. Our preferred estimates are consistent with this broader view of racial bias, measuring the disparate treatment of black and white defendants at the margin for <u>all</u> reasons unrelated to true risk of pre-trial misconduct, including reasons related to seemingly non-race characteristics such as crime

of all the relevant circumstances, neither alternative nonfinancial conditions nor an amount the defendant can afford will adequately assure his appearance for trial, it is permissible to set bail at a higher amount, but no higher than necessary to ensure the defendant's appearance.")

[11] Dobbie et al. (2018) show that the assignment of ROR and non-monetary conditions have a statistically identical impact on defendant outcomes, including pre-trial misconduct. We therefore combine ROR and non-monetary conditions into a single category in our analysis.

[12] To compare these estimates to our preferred pre-trial release estimates, we scale the estimated treatment effects by the "first stage" effect of non-monetary bail on pre-trial release given by the Panel A estimates described above. For example, in our main results, we find that marginal white defendants are 22.2 percentage points more likely to be rearrested for any crime prior to disposition compared to marginal black defendants. If we scale the estimates in Panel B of Appendix Table A1 by those in Panel A of Appendix Table A1, we find that marginal white defendants are 19.1 percentage points more likely to be rearrested compared to marginal black defendants ($D^{IV} = \frac{0.085}{0.490} - \frac{-0.009}{0.511} = 0.191$).

type.

A second view is that racial bias is disparate treatment due to phenotype alone, not other correlated factors such as crime type. In Appendix B, we show that it is possible to test for this narrower form of racial bias using a re-weighting procedure that weights the distribution of observables of blacks to match observables of whites in the spirit of DiNardo, Fortin, and Lemieux (1996) and Angrist and Fernández-Val (2013). This narrower test for racial bias relies on the assumption that judge preferences vary only by observable characteristics $\mathbf{X}_i$, i.e. $t_r^j(\mathbf{V}_i) = t_r^j(\mathbf{X}_i)$. We find nearly identical estimates of racial bias using this re-weighting procedure, suggesting that judge preferences over non-race characteristics are a relatively unimportant contributor to our findings. We discuss these results in robustness checks below.

II. Data and Instrument Construction

This section summarizes the most relevant information regarding our administrative court data from Philadelphia and Miami-Dade, describes the construction of our judge leniency measure, and provides empirical support for the baseline assumptions required for our IV and MTE estimators of racial bias. Further details on the cleaning and coding of variables are contained in Appendix D.

A. Data Sources and Descriptive Statistics

Philadelphia court records are available for all defendants arrested and charged between 2010-2014 and Miami-Dade court records are available for all defendants arrested and charged between 2006-2014. For both jurisdictions, the court data contain information on defendant's name, gender, race, date of birth, and zip code of residence. Because our ethnicity identifier does not distinguish between non-Hispanic white and Hispanic white, we match the surnames in our dataset to census genealogical records of surnames. If the probability a given surname is Hispanic is greater than 70 percent, we label this individual as Hispanic. In our main analysis, we include all defendants and compare outcomes for marginal black and marginal white (Hispanic and non-Hispanic) defendants. In robustness checks, we present results comparing marginal black and marginal non-Hispanic white defendants.[13]

The court data also include information on the original arrest charge, the filing charge, and the final disposition charge. We also have information on the severity of each charge based on state-specific offense grades, the outcome for each charge, and the punishment for each guilty disposition. Finally, the case-level data include information on attorney type, arrest date, and the date of and judge presiding over each court appearance from arraignment to sentencing. Importantly, the case-level data also include information on bail type, bail amount when monetary bail is set, and whether bail was met. Because the data contain defendant identifiers, we can measure whether a defendant

[13] Appendix Table A3 presents results for marginal Hispanic white defendants compared to non-Hispanic white defendants. Perhaps in some part because of measurement error in our coding of Hispanic ethnicity, we find no evidence of racial bias against Hispanics.

was subsequently arrested for a new crime before case disposition. In Philadelphia, we also observe whether a defendant failed to appear for a required court appearance.

We make three restrictions to the court data to isolate cases that are quasi-randomly assigned to judges. First, we drop a small set of cases with missing bail judge information or missing race information. Second, we drop the 30 percent of defendants in Miami-Dade who never have a bail hearing because they post bail immediately following the arrest; below we show that the characteristics of defendants who have a bail hearing are uncorrelated with our judge leniency measure. Third, we drop all weekday cases in Miami-Dade because, as explained in Appendix E, bail judges in Miami-Dade are assigned on a quasi-random basis only on the weekends. The final sample contains 162,836 cases from 93,914 unique defendants in Philadelphia and 93,417 cases from 65,944 unique defendants in Miami-Dade.

Table 1 reports summary statistics for our estimation sample separately by race and pre-trial release status. On average, black defendants are 3.6 percentage points more likely to be assigned monetary bail compared to white defendants and receive bail amounts that are $9,923 greater than white defendants. Conversely, black defendants are 2.0 percentage points and 1.6 percentage points less likely to be released on their own recognizance or to be assigned non-monetary conditions compared to white defendants, respectively. As a result, black defendants are 2.4 percentage points more likely to be detained pre-trial compared to white defendants.

Compared to white defendants, released black defendants are also 1.9 percentage points more likely to be rearrested for a new crime before case disposition, our preferred measure of pre-trial misconduct. Released black defendants are also 0.9 percentage points, 0.7 percentage points, and 3.0 percentage points more likely to be rearrested for a drug, property, and violent crime, respectively. In Philadelphia, released black defendants are 1.4 percentage points more likely to fail to appear in court compared to white defendants. Defining pre-trial misconduct as either failure to appear or rearrest in Philadelphia, and only rearrest in Miami, released black defendants are 4.1 percentage points more likely to commit any form of pre-trial misconduct compared to white defendants.[14]

B. Construction of the Instrumental Variable

We estimate the causal impact of pre-trial release for the marginal defendant using a measure of the tendency of a quasi-randomly assigned bail judge to release a defendant as an instrument for release. In both Philadelphia and Miami-Dade, there are multiple bail judges serving at each point in time, allowing us to utilize variation in bail setting across judges. Both jurisdictions also assign cases to bail judges in a quasi-random fashion in order to balance caseloads: Philadelphia utilizes a rotation system where three judges work together in five-day shifts, with one judge working an eight-hour morning shift (7:30AM-3:30PM), another judge working the eight-hour afternoon shift (3:30PM-11:30PM), and the final judge working the eight-hour evening shift (11:30PM-7:30AM). Similarly,

[14]We find that approximately four percent of detained defendants are rearrested for a new crime prior to case disposition – an outcome that should be impossible. In robustness checks, we show that our results are unaffected by dropping these cases.

bail judges in Miami-Dade rotate through the weekend felony and misdemeanor bail hearings. See Appendix E for additional details.

Following Dobbie et al. (2018), we construct our instrument using a residualized, leave-out judge leniency measure that accounts for the case assignment processes in Philadelphia and Miami-Dade. To construct this residualized judge leniency measure, we first regress pre-trial release decisions on an exhaustive set of court-by-time fixed effects, the level at which defendants are quasi-randomly assigned to judges in our setting. In Miami, these court-by-time fixed effects include court-by-bail year-by-bail day of week fixed effects and court-by-bail month-by-bail day of week fixed effects. In Philadelphia, we add bail-day of week-by-bail shift fixed effects. We then use the residuals from this regression to calculate the leave-out mean judge release rate for each defendant. We calculate our instrument across all case types, but allow the instrument to vary across years and defendant race.[15]

Figure 1 presents the distribution of our residualized judge leniency measure for pre-trial release at the judge-by-year level for all defendants, white defendants, and black defendants. Our sample includes seven total bail judges in Philadelphia and 170 total bail judges in Miami-Dade. In Philadelphia, the average number of cases per judge is 23,262 during the sample period of 2010-2014, with the typical judge-by-year cell including 5,253 cases. In Miami-Dade, the average number of cases per judge is 550 during the sample period of 2006-2014, with the typical judge-by-year cell including 179 cases. Controlling for the exhaustive set of court-by-time fixed effects, the judge release measure ranges from -0.283 to 0.253 with a standard deviation of 0.040. In other words, moving from the least to most lenient judge increases the probability of pre-trial release by 53.6 percentage points, a 76.8 percent change from the mean release rate of 69.8 percentage points.

C. Instrument Validity

Existence of First Stage: To examine the first-stage relationship between judge leniency (Z_{itj}) and whether a defendant is released pre-trial ($Released_{itj}$), we estimate the following equation for defendant-case i, assigned to judge j at time t using a linear probability model, estimated separately for white and black defendants:

$$Released_{itj} = \gamma_W Z_{itj} + \pi_W \mathbf{X}_{it} + v_{itj} \tag{10}$$

$$Released_{itj} = \gamma_B Z_{itj} + \pi_B \mathbf{X}_{it} + v_{itj} \tag{11}$$

where the vector $\mathbf{X}_{it}$ includes court-by-time fixed effects. The error term v_{itj} is composed of characteristics unobserved by the econometrician but observed by the judge, as well as idiosyncratic variation unobserved to both the judge and econometrician. As described previously, Z_{itj} are leave-out (jackknife) measures of judge leniency that are allowed to vary across years and defendant race.

[15] Our leave-out procedure is essentially a reduced-form version of jackknife IV, with the leave-out leniency measure for judge j being algebraically equivalent to judge j's fixed effect from a leave-out regression of residualized pre-trial release on the full set of judge fixed effects and court-by-time fixed effects. In unreported results, jackknife IV and LIML estimates using the full set of judge fixed effects as instruments yield similar results.

Robust standard errors are two-way clustered at the individual and judge-by-shift level.

Figure 1 provides graphical representations of the first stage relationship, for all defendants and separately by race, between our residualized measure of judge leniency and the probability of pre-trial release controlling for our exhaustive set of court-by-time fixed effects, overlaid over the distribution of judge leniency. The graphs are a flexible analog to Equations (10) and (11), where we plot a local linear regression of actual individual pre-trial release against judge leniency. The individual rate of pre-trial release is monotonically increasing for both races, and approximately linearly increasing in our leniency measure.

Table 2 presents formal first stage results from Equations (10) and (11) for all defendants, white defendants, and black defendants. Columns 1, 3, and 5 begin by reporting results with only court-by-time fixed effects. Columns 2, 4, and 6 add our baseline crime and defendant controls: race, gender, age, whether the defendant had a prior offense in the past year, whether the defendant had a prior history of pre-trial crime in the past year, whether the defendant had a prior history of failure to appear in the past year, the number of charged offenses, indicators for crime type (drug, DUI, property, violent, or other), crime severity (felony or misdemeanor), and indicators for any missing characteristics.

We find that our residualized judge instrument is highly predictive of whether a defendant is released pre-trial. Our results show that a defendant assigned to a bail judge that is 10 percentage points more likely to release a defendant pre-trial is 38.9 percentage points more likely to be released pre-trial. Judge leniency is also highly predictive of pre-trial release for both white and black defendants, with the first-stage coefficient being 0.360 and 0.415, respectively.[16]

Exclusion Restriction: Table 3 verifies that assignment of cases to bail judges is random after we condition on our court-by-time fixed effects. Columns 1, 3, and 5 of Table 3 use a linear probability model to test whether case and defendant characteristics are predictive of pre-trial release. These estimates capture both differences in the bail conditions set by the bail judges and differences in these defendants' ability to meet the bail conditions. We control for court-by-time fixed effects and two-way cluster standard errors at the individual and judge-by-shift level. For example, we find that black male defendants are 10.4 percentage points less likely to be released pre-trial compared to similar female defendants, while white male defendants are 8.6 percentage points less likely to be released pre-trial compared to similar female defendants. White defendants with at least one prior offense in the past year are 16.8 percentage points less likely to be released compared to defendants with no prior offenses, while black defendants with at least one prior offense in the past year are 13.4

[16]Consistent with prior work using judge stringency as an instrumental variable (e.g., Bhuller et al. 2016), the probability of being released pre-trial does not increase one-for-one with our measure of judge leniency, likely because of attenuation bias due to sampling variation in the construction of our instrument. For instance, our judge leniency measure is computed over finite judge caseloads and judge leniency may drift over the course of the year, reducing the accuracy of our leave-out measure. Consistent with this explanation, we find first stage coefficients ranging from 0.6 to 0.7 in Monte Carlo simulations when judge tendencies are fixed over the course of the year, and first stage coefficients ranging from 0.2 to 0.4 when judge tendencies are allowed to change within each year. It is important to note that attenuation bias due to sampling variation in our leniency measure does not bias our estimates since it affects both the first stage and reduced form proportionally.

percentage points less likely to be released compared to defendants with no prior offenses. Columns 2, 4, and 6 assess whether these same case and defendant characteristics are predictive of our judge leniency measure using an identical specification. We find that judges with differing leniencies are assigned cases with very similar defendants.

Even with random assignment, the exclusion restriction could be violated if bail judge assignment impacts the probability of pre-trial misconduct through channels other than pre-trial release. The assumption that judges only systematically affect defendant outcomes through pre-trial release is fundamentally untestable, and our estimates should be interpreted with this potential caveat in mind. However, we argue that the exclusion restriction assumption is reasonable in our setting. Bail judges exclusively handle one decision, limiting the potential channels through which they could affect defendants. In addition, we are specifically interested in short-term outcomes (pre-trial misconduct) which occur prior to disposition, further limiting the role of alternative channels that could affect longer-term outcomes. Finally, Dobbie et al. (2018) find that there are no independent effects of the money bail amount or the non-monetary bail conditions on defendant outcomes, and that bail judge assignment is uncorrelated with the assignment of public defenders and subsequent trial judges.

Monotonicity: The final condition needed for our IV and MTE estimators is that the impact of judge assignment on the probability of pre-trial release is monotonic across defendants of the same race. In our setting, the monotonicity assumption requires that individuals released by a strict judge would also be released by a more lenient judge, and that individuals detained by a lenient judge would also be detained by a stricter judge. The monotonicity assumption is required in order to identify and interpret our IV estimator as a well-defined LATE and to estimate marginal treatment effects using the standard local instrument variables (LIV) approach. See Angrist et al. (1996) and Heckman and Vytlacil (2005) for additional details. Importantly, we allow our judge leniency measure to vary by defendant race to allow for the possibility that the degree of racial bias varies across judges. In practice, we observe that judge behavior is only imperfectly monotonic with respect to race (see Appendix Figure A1), with a regression of the ranking of each judge's leniency measure for whites on the ranking of each judge's leniency measure for blacks yielding a coefficient equal to 0.827 (se=0.010). The non-monotonic behavior we observe with respect to race is driven by approximately 17.9 percent of judges who hear about 8.2 percent of all cases. Consistent with the monotonicity assumption within race, we find a strong first-stage relationship across various case and defendant types (see Appendix Table A2).[17]

[17] One specific concern is that lenient judges may be better at using unobservable information to predict the risk of pre-trial misconduct, as this would result in some high-risk defendants being released by only strict judges. Following Kleinberg et al. (2018), we test for this possibility by examining pre-trial misconduct rates among observably identical defendants released by either lenient or strict judges. If the most lenient judges are better at using unobservable information to predict risk, then defendants released by these most lenient judges will have lower misconduct rates than observably identical defendants released by the less lenient judges. To implement this test, we first split judges into quintiles of leniency. We then calculate predicted risk using the machine learning algorithm described in Appendix F, but only in the sample of defendants assigned to the most-lenient quintile. Finally, we apply the risk predictions to defendants in all leniency quintiles and plot predicted risk against actual risk for each leniency quintile (see Appendix

III. Results

In this section, we present our main results applying our empirical test for racial bias. We then show the robustness of our results to alternative specifications, before comparing the results from our empirical test with the alternative outcome-based tests developed by Knowles et al. (2001) and Anwar and Fang (2006).

A. Empirical Test for Racial Bias

IV Estimates: We begin by presenting IV estimates of racial bias that rely on relatively few auxiliary assumptions, but with the caveat that the weighting scheme underlying the estimator may not always be policy relevant. We estimate these IV results using the following two-stage least squares specifications for defendant-case i assigned to judge j at time t, estimated separately for white and black defendants:

$$Y_{itj} = \alpha_W^{IV} Released_{itj} + \beta_W \mathbf{X}_{it} + \mathbf{v}_{itj} \tag{12}$$

$$Y_{itj} = \alpha_B^{IV} Released_{itj} + \beta_B \mathbf{X}_{it} + \mathbf{v}_{itj} \tag{13}$$

where Y_{itj} is the probability of pre-trial misconduct, as measured by the probability of rearrest prior to case disposition. The vector $\mathbf{X}_{it}$ includes court-by-time fixed effects and baseline crime and defendant controls: race, gender, age, whether the defendant had a prior offense in the past year, whether the defendant had a prior history of pre-trial crime in the past year, whether the defendant had a prior history of failure to appear in the past year, the number of charged offenses, indicators for crime type (drug, DUI, property, violent, or other), crime severity (felony or misdemeanor), and indicators for any missing characteristics. As described previously, the error term $\mathbf{v}_{itj} = \mathbf{U}_{itj} + \varepsilon_{itj}$ consists of characteristics unobserved by the econometrician but observed by the judge, $\mathbf{U}_{itj}$, and idiosyncratic variation unobserved by both the econometrician and judge, ε_{itj}. We instrument for pre-trial release, $Released_{itj}$, with our measure of judge leniency, Z_{itj}, that is allowed to vary across years and defendant race. Robust standard errors are two-way clustered at the individual and judge-by-shift level.

Estimates from Equations (12) and (13) are presented in columns 1-2 of Table 4. Column 3 reports our IV estimate of racial bias $D^{IV} = \alpha_W^{IV} - \alpha_B^{IV}$. Panel A of Table 4 presents results for the probability of rearrest for any crime prior to case disposition, while Panel B presents results for rearrest rates for drug, property, and violent offenses separately. In total, 17.8 percent of defendants are rearrested for a new crime prior to disposition, with 7.9 percent of defendants rearrested for a crime that includes a drug offense, 6.7 percent of defendants rearrested for a crime that includes

Figure A2). Following the above logic, if lenient judges are better at using unobservable information, then predicted risk should be systematically below actual risk. We find that predicted risk largely tracks true risk in all judge leniency quintiles, suggesting that lenient judges are neither more nor less skilled in predicting defendant risk. These results are broadly consistent with Kleinberg et al. (2018), who find that judges more or less agree on how to rank-order defendants based on their observable characteristics.

a property offense, and 6.1 percent of defendants rearrested for a crime that includes a violent offense.[18]

We find convincing evidence of racial bias against black defendants using our IV estimator. We find that marginally released white defendants are 23.6 percentage points more likely to be rearrested for any crime compared to marginally detained white defendants (column 1). In contrast, the effect of pre-trial release on rearrest rates for the marginally released black defendants is a statistically insignificant 1.4 percentage points (column 2). Taken together, these IV estimates imply that marginally released white defendants are 22.2 percentage points more likely to be rearrested prior to disposition than marginally released black defendants (column 3), consistent with racial bias against blacks (p-value = 0.027). Importantly, we can reject the null hypothesis of no racial bias even assuming the maximum infra-marginality bias in our IV estimator of 1.1 percentage points (see Appendix B).

In Panel B, we find suggestive evidence of racial bias against black defendants across all crime types, although the point estimates are too imprecise to make definitive conclusions. For example, we find that marginally released whites are about 8.0 percentage points more likely to be rearrested for a violent crime prior to disposition than marginally released blacks (p-value = 0.173). Marginally released white defendants are also 4.7 percentage points more likely to be rearrested for a drug crime prior to case disposition than marginally released black defendants (p-value = 0.430), and 16.3 percentage points more likely to be rearrested for a property crime (p-value = 0.025). These results suggest that judges are likely racially biased against black defendants even if they are most concerned about minimizing specific types of new crime, such as violent crimes.

MTE Estimates: Our second set of estimates comes from our MTE estimator that allows us to put equal weight on each judge in our sample, but at the cost of additional auxiliary assumptions. We estimate these MTE results using a two-step procedure. First, we estimate the entire distribution of MTEs using the derivative of residualized rearrest before case disposition, $\ddot{Y}_{itj}$, with respect to variation in the propensity score provided by our instrument, p_r^j, separately for white and black defendants:

$$MTE_W(p_W^j) = \frac{\partial}{\partial p_W^j}\mathbb{E}(\ddot{Y}_{itj}|p_W^j, W) \tag{14}$$

$$MTE_B(p_B^j) = \frac{\partial}{\partial p_B^j}\mathbb{E}(\ddot{Y}_{itj}|p_B^j, B) \tag{15}$$

where p_r^j is the propensity score for release for judge j and defendant race r and $\ddot{Y}_{itj}$ is rearrest residualized using the full set of court-by-time fixed effects and baseline crime and defendant controls, $\mathbf{X}_{it}$. Following Heckman, Urzua, and Vytlacil (2006) and Doyle (2007), we also residualize Z_{itj} and $Released_{itj}$ using $\mathbf{X}_{it}$. We then regress the residualized release variable on the residualized judge

[18]For completeness, Figure 1 provides a graphical representation of our reduced form results separately by race. Following the first stage results, we plot the reduced form relationship between our judge leniency measure and the residualized rate of rearrest prior to case disposition, estimated using local linear regression.

leniency measure to calculate p_r^j, a race-specific propensity score. Next, we compute the numerical derivative of a local quadratic estimator relating $\ddot{Y}_{itj}$ to p_r^j to estimate race-specific MTEs. See Figure 2 for estimates of the full distribution of MTEs by defendant race.

Second, we use the race-specific MTEs to calculate the level of racial bias for each judge j. We calculate the average level of bias across all bail judges using a simple average of these judge-specific estimates:

$$\sum_{j=1}^{J} \frac{1}{J} \left(MTE_W(p_W^j) - MTE_B(p_B^j) \right) \tag{16}$$

We calculate standard errors by bootstrapping this two-step procedure at the judge-by-shift level. See Appendix B for additional details.

Estimates from Equations (14) and (15) are presented in columns 4-5 of Table 4, with column 6 reporting our MTE equal-weighted estimate of racial bias D^{MTE} from Equation (16). Consistent with our IV estimates, we find that marginally released white defendants are 24.9 percentage points more likely to be rearrested for any crime compared to marginally detained white defendants (column 4), while the effect of pre-trial release on rearrest rates for the marginally released black defendants is a statistically insignificant 1.7 percentage points (column 5). Our MTE estimates therefore imply that marginally released white defendants are 23.1 percentage points more likely to be rearrested prior to disposition than marginally released black defendants (column 6), consistent with racial bias against black defendants (p-value = 0.048).

In addition, Figure 2 shows that the MTEs for white defendants lie strictly above the MTEs for black defendants, implying that marginally released white defendants are riskier than marginally released black defendants at all points in the judge leniency distribution. In other words, the results from Figure 2 show that there is racial bias against black defendants at every part of the judge leniency distribution. These results, along with the fact that both IV and MTE approaches yield qualitatively similar estimates of racial bias, suggest that both the choice of IV weights and the additional parametric assumptions required to estimate the race-specific MTEs do not greatly affect our estimates of racial bias.

B. Robustness

Appendix Table A4 explores whether our main findings are subject to omitted payoff bias, which can arise if judges consider other outcomes such as failures to appear. While we only observe failures to appear in Philadelphia, we find that our estimates are qualitatively similar when we use a measure of pre-trial misconduct defined as failure to appear, or when we define pre-trial misconduct as either failure to appear or rearrest in Philadelphia, and only rearrest in Miami. To further explore the possibility that judges may only care about minimizing specific types of new crime, Appendix Table A5 presents estimates for a subset of more serious crime types for which estimates of social costs are available, such as assault and robbery, and weights each individual estimate of D^{IV} and D^{MTE} by

the corresponding social cost.[19] While our estimates become less precise given the infrequency of certain types of new crime, a social cost-weighted estimate of D^{IV} yields a lower bound of $8,637 and an upper bound of $20,658, while a social cost-weighted estimate of D^{MTE} yields a lower bound of $7,573 and an upper bound of $21,197, suggesting that marginally released white defendants generate larger social costs than marginally released black defendants.

Appendix Table A6 explores the sensitivity of our main results to a number of different specifications, where columns 1-5 report estimates of D^{IV} and columns 6-8 report estimates of D^{MTE}. Columns 1 and 6 drop a small number of defendants who the data indicate were rearrested prior to disposition despite never being released. Column 2 presents re-weighted estimates with the weights chosen to match the distribution of observable characteristics by race to explore whether judge preferences for non-race characteristics, such as crime type, can explain our main results (see Section I.D and Appendix B for details). Columns 3 and 7 presents results comparing outcomes for marginal non-Hispanic white defendants and marginal black defendants. Columns 4 and 8 presents results clustering more conservatively at the individual and judge level. Column 5 assesses whether monetary bail amounts have an independent effect on the probability of pre-trial misconduct – a potential violation of the exclusion restriction – by controlling for monetary bail amount as an additional regressor in both our first- and second-stage regressions.[20] Under these alternative specifications, we continue to find that marginally released white defendants are significantly more likely to be rearrested prior to disposition than marginally released black defendants, evidence of racial bias against black defendants.

C. Comparison to Other Outcome Tests

Appendix Tables A7-A9 replicate the outcome tests from Knowles et al. (2001) and Anwar and Fang (2006). The Knowles et al. (2001) test relies on the prediction that, under the null hypothesis of no racial bias, the average pre-trial misconduct rate given by standard OLS estimates will not vary by defendant race. In contrast to our IV and MTE tests, however, standard OLS estimates suggest racial bias against white defendants. The Anwar and Fang (2006) test instead relies on the prediction that, under the null hypothesis of no relative racial bias, the treatment of black and white defendants will not depend on judge race. However, this test also fails to find racial bias in our setting because both white and black judges are racially biased against black defendants. We also find that the IV and MTE estimates of racial bias are similar among white and black judges, although the confidence intervals for these estimates are large. Taken together, these results highlight the importance of accounting for both infra-marginality and omitted variables, as well as the importance of developing empirical tests that can detect absolute racial bias in the criminal justice system. See Arnold et al. (2017) for additional details on these results.

[19] We exclude rearrest for crime types that are extremely rare, i.e. murder and rape. We also exclude rearrest for crime types that cannot be categorized into the listed categories.

[20] In these specifications, the coefficient on monetary bail amount is -0.002 (p-value = 0.500) for white defendants and -0.001 (p-value = 0.184) for black defendants, suggesting that monetary bail amount has no significant independent effect on pre-trial misconduct, consistent with findings reported in Dobbie et al. (2018).

IV. Potential Mechanisms

In this section, we attempt to differentiate between two alternative forms of racial bias that could explain our findings: (1) racial animus (e.g., Becker 1957, 1993) and (2) racially biased prediction errors in risk (e.g., Bordalo et al. 2016).

A. Racial Animus

The first potential explanation for our results is that judges either knowingly or unknowingly discriminate against black defendants at the margin of release as originally modeled by Becker (1957, 1993). Bail judges could, for example, harbor explicit animus against black defendants that leads them to value the freedom of black defendants less than the freedom of observably similar white defendants. Bail judges could also harbor implicit biases against black defendants – similar to those documented among both employers (Rooth 2010) and doctors (Penner et al. 2010) – leading to the relative over-detention of blacks despite the lack of any explicit animus.[21] Racial animus may be a particular concern in bail setting due to the relatively low number of minority bail judges, the rapid-fire determination of bail decisions, and the lack of face-to-face contact between defendants and judges. Prior work has shown that it is exactly these types of settings where racial prejudice is most likely to translate into the disparate treatment of minorities (e.g., Greenwald et al. 2009).

One suggestive piece of evidence against this hypothesis is provided by the Anwar and Fang (2006) test of relative racial bias discussed above, which indicates that bail judges are monolithic in their treatment of white and black defendants. Consistent with these results, we also find that IV and MTE estimates of racial bias are similar among white and black judges, although the confidence intervals for these estimates are extremely large. These estimates suggest that either racial animus is not driving our results or that black and white bail judges harbor equal levels of racial animus towards black defendants.

B. Racially Biased Prediction Errors in Risk

A second explanation for our results is that bail judges are making racially biased prediction errors in risk, potentially due to inaccurate anti-black stereotypes. Bordalo et al. (2016) show, for example, that representativeness heuristics – that is, probability judgments based on the most distinctive differences between groups – can exaggerate perceived differences between groups. In our setting, these kinds of race-based heuristics or anti-black stereotypes could lead bail judges to exaggerate the relative danger of releasing black defendants versus white defendants at the margin of release. These race-based prediction errors could also be exacerbated by the fact that bail judges must make quick judgments on the basis of limited information and with virtually no training.

[21] Implicit bias is correlated with the probability of making negative judgments about the ambiguous actions by blacks (Rudman and Lee 2002), of exhibiting a variety of micro-behaviors indicating discomfort with minorities (McConnell and Leibold 2001), and of showing greater activation of the area of the brain associated with fear-driven responses to the presentation of unfamiliar black versus white faces (Phelps et al. 2000).

Representativeness of Black and White Defendants: We first explore whether our data are consistent with the formation of anti-black stereotypes that could lead to racially biased prediction errors. Extending Bordalo et al. (2016) to our setting, these anti-black stereotypes should only be present if blacks are over-represented among the right tail of the predicted risk distribution relative to whites (both Hispanic and non-Hispanic). To test this idea, Figure 3 presents the distribution of the predicted risk of rearrest prior to case disposition calculated using the full set of crime and defendant characteristics, as well as the likelihood ratios, $\mathbb{E}(x|Black)/\mathbb{E}(x|White)$, throughout the risk distribution.[22] Results for each individual characteristic in our predicted risk measure are also presented in Appendix Table A10. Consistent with the potential formation of anti-black stereotypes, we find that black defendants are significantly under-represented in the left tail of the predicted risk distribution and over-represented in the right tail of the predicted risk distribution. For example, black defendants are 1.2 times less likely than whites to be represented among the bottom 25 percent of the predicted risk distribution, but 1.1 times more likely to be represented among the top 25 percent and 1.2 times more likely to be represented among the top five percent of the predicted risk distribution.

In Appendix F, we show that these black-white differences in the predicted risk distribution are large enough to rationalize the black-white differences in pre-trial release rates under the Bordalo et al. (2016) stereotypes model. First, as a benchmark for the stereotypes model, we compute the fraction of black defendants that would be released if judges applied the same release threshold for whites to blacks. We rank-order both black and white defendants using our predicted risk measure, finding that 70.8 percent of black defendants would be released pre-trial if judges use the white release threshold for both black and white defendants. By comparison, only 68.8 percent of black defendants are actually released pre-trial. Thus, to rationalize the black-white difference in release rates, the stereotypes model will require that judges believe that black defendants are riskier than they actually are.

In the stereotypes model, judges form beliefs about the distribution of risk through a representativeness-based discounting model, where the weight attached to a given risk type t is increasing in the representativeness of t. Formally, let $\pi_{t,r}$ be the probability that a defendant of race r is in risk category t. The stereotyped beliefs for black defendants, $\pi^{st}_{t,B}$, is given by:

$$\pi^{st}_{t,B} = \pi_{t,B} \frac{\left(\frac{\pi_{t,B}}{\pi_{t,W}}\right)^{\theta}}{\sum_{s \in T} \pi_{s,B} \left(\frac{\pi_{s,B}}{\pi_{s,W}}\right)^{\theta}} \tag{17}$$

where θ captures the extent to which representativeness distorts beliefs and the representativeness

[22] Our measures of representativeness and predicted risk may be biased if judges base their decisions on variables that are not observed by the econometrician (e.g., demeanor at the bail hearing). Following Kleinberg et al. (2018), we can test for the importance of unobservables in bail decisions by splitting our sample into a training set to generate the risk predictions and a test set to test those predictions. We find that our measure of predicted risk from the training set is a strong predictor of true risk in the test set, indicating that our measure of predicted risk is not systematically biased by unobservables (see Appendix Figure A3).

ratio, $\frac{\pi_{t,B}}{\pi_{t,W}}$, is equal to the probability a defendant is black given risk category t divided by the probability a defendant is white given risk category t.

Using the definition of $\pi^{st}_{t,B}$ from Equation (17), we can calculate the full stereotyped risk distribution for black defendants under different values of θ. For each value of θ, we can then calculate the implied release rate for black defendants under the above assumption that judges use the white release threshold for both black and white defendants. By iterating over different values of θ, we can then find the level of θ that equates the implied and true release rates for black defendants. Using this approach, we find that $\theta = 1.9$ can rationalize the true average release rate for blacks. To understand how far these beliefs are from the true distribution of risk, we plot the stereotyped distribution for blacks with $\theta = 1.9$ alongside the true distribution of risk for blacks in Appendix Figure A4. The mean predicted risk is 0.235 under the true distribution of risk for blacks, compared to 0.288 under the stereotyped distribution for blacks with $\theta = 1.9$.[23] These results indicate that a relatively modest shift in the true risk distribution for black defendants is sufficient to explain the large racial disparities we observe in our setting. See Appendix F for additional details on the stereotypes model and these calculations.

Further evidence in support of anti-black stereotypes comes from a comparison of the crime-specific distributions of risk. Black defendants are most over-represented in the right tail of the predicted risk distribution for new violent crimes (see Appendix Figure A5), where we also tend to find strong evidence of racial bias.

A final piece of evidence in support of stereotyping comes from a comparison of the Hispanic and black distributions of risk relative to the non-Hispanic white distribution. Recall that we find no evidence of racial bias against Hispanic defendants (see Appendix Table A3). Consistent with the stereotyping model, we also find that the risk distributions of Hispanic and white defendants overlap considerably. In contrast, the risk distribution for blacks is shifted to the right relative to both the Hispanic and white distributions (see Appendix Figure A6). Thus, all of our results are broadly consistent with bail judges making race-based prediction errors due to anti-black stereotypes and representativeness-based thinking, which in turn leads to the over-detention of black defendants at the margin of release.

Racial Bias and Prediction Errors in Risk: We can also test for race-based prediction errors by examining situations where prediction errors of any kind are more likely to occur. One such test for race-based prediction errors uses a comparison of experienced and inexperienced judges. When a defendant violates the conditions of release, such as by committing a new crime, he or she is taken into custody and brought to court for a hearing during which a bail judge decides whether to revoke bail. As a result, judges may be less likely to rely on inaccurate racial stereotypes as they acquire greater on-the-job experience, at least in settings with limited information and contact. Consistent with this idea, we find that more experienced bail judges are more likely to release defendants, but not make misclassification errors (see Appendix Figure A7). In contrast, while it appears plausible

[23] Our estimate of θ is quantitatively similar to the magnitude of stereotypes in explaining investor overreaction to stock market news and the formation of credit cycles (Bordalo et al. forthcoming, Bordalo et al. 2017).

that race-based prediction errors will decrease with experience, there is no reason to believe that racial animus will change with experience.[24]

To test this idea, columns 1-4 of Table 5 presents our estimates of racial bias, D^{IV} and D^{MTE}, separately by court. Although we caution that there are likely many differences in the criminal justice systems of the two cities in our sample, one distinction is the degree to which bail judges specialize in conducting bail hearings. In Philadelphia, bail judges are full-time judges who specialize in setting bail 24 hours a day, seven days a week, hearing an average of 5,253 cases each year. Conversely, the Miami bail judges in our sample are part-time generalists who work as trial court judges on weekdays and assist the bail court on weekend, hearing an average of only 179 bail cases each year. Consistent with racially biased prediction errors being more common among inexperienced judges, we find that racial bias is higher in Miami than Philadelphia (p-value = 0.325 for IV, p-value = 0.442 for MTE). In Miami, we find that marginally released white defendants are 25.1 percentage points more likely to be rearrested using our IV estimator (p-value = 0.029) and 24.9 percentage points more likely to be rearrested using our MTE estimator (p-value = 0.040), compared to marginally released black defendants. In Philadelphia, we find no statistically significant evidence of racial bias under either our IV or MTE estimates, suggesting the possible importance of experience in alleviating any prediction errors.[25]

Columns 5-8 of Table 5 provide additional evidence on this issue by exploiting the substantial variation in the experience profiles of the Miami bail judges in our sample. Splitting by the median number of years hearing bail cases, the average experienced Miami judge has 9.5 years of experience working in the bail system, while the average inexperienced Miami judge has only 2.5 years of experience. Consistent with our across-court findings, we find suggestive evidence that inexperienced judges are more racially biased than experienced judges (p-value = 0.193 for IV, p-value= 0.095 for MTE). Among inexperienced judges, we find that marginally released white defendants are 48.7 percentage points more likely to be rearrested using our IV estimator (p-value = 0.040) and 51.0 percentage points more likely to be rearrested using our MTE estimator (p-value = 0.029), compared to marginally released black defendants. Among experienced judges, we find no statistically significant evidence of racial bias under either our IV or MTE estimates.

Taken together, our results suggest that bail judges make racially biased prediction errors in risk. In contrast, we find limited evidence in support of the hypothesis that bail judges harbor racial animus towards black defendants. These results are broadly consistent with recent work by

[24] One potential concern is that intergroup contact can increase tolerance towards minority groups. For example, Van Laar et al. (2005) and Boisjoly et al. (2006) show that living with a minority group increases tolerance among white college students, Dobbie and Fryer (2013) show that teaching in a school with mostly minority children increases racial tolerance, and Clingingsmith et al. (2009) show that winning a lottery to participate in the Hajj pilgrimage to Mecca increases belief in equality and harmony of ethnic groups. However, it is not clear how these findings should be extrapolated to our setting, where judges primarily interact with blacks who are criminal defendants.

[25] Our IV estimate of racial bias in Philadelphia should be interpreted with some caution given that we only observe seven judges for this city in our data. The maximum infra-marginality bias of our IV estimator in Philadelphia is 16.4 percentage points, compared to only 1.6 percentage points in Miami-Dade. We note, however, that there is no infra-marginality bias of our MTE estimator for either city if we have correctly specified the shape of the MTE function.

Kleinberg et al. (2018) showing that bail judges make significant prediction errors in risk for all defendants, perhaps due to over-weighting the most salient case and defendant characteristics such as race and the nature of the charged offense. Our results also provide additional support for the stereotyping model developed by Bordalo et al. (2016), which suggests that probability judgments based on the most distinctive differences between groups – such as the significant over-representation of blacks relative to whites in the right tail of the risk distribution – can lead to anti-black stereotypes and, as a result, racial bias against black defendants.

V. Conclusion

In this paper, we test for racial bias in bail setting using the quasi-random assignment of bail judges to identify pre-trial misconduct rates for marginal white and marginal black defendants. We find evidence that there is substantial bias against black defendants, ruling out statistical discrimination as the sole explanation for the racial disparities in bail. Our estimates are nearly identical if we account for observable crime and defendant differences by race, indicating that our results cannot be explained by black-white differences in the probability of being arrested for certain types of crimes (e.g., the proportion of felonies versus misdemeanors) or black-white differences in defendant characteristics (e.g., the proportion of defendants with prior offenses versus no prior offenses).

We find several pieces of evidence consistent with our results being driven by racially biased prediction errors in risk, as opposed to racial animus among bail judges. First, we find that both white and black bail judges are racially biased against black defendants, a finding that is inconsistent with most models of racial animus. Second, we find that black defendants are sufficiently over-represented in the right tail of the predicted risk distribution to rationalize observed racial disparities in release rates under a theory of stereotyping. Finally, racial bias is significantly higher among both part-time and inexperienced judges, and descriptive evidence suggests that experienced judges can better predict misconduct risk for all defendants. Taken together, these results are most consistent with a model of bail judges relying on inaccurate stereotypes that exaggerate the relative danger of releasing black defendants versus white defendants at the margin.

The findings from this paper have a number of important implications. If racially biased prediction errors among inexperienced judges are an important driver of black-white disparities in pre-trial detention, our results suggest that providing judges with increased opportunities for training or on-the-job feedback could play an important role in decreasing racial disparities in the criminal justice system. Consistent with recent work by Kleinberg et al. (2018), our findings also suggest that providing judges with data-based risk assessments may also help decrease unwarranted racial disparities.

The empirical test developed in this paper can also be used to test for bias in other settings. Our test for bias is appropriate whenever there is the quasi-random assignment of decision makers and the objective of these decision makers is both known and well-measured. Our test can therefore be used to explore bias in settings as varied as parole board decisions, Disability Insurance applications, bankruptcy filings, and hospital care decisions.

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Table 1: Descriptive Statistics

	All Defendants		White		Black	
	Released	Detained	Released	Detained	Released	Detained
Panel A: Bail Type	(1)	(2)	(3)	(4)	(5)	(6)
Release on Recognizance	0.258	0.000	0.269	0.000	0.249	0.000
Non-Monetary Bail w/ Conditions	0.195	0.030	0.203	0.033	0.189	0.028
Monetary Bail	0.547	0.970	0.527	0.967	0.562	0.972
Bail Amount (in thousands)	13.235	35.286	11.957	24.782	14.180	42.227
Panel B: Defendant Characteristics						
Male	0.811	0.893	0.796	0.890	0.822	0.895
Age at Bail Decision	33.911	35.092	34.070	36.296	33.794	34.296
Prior Offense in Past Year	0.287	0.466	0.272	0.464	0.299	0.466
Arrested on Bail in Past Year	0.185	0.262	0.181	0.256	0.188	0.266
Failed to Appear in Court in Past Year	0.071	0.057	0.070	0.054	0.071	0.059
Panel C: Charge Characteristics						
Number of Offenses	2.722	3.162	2.544	2.587	2.854	3.541
Felony Offense	0.482	0.538	0.450	0.473	0.506	0.581
Misdemeanor Only	0.518	0.462	0.550	0.527	0.494	0.419
Any Drug Offense	0.390	0.260	0.373	0.244	0.403	0.271
Any DUI Offense	0.084	0.007	0.091	0.007	0.079	0.007
Any Violent Offense	0.310	0.331	0.288	0.241	0.326	0.390
Any Property Offense	0.238	0.387	0.237	0.406	0.239	0.376
Panel D: Outcomes						
Rearrest Prior to Disposition	0.237	0.042	0.226	0.037	0.245	0.045
Rearrest Drug Crime	0.111	0.006	0.106	0.005	0.115	0.006
Rearrest Property Crime	0.086	0.022	0.082	0.022	0.089	0.022
Rearrest Violent Crime	0.078	0.021	0.061	0.013	0.091	0.026
Failure to Appear in Court (Phl only)	0.258	0.006	0.250	0.006	0.264	0.007
Failure to Appear in Court or Rearrest	0.348	0.044	0.325	0.039	0.366	0.048
Observations	178,765	77,488	76,015	30,831	102,750	46,657

Note: This table reports descriptive statistics for the sample of defendants from Philadelphia and Miami-Dade counties. The sample consists of bail hearings that were quasi-randomly assigned from Philadelphia between 2010-2014 and from Miami-Dade between 2006-2014, as described in the text. Information on race, gender, age, and criminal outcomes is derived from court records. Released is defined as being released at any point before trial. Detained is defined as never being released before trial. See Appendix D for additional details on the sample and variable construction.

Table 2: First Stage Results

	All Defendants		White		Black	
	(1)	(2)	(3)	(4)	(5)	(6)
Pre-trial Release	0.405***	0.389***	0.373***	0.360***	0.434***	0.415***
	(0.027)	(0.025)	(0.036)	(0.032)	(0.036)	(0.033)
	[0.698]	[0.698]	[0.711]	[0.711]	[0.688]	[0.688]
Court x Year FE	Yes	Yes	Yes	Yes	Yes	Yes
Baseline Controls	No	Yes	No	Yes	No	Yes
Observations	256,253	256,253	106,846	106,846	149,407	149,407

Note: This table reports the first-stage relationship between pre-trial release and judge leniency. The regressions are estimated on the sample as described in the notes to Table 1. Judge leniency is estimated using data from other cases assigned to a bail judge in the same year, constructed separately by defendant race, following the procedure described in Section II.B. All regressions include court-by-time fixed effects. Baseline controls include race, gender, age, whether the defendant had a prior offense in the past year, whether the defendant had a prior history of pre-trial crime in the past year, whether the defendant had a prior history of failure to appear in the past year, the number of charged offenses, indicators for crime type (drug, DUI, property, violent, and other), crime severity (felony and misdemeanor), and indicators for any missing controls. The sample mean of the dependent variable is reported in brackets. Robust standard errors two-way clustered at the individual and judge-by-shift level are reported in parentheses. *** = significant at 1 percent level, ** = significant at 5 percent level, * = significant at 10 percent level.

Table 3: Test of Randomization

	All		White		Black	
	Pre-Trial Release	Judge Leniency	Pre-Trial Release	Judge Leniency	Pre-Trial Release	Judge Leniency
	(1)	(2)	(3)	(4)	(5)	(6)
Male	−0.09424***	−0.00005	−0.08593***	0.00004	−0.10379***	−0.00014
	(0.00235)	(0.00024)	(0.00325)	(0.00038)	(0.00323)	(0.00031)
Age at Bail Decision	−0.01725***	−0.00009	−0.02250***	−0.00015	−0.01512***	−0.00005
	(0.00086)	(0.00009)	(0.00127)	(0.00016)	(0.00104)	(0.00010)
Prior Offense in Past Year	−0.14922***	−0.00017	−0.16817***	0.00030	−0.13411***	−0.00044
	(0.00287)	(0.00028)	(0.00445)	(0.00046)	(0.00362)	(0.00036)
Arrested on Bail in Past Year	0.01066***	0.00004	0.01967***	−0.00166***	0.00495	0.00116***
	(0.00355)	(0.00034)	(0.00552)	(0.00057)	(0.00439)	(0.00042)
Failed to Appear in Court in Past Year	0.03318***	0.00012	0.03253***	0.00104**	0.03245***	−0.00047
	(0.00413)	(0.00025)	(0.00631)	(0.00043)	(0.00529)	(0.00031)
Number of Offenses	−0.02090***	−0.00001	−0.01829***	−0.00002	−0.02131***	0.00000
	(0.00053)	(0.00003)	(0.00085)	(0.00006)	(0.00063)	(0.00004)
Felony Offense	−0.17618***	−0.00003	−0.18817***	−0.00014	−0.16948***	0.00004
	(0.00257)	(0.00012)	(0.00397)	(0.00020)	(0.00323)	(0.00014)
Any Drug Offense	0.03514***	−0.00038	0.02558***	−0.00002	0.04069***	−0.00063*
	(0.00258)	(0.00026)	(0.00357)	(0.00039)	(0.00332)	(0.00032)
Any Property Offense	−0.04272***	−0.00013	−0.05560***	0.00009	−0.03188***	−0.00029
	(0.00285)	(0.00026)	(0.00388)	(0.00041)	(0.00354)	(0.00033)
Any Violent Offense	0.01640***	0.00028	0.07515***	0.00033	−0.02443***	0.00023
	(0.00389)	(0.00025)	(0.00497)	(0.00045)	(0.00429)	(0.00029)
Joint F-Test	[0.00000]	[0.60067]	[0.00000]	[0.21951]	[0.00000]	[0.08289]
Observations	256,253	256,253	106,846	106,846	149,407	149,407

Note: This table reports reduced form results testing the random assignment of cases to bail judges. The regressions are estimated on the sample as described in the notes to Table 1. Judge leniency is estimated using data from other cases assigned to a bail judge in the same year, constructed separately by defendant race, following the procedure described in Section II.B. Columns 1, 3, and 5 report estimates from an OLS regression of pre-trial release on the variables listed and court-by-time fixed effects. Columns 2, 4, and 6 report estimates from an OLS regression of judge leniency on the variables listed and court-by-time fixed effects. The p-value reported at the bottom of the columns is for a F-test of the joint significance of the variables listed in the rows. Robust standard errors two-way clustered at the individual and the judge-by-shift level are reported in parentheses. ***=significant at 1 percent level, **=significant at 5 percent level, *=significant at 10 percent level.

Table 4: Pre-trial Release and Criminal Outcomes

	IV Results			MTE Results		
	White	Black	D^{IV}	White	Black	D^{MTE}
Panel A: Rearrest for All Crimes	(1)	(2)	(3)	(4)	(5)	(6)
Rearrest Prior to Disposition	0.236***	0.014	0.222**	0.249***	0.017	0.231**
	(0.073)	(0.070)	(0.101)	(0.084)	(0.080)	(0.117)
	[0.172]	[0.182]	–	[0.172]	[0.182]	–
Panel B: Rearrest by Crime Type						
Rearrest for Drug Crime	0.067	0.019	0.047	0.074	−0.024	0.097
	(0.043)	(0.043)	(0.060)	(0.048)	(0.054)	(0.074)
	[0.077]	[0.081]	–	[0.077]	[0.081]	–
Rearrest for Property Crime	0.158***	−0.005	0.163**	0.149**	0.043	0.106
	(0.057)	(0.047)	(0.073)	(0.066)	(0.053)	(0.084)
	[0.065]	[0.068]	–	[0.065]	[0.068]	–
Rearrest for Violent Crime	0.079**	−0.000	0.080	0.082*	−0.001	0.083
	(0.039)	(0.042)	(0.058)	(0.044)	(0.050)	(0.068)
	[0.047]	[0.071]	–	[0.047]	[0.071]	–
Observations	106,846	149,407	–	106,846	149,407	–

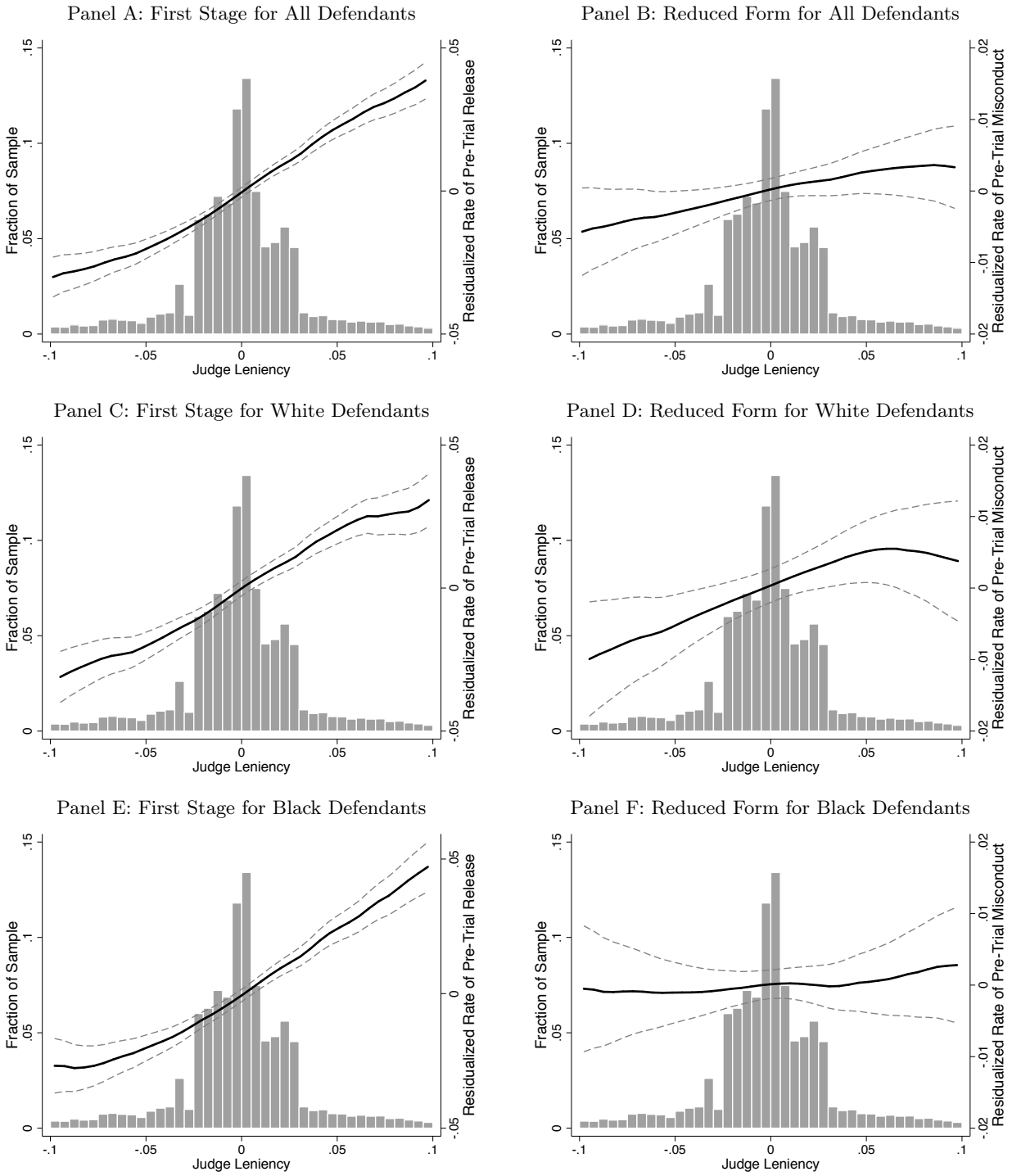
Note: This table reports estimates of racial bias in pre-trial release based on rearrest prior to case disposition. Columns 1-2 report two-stage least squares results of the impact of pre-trial release on the probability of pre-trial misconduct separately by race, while column 3 reports the difference between the white and black two-stage least squares coefficients, or D^{IV} as described in the text. Columns 1-3 use IV weights for each specification and report robust standard errors two-way clustered at the individual and judge-by-shift level in parentheses. Columns 4-5 report the average marginal treatment effect of the impact of pre-trial release on the probability of pre-trial misconduct separately by race, while column 6 reports the difference between the white and black MTE coefficients, or D^{MTE} as described in the text. Columns 4-6 use equal weights for each judge and report bootstrapped standard errors clustered at the judge-by-shift level in parentheses. All specifications control for court-by-time fixed effects and defendant race, gender, age, whether the defendant had a prior offense in the past year, whether the defendant had a prior history of pre-trial crime in the past year, whether the defendant had a prior history of failure to appear in the past year, the number of charged offenses, indicators for crime type (drug, DUI, property, violent, or other), crime severity (felony or misdemeanor), and indicators for any missing characteristics. The sample means of the dependent variables are reported in brackets. *** = significant at 1 percent level, ** = significant at 5 percent level, * = significant at 10 percent level.

Table 5: Racial Bias in Pre-Trial Release by Judge Experience

	Judge Specialization				Judge Experience			
	Miami D^{IV}	Miami D^{MTE}	Phl D^{IV}	Phl D^{MTE}	Miami Low Exp D^{IV}	Miami Low Exp D^{MTE}	Miami High Exp D^{IV}	Miami High Exp D^{MTE}
Panel A: Rearrest for All Crimes	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Rearrest Prior to Disposition	0.251**	0.249**	0.040	0.078	0.487**	0.510**	0.144	0.036
	(0.114)	(0.121)	(0.184)	(0.195)	(0.237)	(0.233)	(0.178)	(0.164)
	[0.149]	[0.149]	[0.194]	[0.194]	[0.148]	[0.148]	[0.152]	[0.152]
Panel B: Rearrest by Crime Type								
Rearrest for Drug Crime	0.053	0.103	0.008	0.015	0.141	0.185	−0.013	0.006
	(0.066)	(0.077)	(0.138)	(0.150)	(0.119)	(0.138)	(0.101)	(0.110)
	[0.057]	[0.057]	[0.092]	[0.092]	[0.057]	[0.057]	[0.057]	[0.057]
Rearrest for Property Crime	0.196**	0.127	−0.031	−0.014	0.296**	0.293*	0.146	0.035
	(0.084)	(0.096)	(0.110)	(0.199)	(0.140)	(0.163)	(0.111)	(0.124)
	[0.078]	[0.078]	[0.060]	[0.060]	[0.078]	[0.078]	[0.079]	[0.079]
Rearrest for Violent Crime	0.082	0.079	0.065	0.066	0.204	0.218*	0.032	−0.036
	(0.065)	(0.075)	(0.115)	(0.119)	(0.134)	(0.119)	(0.100)	(0.099)
	[0.050]	[0.050]	[0.067]	[0.067]	[0.048]	[0.048]	[0.051]	[0.051]
Observations	93,417	93,417	162,836	162,836	47,692	47,692	45,725	45,725

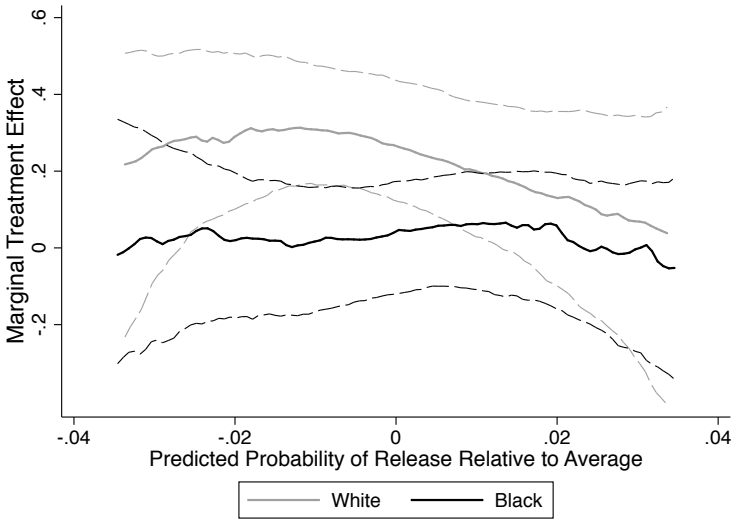
This table reports estimates of racial bias for different subgroups of judges. D^{IV} is the difference between the white and black two-stage least squares estimates coefficients of pre-trial release on pre-trial misconduct using IV weights. D^{MTE} is the difference between the average white and black MTE estimates of pre-trial release on pre-trial misconduct using equal weights by judge. Columns 1-2 report estimates for non-specialist bail judges in Miami-Dade. Columns 3-4 report estimates for specialist bail judges in Philadelphia. Columns 5-8 report estimates for non-specialist bail judges in Miami with below and above median years of experience. The sample is described in the notes to Table 1. The dependent variable is listed in each row. All specifications control for court-by-time fixed effects and defendant race, gender, age, whether the defendant had a prior offense in the past year, whether the defendant had a prior history of pre-trial crime in the past year, whether the defendant had a prior history of failure to appear in the past year, the number of charged offenses, indicators for crime type (drug, DUI, property, violent, or other), crime severity (felony or misdemeanor), and indicators for any missing characteristics. The sample means of the dependent variables are reported in brackets. For IV specifications, robust standard errors two-way clustered at the individual and judge-by-shift level reported in parentheses. For MTE specifications, bootstrapped standard errors clustered at the judge-by-shift level are reported in parentheses. *** = significant at 1 percent level, ** = significant at 5 percent level, * = significant at 10 percent level.

Figure 1: First Stage and Reduced Form Results



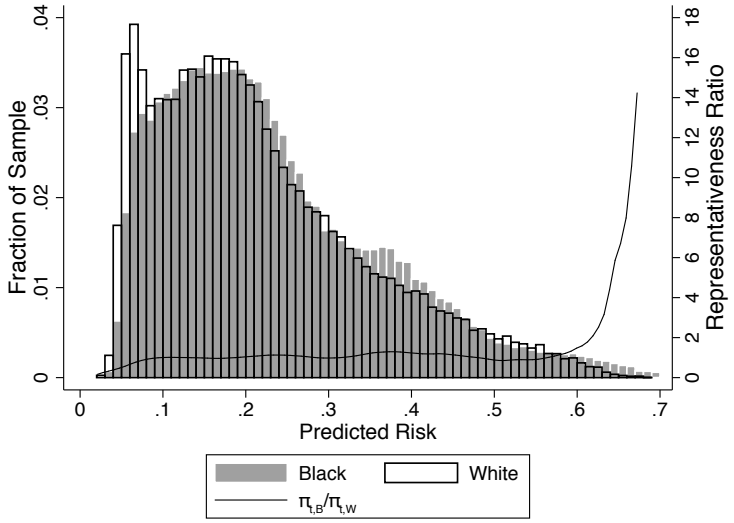
Note: These figures report the first stage and reduced form relationships between defendant outcomes and judge leniency. The regressions are estimated on the sample as described in the notes to Table 1. Judge leniency is estimated using data from other cases assigned to a bail judge in the same year, constructed separately by defendant race, following the procedure described in Section II.B. In the first stage regressions, the solid line is a local linear regression of pre-trial release on judge leniency. In the reduced form regressions, the solid line is a local linear regression of pre-trial misconduct on judge leniency. All regressions include court-by-time fixed effects and two-way cluster standard errors at the individual and judge-by-shift level.

Figure 2: Marginal Treatment Effects



Note: This figure reports the marginal treatment effects (MTEs) of pre-trial release on pre-trial rearrest separately by race. To estimate each MTE, we first estimate the predicted probability of release using only judge leniency. We then estimate the relationship between the predicted probability of release and rearrest prior to disposition using a local quadratic estimator (bandwidth = 0.030). Finally, we use the numerical derivative of the local quadratic estimator to calculate the MTE at each point in the distribution. Standard errors are computed using 500 bootstrap replications clustered at the judge-by-shift level. See the text for additional details.

Figure 3: Predicted Risk Distribution by Defendant Race



Note: This figure reports the predicted distribution of pre-trial misconduct risk separately by race. Pre-trial misconduct risk is estimated using the machine learning algorithm described in Appendix F. The solid line represents the representativeness ratio for black versus white defendants as described in the text, or the estimated misconduct risk for blacks divided by the estimated misconduct risk for whites. See the text for additional details.

Appendix A: Additional Results

Appendix Table A1: Racial Bias in the Assignment of Non-Monetary Bail

	White	Black	D^{IV}
Panel A: Pre-Trial Release	(1)	(2)	(3)
Pre-trial Release	0.490***	0.511***	−0.021
	(0.081)	(0.045)	(0.092)
	[0.711]	[0.688]	–
Panel B: Pre-Trial Misconduct			
Rearrest Prior to Disposition	0.085*	−0.009	0.094
	(0.050)	(0.039)	(0.065)
	[0.172]	[0.182]	–
Rearrest for Drug Crime	0.060**	−0.026	0.086**
	(0.030)	(0.026)	(0.041)
	[0.077]	[0.081]	–
Rearrest for Property Crime	0.087**	0.001	0.086*
	(0.037)	(0.029)	(0.048)
	[0.065]	[0.068]	–
Rearrest for Violent Crime	0.033	0.010	0.022
	(0.029)	(0.027)	(0.040)
	[0.047]	[0.071]	–
Observations	106,846	149,407	–

Note: This table reports estimates of the impact of assigning non-monetary bail (defined as both ROR and non-monetary conditions) versus monetary bail on pre-trial release (Panel A) and pre-trial misconduct (Panel B). Columns 1-2 report two-stage least squares results of the impact of pre-trial release on the probability of pre-trial misconduct separately by race, while column 3 reports the difference between the white and black two-stage least squares coefficients, or D^{IV} as described in the text. All specifications use IV weights for each specification and report robust standard errors two-way clustered at the individual and judge-by-shift level in parentheses. All specifications also control for court-by-time fixed effects and defendant race, gender, age, whether the defendant had a prior offense in the past year, whether the defendant had a prior history of pre-trial crime in the past year, whether the defendant had a prior history of failure to appear in the past year, the number of charged offenses, indicators for crime type (drug, DUI, property, violent, or other), crime severity (felony or misdemeanor), and indicators for any missing characteristics. The sample means of the dependent variables are reported in brackets. *** = significant at 1 percent level, ** = significant at 5 percent level, * = significant at 10 percent level.

Appendix Table A2: First Stage Results by Case Characteristics

	Crime Severity		Crime Type			Defendant Type	
	Misd.	Felony	Property	Drug	Violent	Prior	No Prior
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
Pre-trial Release	0.584***	0.204***	0.516***	0.364***	0.119***	0.452***	0.346***
	(0.042)	(0.035)	(0.046)	(0.048)	(0.041)	(0.038)	(0.028)
	[0.721]	[0.674]	[0.607]	[0.785]	[0.685]	[0.587]	[0.587]
Court x Year FE	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Crime Controls	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Observations	128,409	127,844	55,432	83,277	74,193	87,424	168,829

Note: This table reports the first stage relationship between pre-trial release and judge leniency in different subsamples. The regressions are estimated on the sample as described in the notes to Table 1. Judge leniency is estimated using data from other cases assigned to a bail judge in the same year, constructed separately by defendant race, following the procedure described in Section II.B. All regressions include court-by-time fixed effects and baseline controls for race, gender, age, whether the defendant had a prior offense in the past year, whether the defendant had a prior history of pre-trial crime in the past year, whether the defendant had a prior history of failure to appear in the past year, the number of charged offenses, indicators for crime type (drug, DUI, property, violent, and other), crime severity (felony and misdemeanor), and indicators for any missing controls. The sample mean of the dependent variable is reported in brackets. Robust standard errors two-way clustered at the individual and judge-by-shift level are reported in parentheses. *** = significant at 1 percent level, ** = significant at 5 percent level, * = significant at 10 percent level.

Appendix Table A3: White-Hispanic Bias in Pre-Trial Release

	IV Results			MTE Results		
	White	Hispanic	D^{IV}	White	Hispanic	D^{MTE}
Panel A: Rearrest for All Crimes	(1)	(2)	(3)	(4)	(5)	(6)
Rearrest Prior to Disposition	0.274***	0.246**	0.028	0.206**	0.261**	−0.055
	(0.099)	(0.119)	(0.147)	(0.093)	(0.130)	(0.161)
	[0.167]	[0.176]	–	[0.167]	[0.176]	–
Panel B: Rearrest by Crime Type						
Rearrest for Drug Crime	0.098	0.079	0.020	0.030	0.099	−0.069
	(0.067)	(0.068)	(0.093)	(0.061)	(0.072)	(0.098)
	[0.066]	[0.087]	–	[0.066]	[0.087]	–
Rearrest for Property Crime	0.117	0.211**	−0.094	0.112*	0.167	−0.055
	(0.073)	(0.102)	(0.125)	(0.068)	(0.115)	(0.133)
	[0.066]	[0.064]	–	[0.066]	[0.064]	–
Rearrest for Violent Crime	0.012	0.141**	−0.129	0.014	0.146*	−0.131
	(0.052)	(0.069)	(0.088)	(0.052)	(0.075)	(0.091)
	[0.043]	[0.052]	–	[0.043]	[0.052]	–
Observations	35,914	48,447	–	35,914	48,447	–

Note: This table reports estimates of white non-Hispanic versus white Hispanic bias in pre-trial release based on rearrest prior to case disposition. Columns 1-2 report two-stage least squares results of the impact of pre-trial release on the probability of pre-trial misconduct separately by race, while column 3 reports the difference between the white non-Hispanic and white Hispanic two-stage least squares coefficients, or D^{IV} as described in the text. Columns 1-3 use IV weights for each specification and report robust standard errors two-way clustered at the individual and judge-by-shift level in parentheses. Columns 4-5 report the average marginal treatment effect of the impact of pre-trial release on the probability of pre-trial misconduct separately by race, while column 6 reports the difference between the white non-Hispanic and white Hispanic MTE coefficients, or D^{MTE} as described in the text. Columns 4-6 use equal weights for each judge and report bootstrapped standard errors clustered at the judge-by-shift level in parentheses. All specifications control for court-by-time fixed effects and defendant race, gender, age, whether the defendant had a prior offense in the past year, whether the defendant had a prior history of pre-trial crime in the past year, whether the defendant had a prior history of failure to appear in the past year, the number of charged offenses, indicators for crime type (drug, DUI, property, violent, or other), crime severity (felony or misdemeanor), and indicators for any missing characteristics. The sample means of the dependent variables are reported in brackets. *** = significant at 1 percent level, ** = significant at 5 percent level, * = significant at 10 percent level.

Appendix Table A4: Results for Other Definitions of Pre-Trial Misconduct

	Philadelphia		Miami		Pooled	
	D^{IV}	D^{MTE}	D^{IV}	D^{MTE}	D^{IV}	D^{MTE}
	(1)	(2)	(3)	(4)	(5)	(6)
Rearrest	0.045	0.078	0.263**	0.249**	0.222**	0.231**
	(0.183)	(0.194)	(0.115)	(0.121)	(0.101)	(0.117)
	[0.194]	[0.194]	[0.149]	[0.149]	[0.178]	[0.178]
FTA	−0.024	0.006	–	–	–	–
	(0.187)	(0.202)				
	[0.204]	[0.204]	–	–	–	–
FTA or Rearrest	0.008	0.042	0.263**	0.249**	0.208**	0.314*
	(0.209)	(0.221)	(0.115)	(0.121)	(0.102)	(0.189)
	[0.318]	[0.318]	[0.149]	[0.149]	[0.256]	[0.256]
Observations	162,836	162,836	93,417	93,417	256,253	256,253

Note: This table reports estimates of racial bias in pre-trial release based on rearrest prior to case disposition, FTA (available only in Philadelphia), and either rearrest or FTA. Columns 1-2 report two-stage least squares estimates of D^{IV} and MTE estimates of D^{MTE} for Philadelphia. Columns 3-4 report two-stage least squares estimates of D^{IV} and MTE estimates of D^{MTE} for Miami. Columns 5-6 report two-stage least squares estimates of D^{IV} and MTE estimates of D^{MTE} for the pooled sample. For IV specifications, robust standard errors two-way clustered at the individual and judge-by-shift level reported in parentheses. For MTE specifications, bootstrapped standard errors clustered at the judge-by-shift level are reported in parentheses. All specifications control for court-by-time fixed effects and defendant race, gender, age, whether the defendant had a prior offense in the past year, whether the defendant had a prior history of pre-trial crime in the past year, whether the defendant had a prior history of failure to appear in the past year, the number of charged offenses, indicators for crime type (drug, DUI, property, violent, or other), crime severity (felony or misdemeanor), and indicators for any missing characteristics. The sample means of the dependent variables are reported in brackets. *** = significant at 1 percent level, ** = significant at 5 percent level, * = significant at 10 percent level.

Appendix Table A5: Social Cost of Crime Results

	D^{IV} Estimate	D^{MTE} Estimate	Lower Bound	Upper Bound
	(1)	(2)	(3)	(4)
Rearrest for Robbery	0.028	0.035	$73,196	$333,701
	(0.034)	(0.037)		
Rearrest for Assault	0.068	0.065	$41,046	$109,903
	(0.050)	(0.057)		
Rearrest for Burglary	0.047	0.018	$50,291	$50,291
	(0.048)	(0.058)		
Rearrest for Theft	0.118*	0.081	$9,598	$9,974
	(0.062)	(0.075)		
Rearrest for Drug	0.047	0.097	$2,544	$2,544
	(0.060)	(0.067)		
Rearrest for DUI	0.007	0.016	$25,842	$25,842
	(0.009)	(0.012)		

Note: This table reports the difference in two-stage least squares and marginal treatment effect estimates of the impact of pre-trial release on the probability of pre-trial misconduct between white and black defendants for different crimes. The regressions are estimated on the sample as described in the notes to Table 1. The dependent variable is listed in each row. In column 1, robust standard errors two-way clustered at the individual and judge-by-shift level are reported in parentheses. In column 2, bootstrap standard errors clustered at the judge-by-shift level are reported in parentheses. All specifications control for court-by-time fixed effects and defendant race, gender, age, whether the defendant had a prior offense in the past year, whether the defendant had a prior history of pre-trial crime in the past year, whether the defendant had a prior history of failure to appear in the past year, the number of charged offenses, indicators for crime type (drug, DUI, property, violent, or other), crime severity (felony or misdemeanor), and indicators for any missing characteristics. *** = significant at 1 percent level, ** = significant at 5 percent level, * = significant at 10 percent level.

Appendix Table A6: Robustness Results

	Estimates of D^{IV}					Estimates of D^{MTE}		
	Drop Impossible	Re-Weight Char.	Drop Hispanics	Cluster by Judge	Control Bail $	Drop Impossible	Drop Hispanics	Cluster by Judge
Panel A: Rearrest for All Crimes	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Rearrest Prior to Disposition	0.215**	0.238**	0.238**	0.222**	0.252**	0.221**	0.259*	0.231*
	(0.095)	(0.103)	(0.119)	(0.102)	(0.104)	(0.098)	(0.151)	(0.126)
Panel B: Rearrest by Crime Type								
Drug Crime	0.059	0.055	0.066	0.047	0.054	0.109	0.094	0.097
	(0.059)	(0.057)	(0.080)	(0.061)	(0.062)	(0.069)	(0.097)	(0.073)
Property Crime	0.150**	0.181**	0.105	0.163**	0.178**	0.096	0.074	0.106
	(0.066)	(0.076)	(0.083)	(0.077)	(0.076)	(0.074)	(0.106)	(0.097)
Violent Crime	0.059	0.103*	0.006	0.080	0.100	0.048	−0.004	0.083
	(0.054)	(0.060)	(0.069)	(0.064)	(0.062)	(0.062)	(0.088)	(0.070)
Observations	252,992	256,253	170,923	256,253	256,253	252,992	170,923	256,253

Note: This table reports robustness checks for our estimates of D^{IV} and D^{MTE}. Columns 1 and 6 drop the four percent of cases where defendants are reported as being detained but are rearrested prior to disposition. Column 2 re-weights cases so that the white and black samples have identical observable characteristics following the procedure described in Appendix B. Columns 3 and 7 drop Hispanic whites from the sample. Column 4 reports standard errors clustered by defendant and judge. Column 5 instruments for monetary bail amount with a leave-out leniency measure constructed using monetary bail amount. Column 8 reports standard errors clustered by judge. All regressions include court-by-time fixed effects and baseline controls for race, gender, age, whether the defendant had a prior offense in the past year, whether the defendant had a prior history of pre-trial crime in the past year, whether the defendant had a prior history of failure to appear in the past year, the number of charged offenses, indicators for crime type (drug, DUI, property, violent, and other), crime severity (felony and misdemeanor), and indicators for any missing controls. *** = significant at 1 percent level, ** = significant at 5 percent level, * = significant at 10 percent level.

Appendix Table A7: OLS Results

	White	Black	Difference
Panel A: Rearrest for All Crimes	(1)	(2)	(3)
Rearrest Prior to Disposition	0.181***	0.188***	−0.007**
	(0.003)	(0.002)	(0.004)
	[0.172]	[0.182]	–
Panel B: Rearrest by Crime Type			
Rearrest for Drug Crime	0.097***	0.103***	−0.006**
	(0.002)	(0.002)	(0.002)
	[0.077]	[0.081]	–
Rearrest for Property Crime	0.067***	0.073***	−0.006*
	(0.002)	(0.002)	(0.003)
	[0.065]	[0.068]	–
Rearrest for Violent Crime	0.052***	0.063***	−0.010***
	(0.002)	(0.002)	(0.002)
	[0.047]	[0.071]	–
Observations	106,846	149,407	–

Note: This table reports OLS results of racial bias in pre-trial release based on rearrest prior to case disposition. The regressions are estimated on the sample as described in the notes to Table 1. Columns 1-2 report OLS estimates of the impact of pre-trial release on the probability of pre-trial misconduct separately by race, while column 3 reports the difference between the white and black OLS coefficients. Robust standard errors two-way clustered at the individual and judge-by-shift level are reported in parentheses. The sample means of the dependent variables are reported in brackets. All specifications control for court-by-time fixed effects and defendant race, gender, age, whether the defendant had a prior offense in the past year, whether the defendant had a prior history of pre-trial crime in the past year, whether the defendant had a prior history of failure to appear in the past year, the number of charged offenses, indicators for crime type (drug, DUI, property, violent, or other), crime severity (felony or misdemeanor), and indicators for any missing characteristics. *** = significant at 1 percent level, ** = significant at 5 percent level, * = significant at 10 percent level.

Appendix Table A8: Mean Pre-Trial Release and Misconduct Rates by Judge and Defendant Race

	Race of Judge	
	White	Black
Panel A: Pre-Trial Release Rates	(1)	(2)
White Defendant Release Rate	0.557	0.552
	(0.497)	(0.497)
Black Defendant Release Rate	0.535	0.530
	(0.499)	(0.499)
Panel B: Pre-Trial Rearrest Rates		
White Defendant Rearrest Rate	0.207	0.202
	(0.405)	(0.402)
Black Defendant Rearrest Rate	0.280	0.294
	(0.449)	(0.456)

Note: This table presents mean rates of pre-trial release and pre-trial misconduct conditional on release by defendant and judge race in Miami. The means are calculated using the Miami sample reported in Table 1. See text for additional details.

Appendix Table A9: p-values from Tests of Relative Racial Prejudice

	p-Value
	(1)
Pre-Trial Release	0.782
Pre-Trial Rearrest	0.580

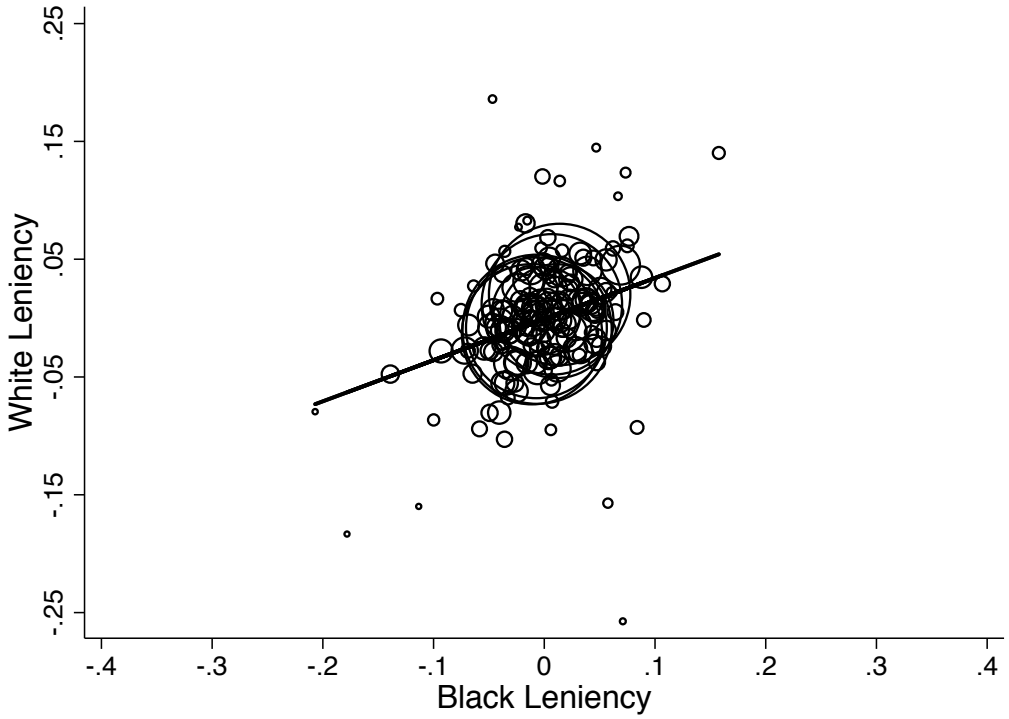
Note: This table replicates the Anwar and Fang (2006) test for pre-trial release rates and pre-trial misconduct rates. This table presents bootstrapped p-values testing for relative racial bias. The null hypothesis is rejected if white judges are more lenient on white defendants, and black judges are more lenient on black defendants.

Appendix Table A10: Representativeness Statistics

	$\mathbb{E}(x\|Black)/\mathbb{E}(x\|White)$
Panel A: Defendant Characteristics	(1)
Male	1.026
Age at Bail Decision	0.978
Prior Offense in Past Year	1.072
Arrested on Bail in Past Year	1.048
Failed to Appear in Court in Past Year	1.028
Panel B: Charge Characteristics	
Number of Offenses	1.200
Felony Offense	1.160
Misdemeanor Only	0.866
Any Drug Offense	1.077
Any DUI Offense	0.839
Any Violent Offense	1.260
Any Property Offense	0.983
Panel C: Outcomes	
Rearrest Prior to Disposition	1.061
Drug Crime	1.059
Property Crime	1.044
Violent Crime	1.496
Failure to Appear in Court	0.983
Failure to Appear in Court or Rearrested	1.102
Observations	256,253

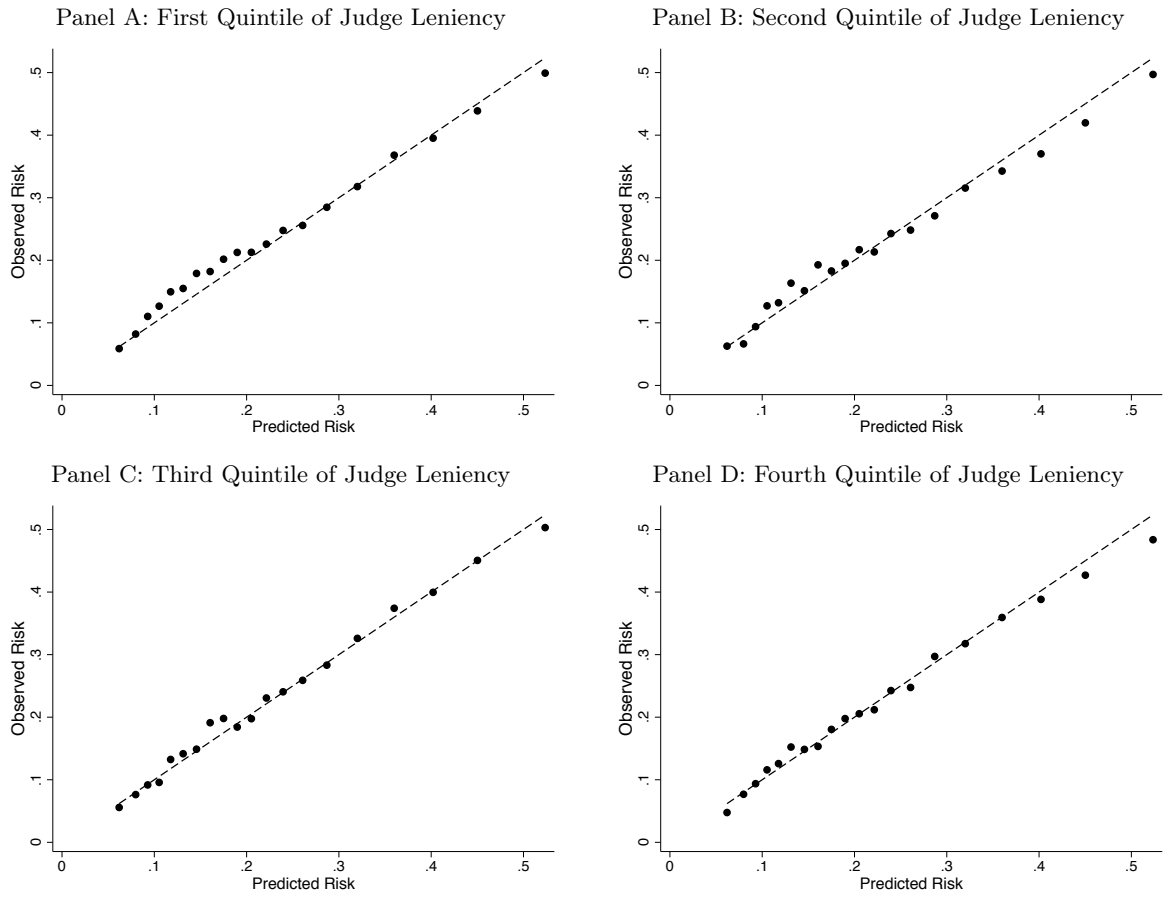
Note: This table reports the mean of the variable listed in the row given the defendant is black, divided by the mean of the variable listed in the row given the defendant is white. The sample is described in the notes to Table 1.

Appendix Figure A1: Judge Leniency by Race



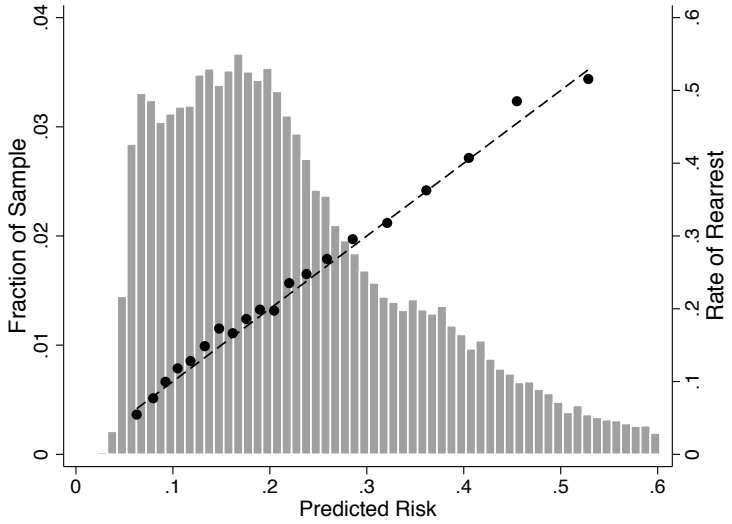
Note: These figures show the correlation between our residualized measure of judge leniency by defendant race over all available years of data. We also plot the linear best fit line estimated using OLS.

Appendix Figure A2: Predicted and Actual Risk by Judge Leniency



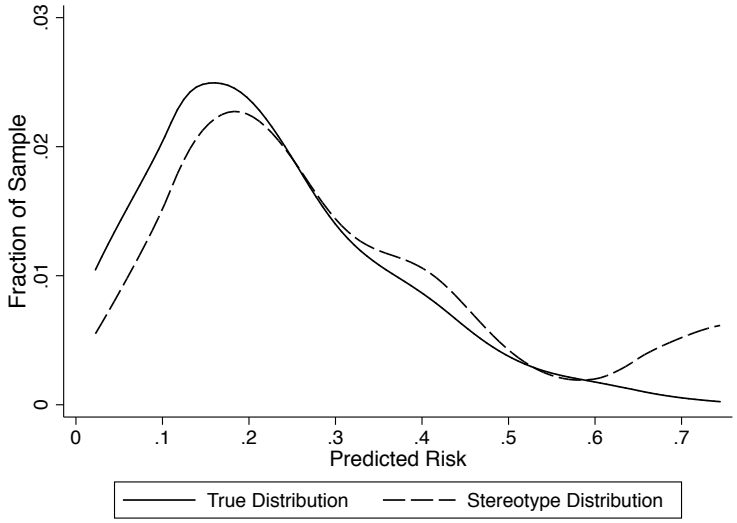
Note: These figures plot predicted pre-trial misconduct risk against actual pre-trial misconduct for different judge-leniency quintiles. Predicted risk is calculated using only cases from the most lenient quintile of judges and the machine learning algorithm described in Appendix F. See the text for additional details.

Appendix Figure A3: Relationship between Predicted Risk and True Risk



Note: This figure reports the distribution of the pre-trial misconduct risk and plots the predicted pre-trial misconduct risk against actual pre-trial misconduct for the test sample. Predicted risk is calculated using the machine learning algorithm described in Appendix F. The dashed line is the 45 degree line. See the text for additional details.

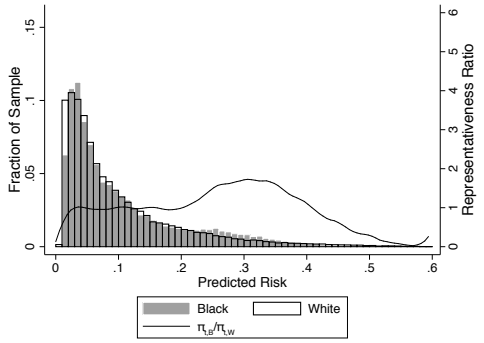
Appendix Figure A4: Stereotyped and True Distribution of Risk for Black Defendants



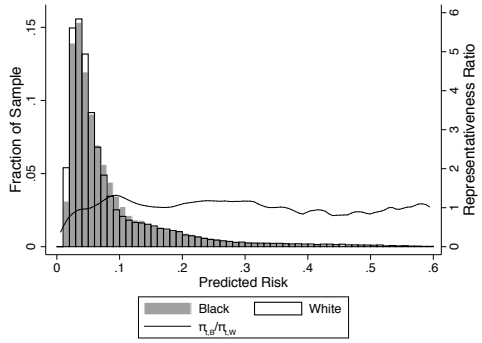
Note: This figure plots the true distribution of risk for black defendants alongside the perceived distribution of risk for black defendants. The stereotyped beliefs are generated by a representativeness-based discounting model with $\theta = 1.9$. This value of θ rationalizes an average release rate of black defendants equal to 68.8 percent, the actual rate of release in the data. See the text and Appendix F for additional details.

Appendix Figure A5: Crime-Specific Predicted Risk Distributions by Race

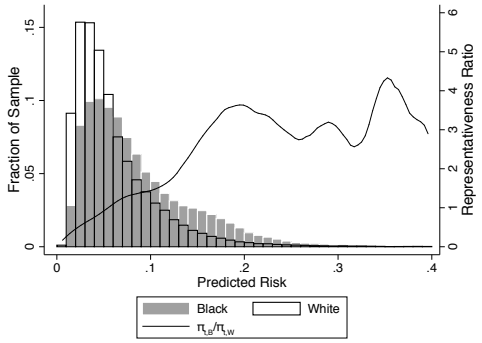
Panel A: Rearrest for Drug Crime



Panel B: Rearrest for Property Crime

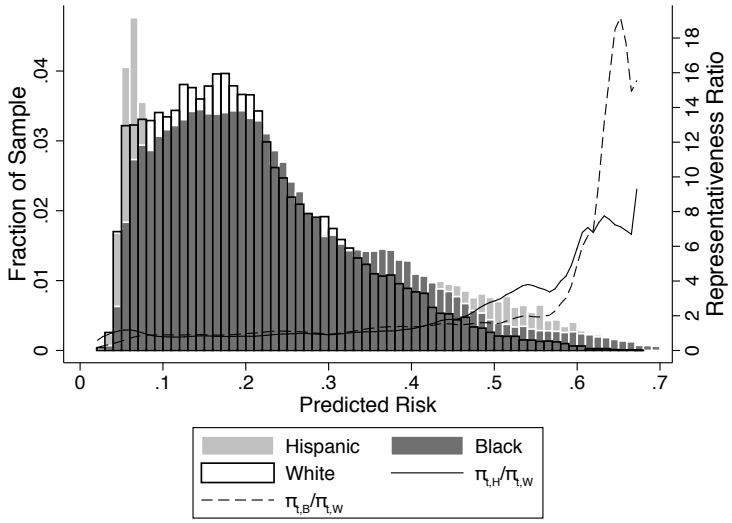


Panel C: Rearrest for Violent Crime



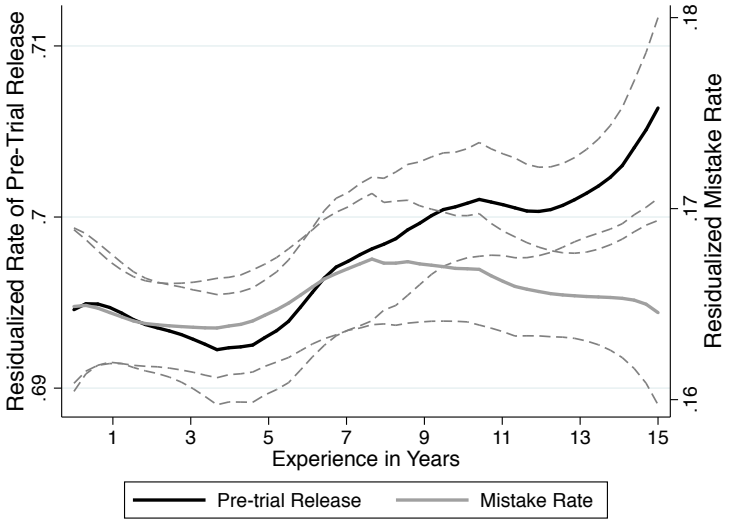
Note: These figures report the distribution of crime-specific risk separately by defendant race. Predicted risk is calculated using the machine learning algorithm described in Appendix F. The solid line in each figure represents the representativeness ratio for black versus white defendants. See the text for additional details.

Appendix Figure A6: Predicted Risk Distribution by Hispanic and Black versus White



Note: This figure reports the distribution of the risk of pre-trial misconduct separately by Hispanic, black, and white defendants. Predicted risk is calculated using the machine learning algorithm described in Appendix F. The dashed line represents the representativeness ratio for black versus white defendants and the solid line represents the representativeness ratio for Hispanic versus white defendants. See the text for additional details.

Appendix Figure A7: Probability of Release and Pre-trial Misconduct with Experience



Note: This figure plots the relationship between judicial experience and both the residualized rate of pre-trial release and the residualized rate of pre-trial crime conditional on release (i.e. the mistake rate). Pre-trial release and pre-trial rearrest are both residualized using the full set of court-by-time fixed effects. See the text for additional details.

Appendix B: Proofs of Consistency for IV and MTE Estimators

This appendix reviews our empirical test for racial bias before providing additional details and proofs for both our IV and MTE estimation approaches. For completeness, we also include all relevant information from the main text in this appendix.

A. Overview

Recall that the goal of our analysis is to empirically test for racial bias in bail setting using the rate of pre-trial misconduct for white defendants and black defendants at the margin of release. Let the true weighted average of treatment effects for defendants of race r at the margin of release for judge j, α_r^j, for some weighting scheme, w^j, across all bail judges, $j = 1...J$, be given by:

$$\begin{aligned} \alpha_r^{*,w} &= \sum_{j=1}^{J} w^j \alpha_r^j \\ &= \sum_{j=1}^{J} w^j t_r^j \end{aligned} \tag{B.1}$$

where w^j are non-negative weights which sum to one that will be discussed in further detail below. Recall that, by definition, $\alpha_r^j = t_r^j$. Intuitively, $\alpha_r^{*,w}$ represents a weighted average of the treatment effects for defendants of race r at the margin of release across all judges.

Following this notation, the true average level of racial bias among bail judges, $D^{*,w}$, for the weighting scheme w^j is given by:

$$\begin{aligned} D^{*,w} &= \sum_{j=1}^{J} w^j \left(t_W^j - t_B^j \right) \\ &= \sum_{j=1}^{J} w^j t_W^j - \sum_{j=1}^{J} w^j t_B^j \\ &= \alpha_W^{*,w} - \alpha_B^{*,w} \end{aligned} \tag{B.2}$$

From Equation (B.1), we can express $D^{*,w}$ as a weighted average across all judges of the difference in treatment effects for white defendants at the margin of release and black defendants at the margin of release.

We develop two estimators for racial bias that use variation in the release tendencies of quasi-randomly assigned bail judges to identify differences in pre-trial misconduct rates at the margin of release. In theory, an estimator for $D^{*,w}$ should satisfy three criteria: (1) rely on minimal auxiliary assumptions to estimate judge-specific thresholds of release, t_r^j, (2) yield statistically precise estimates of the average level of bias, $D^{*,w}$, and (3) use a policy-relevant weighting scheme, w^j. In practice, however, no single estimator can accomplish all three criteria in our setting. The two-stage least squares IV estimator, for example, relies on relatively few auxiliary assumptions and provides

statistically precise estimates by giving greater weight to more precise LATEs, but the particular weighting of the pairwise LATEs may not always yield a policy-relevant estimate of racial bias. In contrast, a fully non-parametric approach where one reports each pairwise LATE separately and allows a researcher to choose a weighting scheme can yield a policy-relevant interpretation of racial bias with minimal assumptions, but often comes at the cost of statistical precision since any particular LATE is often estimated with considerable noise. The MTE framework developed by Heckman and Vytlacil (1999, 2005) provides a third option, allowing a researcher to estimate judge-specific treatment effects for white and black defendants at the margin of release and thus choose a weighting scheme, but with estimation of racial bias for each judge, and relatedly statistical precision, coming at the cost of additional auxiliary assumptions.

In this Appendix, we show that both IV and MTE estimators yield qualitatively similar estimates of the average level of racial bias in our setting, suggesting that neither the choice of IV weights nor the additional parametric assumptions required under our MTE approach greatly affect our estimates. In contrast, we show that the fully non-parametric approach yields uninformative estimates of the average level of racial bias due to very imprecise estimates of the individual pairwise LATEs.

B. Instrumental Variables Framework

Our first estimator uses IV weights, defined as $w^j = \lambda^j$, when estimating the weighted average level of bias, $D^{*,w}$. Recall that λ^j are the standard IV weights defined in Imbens and Angrist (1994). Our IV estimator allows us to estimate a weighted average of racial bias across bail judges with relatively few auxiliary assumptions, but with the caveats that we cannot estimate judge-specific treatment effects and the weighting scheme underlying the IV estimator may not be policy relevant. If the IV weights are uncorrelated with the level of racial bias for a given judge, then our IV estimator will estimate the average level of discrimination across all bail judges. If the IV weights are correlated with the level of racial bias, however, then our IV estimator may under or overestimate the average level of racial bias across all bail judges, but may still be of policy relevance depending on the parameter of interest (e.g., an estimate of racial bias that puts more weights on judges with higher caseloads).

In this subsection, we present a formal definition of the IV-weighted level of racial bias and our IV estimator, provide proofs for consistency, discuss tests of the identifying assumptions, the interpretation of the IV-weighted estimate, and the potential bias of our IV estimator from using a discrete instrument. We then consider a re-weighting procedure that accounts for judge bias on observable non-race characteristics.

B.1. Definition and Consistency of IV Estimator

Definition: Let the IV-weighted level of racial bias, $D^{*,IV}$ be defined as:

$$\begin{aligned} D^{*,IV} &= \sum_{j=1}^{J} w^j \left(t_W^j - t_B^j \right) \\ &= \sum_{j=1}^{J} \lambda^j \left(t_W^j - t_B^j \right) \end{aligned} \tag{B.3}$$

where $w^j = \lambda^j$, the instrumental variable weights defined in Imbens and Angrist (1994) and described in the main text.

Following the definition in the main text, let our IV estimator be defined as:

$$\begin{aligned} D^{IV} &= \alpha_W^{IV} - \alpha_B^{IV} \\ &= \sum_{j=1}^{J} \lambda_W^j \alpha_W^{j,j-1} - \sum_{j=1}^{J} \lambda_B^j \alpha_B^{j,j-1} \end{aligned} \tag{B.4}$$

where each pairwise LATE, $\alpha_r^{j,j-1}$, is again the average treatment effect of compliers between judges $j-1$ and j.

Building on the standard IV framework, we now establish the two conditions under which our IV estimator for racial bias D^{IV} provides a consistent estimate of the IV-weighted level of racial bias, $D^{*,IV}$.

First Condition for Consistency: The first condition for our IV estimator D^{IV} to provide a consistent estimate of $D^{*,IV}$ is that our judge leniency measure Z_i is continuously distributed over some interval $[\underline{z}, \bar{z}]$. Formally, as our instrument becomes continuous, for any judge j and any $\epsilon > 0$, there exists a judge k such that $|z_j - z_k| < \epsilon$.

Proposition B.1. As Z_i becomes continuously distributed, each race-specific IV estimate, α_r^{IV}, converges to a weighted average of treatment effects for defendants at the margin of release.

To see why this proposition holds, first define the treatment effect for a defendant at the margin of release at z_j as:

$$\alpha_r^j = \alpha_r(z = z_j) = \lim_{dz \to 0} \mathbb{E}[Y_i(1) - Y_i(0) | Released_i(z) - Released_i(z - dz) = 1] \tag{B.5}$$

With a continuous instrument Z_i, Angrist, Graddy, and Imbens (2000) show that the IV estimate, α_r^{IV}, converges to:

$$\alpha_r = \int \lambda_r(z) \alpha_r(z) dz \tag{B.6}$$

where the weights, $\lambda_r(z)$ are given by:

$$\lambda_r(z) = \frac{\frac{\partial Released_r}{\partial z}(z) \cdot \int_z^{\bar{z}} (y - \mathbb{E}[z]) \cdot f_r^z(y) dy}{\int_{\underline{z}}^{\bar{z}} \frac{\partial Released_r}{\partial z}(v) \cdot \int_v^{\bar{z}} (y - \mathbb{E}[z]) \cdot f_r^z(y) dy dv} \tag{B.7}$$

where $\frac{\partial Released_r}{\partial z}$ is the derivative of the probability of release with respect to leniency and f_r^z is the probability density function of leniency. If $\frac{\partial Released_r}{\partial z} \geq 0$ for all z, then the weights are nonnegative. Therefore, as Z_i becomes continuously distributed, our race-specific IV estimate will return a weighted average of treatment effects of defendants on the margin of release. □

Second Condition for Consistency: The second condition for our IV estimator D^{IV} to provide a consistent estimate of $D^{*,IV}$ is that the weights λ_r^j must be equal across race. Equal weights ensure that the race-specific IV estimates from Equation (7) in the main text, α_W^{IV} and α_B^{IV}, provide the same weighted averages of $\alpha_W^{j,j-1}$ and $\alpha_B^{j,j-1}$. If the weights $\lambda_W^j = \lambda_B^j = \lambda^j$, our IV estimator can then be rewritten as a simple weighted average of the difference in pairwise LATEs for white and black defendants:

$$D^{IV} = \sum_{j=1}^{J} \lambda^j (\alpha_W^{j,j-1} - \alpha_B^{j,j-1}) \tag{B.8}$$

Proof of Consistency: We combine these two conditions to establish the consistency of our IV estimator. Recall that our IV estimator D^{IV} provides a consistent estimate of racial bias $D^{*,IV}$ if (1) Z_i is continuous and (2) λ_r^j is constant by race.

To begin, we write D^{IV} as:

$$\begin{aligned} D^{IV} &= \alpha_W^{IV} - \alpha_B^{IV} \\ &= \sum_{j=1}^{J} \lambda_W^j \alpha_W^{j,j-1} - \sum_{j=1}^{J} \lambda_B^j \alpha_B^{j,j-1} \end{aligned} \tag{B.9}$$

If $\lambda_r^j = \lambda^j$, then:

$$D^{IV} = \sum_{j=1}^{J} \lambda^j \left(\alpha_W^{j,j-1} - \alpha_B^{j,j-1} \right) \tag{B.10}$$

Following Proposition B.1, as Z_i becomes continuously distributed, we can rewrite D^{IV} as:

$$\begin{aligned} D^{IV} &= \int \lambda(z) \left(\alpha_W(z) - \alpha_B(z) \right) dz \\ &= D^{*,IV} \end{aligned} \tag{B.11}$$

Therefore, in the limit, D^{IV} estimates a weighted average of differences in treatment effects for defendants at the margin of release, and therefore provides a consistent estimate of $D^{*,IV}$. □

B.2. Empirical Implementation

Testing the Equal Weights Assumption: A key assumption for the consistency of our IV estimator is that the IV weights are the same across race. Following Cornelissen et al. (2016), we calculate white and black IV weights for each judge-by-year cell by replacing the terms in Equation (B.7) with their sample analogues. Noting that our instrument is linear by construction and, as a result, that $\frac{\partial Released_r(z)}{\partial z}(z) = c$, we drop the term $\frac{\partial Released_r(z)}{\partial z}(z) = c$, as this appears in both the numerator and denominator of Equation (B.7). We then use kernel density methods to retrieve an estimate $\hat{f}_r^z$, which is the density of leniency for race r. With this estimate of the density of leniency for race r, we can plug in the sample analogue of $\mathbb{E}[z]$ and use numerical integration to estimate the remaining terms and estimate IV weights by race for each point in the distribution.

One implication of the equal weights assumption is that the distributions of black and white IV weights over the distribution of judge leniency are statistically identical. To implement this test, Appendix Figure B1 plots the IV weights for each judge-by-year cell, the level of our variation, by race. The distributions of black and white IV weights are visually indistinguishable from each other and a Kolmogorov-Smirnov test cannot reject the hypothesis that the two estimated distributions are drawn from the same continuous distribution (p-value = 0.431).

A second implication of the equal weights assumption is that the relationship between the black IV weights and the white IV weights should fit a 45-degree line up to sampling error. Appendix Figure B2 plots the black IV weights and the white IV weights for each judge-by-year cell, where we discretize the continuous weights to retrieve an estimate of the weights for each judge-by-year cell and then normalize the weights so that the weights sum to one (in the continuous version the weights integrate to one). The black and white IV weights for each judge-by-year cell are highly correlated across race. To formally test for violations of the equal weights assumption, we regress each black IV weight for each judge-by-year cell on the white IV weight for the same cell. This regression yields a coefficient on the white IV weight equal to 1.028 with a standard error of 0.033. Thus, both tests suggest that our assumption of equal IV weights by race is satisfied in the data.

Understanding the IV Weights: We now investigate the relationship between IV weights and judge characteristics to better understand the economic interpretation of an IV-weighted estimate of racial bias. Appendix Table B1 presents OLS estimates of IV weights in each judge-by-year cell on observable judge-by-year characteristics separately by race. The correlation between the IV weights and both average leniency and whether the judge is a minority is statistically zero in both the white and black distribution, with only a weak correlation between the IV weights and judge experience in a given year. Conversely, the IV weights are positively correlated with the number of cases in a judge-by-year cell and a judge being from Philadelphia (where each judge-by-year cell has more observations). These results suggest that the additional precision in our IV regressions comes, at least in part, from placing more weight on judge-by-year cells with more observations. The IV weights are also positively correlated with judge-by-year specific estimates of racial bias (estimated using the MTE approach discussed in Section D below), although not differentially by

defendant race. The positive correlation between the IV weights and the judge-by-year estimates of bias implies that the IV-weighted estimate of racial bias will be larger than an equal-weighted estimate of racial bias. All of our IV results should be interpreted with these correlations in mind.

Bounding the Maximum Bias of the IV Estimator with a Discrete Instrument: Our approach assumes continuity of the instrument Z_i. If the instrument is discrete, we can characterize the maximum potential bias of our IV estimator D^{IV} relative to $D^{*,IV}$, e.g. "infra-marginality bias."

Proposition B.2. If the instrumental variable weights are equal by race, the maximum bias of our IV estimator D^{IV} from $D^{*,IV}$ is given by $\max_j(\lambda^j)(\alpha^{max} - \alpha^{min})$, where α^{max} is the largest treatment effect among compliers, α^{min} is the smallest treatment effect among compliers, and λ^j is given by:

$$\lambda^j = \frac{(z_j - z_{j-1}) \cdot \sum_{l=j}^{J} \pi^l (z_l - \mathbb{E}[Z])}{\sum_{m=1}^{J} (z_j - z_{j-1}) \cdot \sum_{l=m}^{J} \pi^l (z_l - \mathbb{E}[Z])} \tag{B.12}$$

where π^l is the probability of being assigned to judge j.

To prove that this proposition holds, we proceed in five steps. First, we show that $D^{*,IV}$ is equal to D^{IV} plus a bias term, which we refer to as "infra-marginality bias." Second, we derive an upper bound for the bias term by replacing $\alpha_W^{j,j-1}$ with its minimum possible value for every judge j, and we derive a lower bound by replacing $\alpha_B^{j,j-1}$ with its maximum value for every j. Third, we show that the upper bound and lower bound of D^{IV} both converge to $D^{*,IV}$ as Z_i becomes continuously distributed. Fourth, we develop a formula for the maximum potential bias with a discrete instrument using the derived upper and lower bounds, and provide intuition for how we derive this estimation bias. Fifth, we show how to empirically estimate the maximum potential bias in the case of a discrete instrument.

Recall that under our theory model, compliers for judge j and $j-1$ are individuals such that $t_r^{j-1}(\mathbf{V}_i) < \mathbb{E}[\alpha_i | r_i] \leq t_r^j(\mathbf{V}_i)$. For illustrative purposes, we drop conditioning on $\mathbf{V}_i$. Under this definition of compliers, we know that:

$$\alpha_r^{j,j-1} \in (t_r^{j-1}, t_r^j] \tag{B.13}$$

Note that we can rewrite $D^{*,IV}$ as:

$$\begin{aligned}
D^{*,IV} &= \sum_{j=1}^{J} \lambda^j \left(t_W^j - t_B^j \right) \\
&= \sum_{j=1}^{J} \lambda^j \left(\alpha_W^{j,j-1} - \alpha_B^{j,j-1} \right) + \sum_{j=1}^{J} \lambda^j \left(t_W^j - \alpha_W^{j,j-1} \right) + \sum_{j=1}^{J} \lambda^j \left(\alpha_B^{j,j-1} - t_B^j \right) \\
&= D^{IV} + \underbrace{\sum_{j=1}^{J} \lambda^j \left(t_W^j - \alpha_W^{j,j-1} \right) + \sum_{j=1}^{J} \lambda^j \left(\alpha_B^{j,j-1} - t_B^j \right)}_{\text{infra-marginality bias}}
\end{aligned} \tag{B.14}$$

The second line follows from adding and subtracting $\sum_{j=1}^{J} \lambda^j \alpha_W^{j,j-1}$ and $\sum_{j=1}^{J} \lambda^j \alpha_B^{j,j-1}$ to $D^{*,IV}$ and rearranging terms. The third line follows from assuming equal IV weights by race. Equation B.14 shows that $D^{*,IV}$ is equal to D^{IV} plus a bias term, which we refer to as "infra-marginality bias."

We will now derive an upper bound for $D^{*,IV}$. First, note that Equation (B.13) implies $\alpha_B^{j,j-1} \leq t_B^j$. Therefore $\sum_{j=1}^{J} \lambda^j \left(\alpha_B^{j,j-1} - t_B^j\right) \leq 0$, given $\lambda^j \geq 0$ for all j. We can drop this term from Equation (B.14) to obtain an upper bound on $D^{*,IV}$:

$$\begin{aligned} D^{*,IV} &\leq D^{IV} + \sum_{j=1}^{J} \lambda^j \left(t_W^j - \alpha_W^{j,j-1}\right) \\ &< D^{IV} + \sum_{j=1}^{J} \lambda^j \left(t_W^j - t_W^{j-1}\right) \end{aligned} \tag{B.15}$$

where the second line follows from Equation (B.13) ($t_W^{j-1} < \alpha_W^{j,j-1}$).

Using similar logic, we can also derive a lower bound for $D^{*,IV}$. Equation (B.13) implies $t_W^j \geq \alpha_W^{j,j-1}$. Therefore $\sum_{j=1}^{J} \lambda^j \left(t_W^j - \alpha_W^{j,j-1}\right) \geq 0$, given $\lambda^j \geq 0$ for all j. We can drop this term from Equation (B.14) to obtain a lower bound on $D^{*,IV}$:

$$\begin{aligned} D^{*,IV} &\geq D^{IV} + \sum_{j=1}^{J} \lambda^j \left(\alpha_B^{j,j-1} - t_B^j\right) \\ &= D^{IV} - \sum_{j=1}^{J} \lambda^j \left(t_B^j - \alpha_B^{j,j-1}\right) \\ &> D^{IV} - \sum_{j=1}^{J} \lambda^j \left(t_B^j - t_B^{j-1}\right) \end{aligned} \tag{B.16}$$

where again, the last line follows from Equation (B.13) ($t_B^{j-1} < \alpha_B^{j,j-1}$).

We can now bound $D^{*,IV}$ using Equation (B.16) and Equation (B.15):

$$D^{IV} - \sum_{j=1}^{J} \lambda^j \left(t_B^j - t_B^{j-1}\right) < D^{*,IV} < D^{IV} + \sum_{j=1}^{J} \lambda^j \left(t_W^j - t_W^{j-1}\right) \tag{B.17}$$

It is straightforward to see that the infra-marginality bias goes to zero as Z_i becomes continuous. Given that λ^j are non-negative weights which sum to one, $\sum_{j=1}^{J} \lambda^j \left(t_r^j - t_r^{j-1}\right) \leq \max_j (t_r^j - t_r^{j-1})$ (i.e. the average is less than the maximum). Therefore, if Z_i becomes continuous, then $t_r^j - t_r^{j-1} \to 0$ for all j, and so infra-marginality bias shrinks to zero. Intuitively, at the limit, every complier is at the margin, and so there is no infra-marginality bias. As a result, D^{IV} converges to $D^{*,IV}$ as Z_i becomes continuous.

Note that $t_r^j - t_r^{j-1}$ is positive for all j, implying $\sum_{j=1}^{J} \lambda^j \left(t_r^j - t_r^{j-1}\right) \leq \max_j(\lambda^j) \sum_{j=1}^{J} \left(t_r^j - t_r^{j-1}\right)$, where $\max_j(\lambda^j)$ is the maximum weight across all judges. Given the recursive structure of $\sum_{j=1}^{J} \left(t_r^j - t_r^{j-1}\right)$:

$$\max_j(\lambda^j) \sum_{j=1}^{J} \left(t_r^j - t_r^{j-1}\right) = \max_j(\lambda^j)(t_r^J - t_r^0) \tag{B.18}$$

Note that $t_r^J = \alpha_r^{max}$ (i.e. the largest treatment effect is associated with the most lenient judge) and $t_r^0 = \alpha_r^{min}$ (i.e. the smallest treatment effect is associated with the most strict judge). Therefore, letting α^{max} and α^{min} equal the maximum treatment effect and minimum treatment effect respectively across races, yields:

$$D^{IV} - \max_j(\lambda^j)(\alpha^{max} - \alpha^{min}) < D^{*,IV} < D^{IV} + \max_j(\lambda^j)(\alpha^{max} - \alpha^{min}) \tag{B.19}$$

which proves Proposition B.2. In other words, the maximum bias of our IV estimator D^{IV} from $D^{*,IV}$ is given by $\max_j(\lambda^j)(\alpha^{max} - \alpha^{min})$. □

Next, we simplify these bounds to retrieve estimable bounds. Note that $\alpha^{max} \leq 1$ and $\alpha^{min} \geq 0$ in theory, which implies $(\alpha^{max} - \alpha^{min}) \leq 1$. Therefore, the bounds in Equation (B.19) can be re-written as:

$$D^{IV} - \max_j(\lambda^j) < D^{*,IV} < D^{IV} + \max_j(\lambda^j) \tag{B.20}$$

Rearranging terms yields:

$$-\max_j(\lambda^j) < D^{*,IV} - D^{IV} < \max_j(\lambda^j) \tag{B.21}$$

Under this worst-case assumption, the maximum bias of our IV estimator D^{IV} from $D^{*,IV}$ is given by $\max_j(\lambda^j)$.

To understand the intuition of our maximum bias formula, note that under Proposition B.2, the maximum bias of D^{IV} relative to $D^{*,IV}$ decreases as (1) the heterogeneity in treatment effects among compliers decreases ($\alpha^{max} \to \alpha^{min}$) and (2) the maximum of the judge weights decreases ($\max_j(\lambda^j) \to 0$), as would occur when there are more judges distributed over the range of the instrument. If treatment effects are homogeneous among compliers such that $\alpha^{max} = \alpha^{min}$, our IV estimator D^{IV} continues to provide a consistent estimate of $D^{*,IV}$. In practice, we calculate the maximum bias of our estimator under the worst-case assumption of treatment effect heterogeneity (i.e. $\alpha^{max} - \alpha^{min} = 1$) (the maximum possible value). Because the weights λ^j are identified in our data, the maximum bias due to infra-marginality concerns can be conservatively estimated to be equal to $\max_j(\lambda^j)$.

In general, the IV weights, λ^j, will not be equal across judges. In particular, the weights depend partially on the share of compliers between any two adjacent judges. For example, if there are more infra-marginal defendants for lenient judges, then lenient judges will be given more weight in the

estimation of racial bias. However, our bounding procedure of the maximum bias does not rely on any assumption about equal weights across judges. For example, consider an extreme case where although there are many judges, defendants are only infra-marginal to the most-strict and second most-strict judge. Then, the entire share of compliers will be defendants who are detained by the most-strict judge and released by the second most-strict judge. Therefore, the pairwise LATE for the most-strict judge and the second most-strict judge will receive the entire weight in estimating the effect of release on the probability of pre-trial misconduct. In this case, we would conclude that the maximum bias of our estimator is equal to one, and therefore, we would be unable to provide informative bounds on the true level of racial bias.

We can now illustrate how we empirically estimate the maximum potential bias of our IV estimator from $D^{*,IV}$ using the formula in Proposition B.2. Again, because we do not observe $\alpha^{max} - \alpha^{min}$, we take the most conservative approach and assume that this value is equal to 1. Imbens and Angrist (1994) show that the instrumental variables weights, λ^j, for a discrete multi-valued instrument are given by the following formula:

$$\lambda^j = \frac{(Pr(Released|z_j) - Pr(Released|z_{j-1})) \cdot \sum_{l=j}^{J} \pi^l (g(z_l) - \mathbb{E}[g(Z)])}{\sum_{m=1}^{J} (Pr(Released|z_m) - Pr(Released|z_{m-1})) \cdot \sum_{l=m}^{J} \pi^l (g(z_l) - \mathbb{E}[g(Z)])} \tag{B.22}$$

where π^l is the probability a defendant is assigned to judge l, $g(z_l)$ is a function of the instrument, and $Pr(Released|z_j)$ if the probability a defendant is released if assigned to judge j. While λ^j is not indexed by r, we estimate the weights completely separately by race. In both cases, we find the maximum weight to be the same. To proceed, we residualize both the endogenous variable *Released* and the judge leniency instrument using all exogenous regressors. An instrumental variables regression utilizing residualized variables yields a numerically identical estimate as the specification in the main text (Evdokimov and Kolesár 2018). To estimate the weight λ^j we simply replace each expression in Equation (B.22) with the empirical counterpart. Formally:

$$Pr(Released|z_j) - Pr(Released|z_{j-1}) = \mathbb{E}[\ddot{R}|\ddot{z}_j] - \mathbb{E}[\ddot{R}|\ddot{z}_{j-1}] \tag{B.23}$$

where $\ddot{R}$ is *Released* residualized by the exogenous regressors and $\ddot{z}_j$ is the residualized value of the instrument. Since we use residualized judge leniency as the instrument we replace $g(\ddot{z}_l) = \ddot{z}_l$. Lastly, we replace π^j and $\mathbb{E}[Z]$ with their empirical counterparts:

$$\hat{\pi}^j = \sum_{i=1}^{N} \frac{\mathbb{1}\{\ddot{Z}_i = \ddot{z}_j\}}{N} \tag{B.24}$$

$$\mathbb{E}[Z] = \frac{1}{N} \sum_{i=1}^{N} \ddot{Z}_i \tag{B.25}$$

Plugging these quantities into the formula for the weights yields an estimate of the weight attached to each pairwise LATE. We then take the maximum of our weights and interpret this estimate as the

maximum potential bias between our IV estimator and $D^{*,IV}$. This procedure yields a maximum bias of 0.011 or 1.1 percentage points.

From Equation (B.20), we know:

$$D^{*,IV} < D^{IV} + \max_j(\lambda^j) = D^{IV} + 0.011$$
$$D^{*,IV} > D^{IV} - \max_j(\lambda^j) = D^{IV} - 0.011$$

Therefore, in our setting, $D^{*,IV}$ is bounded within 1.1 percentage points of our IV estimate for racial bias. □

B.3. Re-weighting Procedure to Allow Judge Preferences for Non-Race Characteristics

In this subsection, we show that a re-weighting procedure using our IV estimator can be used to estimate direct racial bias (i.e. racial bias which cannot be explained by the composition of crimes). To begin, let the weights for all white defendants be equal to 1. We construct the weights for a black defendant with observables equal to $\mathbf{X}_i = x$ as:

$$\Psi(x) = \frac{Pr(W|x)Pr(B)}{Pr(B|x)Pr(W)} \tag{B.26}$$

where $Pr(W|x)$ is the probability of being white given observables $\mathbf{X}_i = x$, $Pr(B|x)$ is the probability of being black given observables $\mathbf{X}_i = x$, $Pr(B)$ is the unconditional probability of being black, and $Pr(W)$ is the unconditional probability of being white.

Define the covariate-specific LATE as:

$$\alpha_r^{j,j-1}(x) = \mathbb{E}[Y_i(1) - Y_i(0)|R_i(z_j) - R_i(z_{j-1}) = 1|r_i = r, \mathbf{X}_i = x] \tag{B.27}$$

As noted by Fröhlich (2007) and discussed in Angrist and Fernández-Val (2013), the unconditional LATE can be expressed as:

$$\alpha_r^{j,j-1} = \sum_{x \in X} \alpha_r^{j,j-1}(x) \frac{Pr(Released|z_j, x, r) - Pr(Released|z_{j-1}, x, r)}{Pr(Released|z_j, r) - Pr(Released|z_{j-1}, r)} P(x|r) \tag{B.28}$$

We assume:

$$\frac{Pr(Released|z_j, x, r) - Pr(Released|z_{j-1}, x, r)}{Pr(Released|z_j, r) - Pr(Released|z_{j-1}, r)} = \xi(x) \tag{B.29}$$

In words, while the first stage may vary based on covariates, it varies in the same way for white

and black defendants. Therefore, in the re-weighted sample, $\alpha_B^{j,j-1}$ is given by:

$$\begin{aligned}
\alpha_B^{j,j-1} &= \sum_{x \in X} \alpha_B^{j,j-1}(x)\xi(x)Pr(x|B)\Psi(x) \\
&= \sum_{x \in X} \alpha_B^{j,j-1}(x)\xi(x)Pr(x|B)\frac{Pr(W|x)Pr(B)}{Pr(B|x)Pr(W)} \\
&= \sum_{x \in X} \alpha_B^{j,j-1}(x)\xi(x)\frac{Pr(B|x)Pr(x)}{Pr(B)}\frac{Pr(W|x)Pr(B)}{Pr(B|x)Pr(W)} \\
&= \sum_{x \in X} \alpha_B^{j,j-1}(x)\xi(x)\frac{Pr(W|x)Pr(x)}{Pr(W)} \\
&= \sum_{x \in X} \alpha_B^{j,j-1}(x)\xi(x)Pr(x|W)
\end{aligned}$$

where line 2 follows by plugging in the formula for $\Psi(x)$ and lines 3 and 5 follow from Bayes' rule. These steps closely follow DiNardo, Fortin, and Lemieux (1996), although our parameter of interest is a treatment effect rather than a distribution. Given that the weights for all white defendants are equal to 1, D^{IV} is given by:

$$D^{IV} = \sum_{j=1}^{J} \lambda^j \left(\sum_{x \in X} \xi(x)Pr(x|W) \left(\alpha_W^{j,j-1}(x) - \alpha_B^{j,j-1}(x) \right) \right) \tag{B.30}$$

□

C. Non-Parametric Pairwise LATE Framework

A second approach to estimating the average level of racial bias is to estimate each pairwise LATE separately and then impose the preferred weighting scheme across these non-parametric estimates. We consider, for example, an approach that places equal weight on each judge to estimate the average level of racial bias across judges all judges in the sample. This fully non-parametric approach can yield a policy-relevant interpretation of racial bias with minimal assumptions, but often comes at the cost of statistical precision since any particular LATE is often estimated with considerable noise.

In this subsection, we present a formal definition of the equal-weighted level of bias and our non-parametric estimator, provide proofs for consistency, and evaluate the feasibility of this non-parametric approach using Monte Carlo simulations.

C.1. Definition and Consistency of Pairwise LATE Estimator

Definition: Let the equal-weighted LATE estimate of racial bias based on the non-parametric pairwise estimates, $D^{*,PW}$ be defined as:

$$\begin{aligned} D^{*,PW} &= \sum_{j=1}^{J} w^j \left(t_W^j - t_B^j \right) \\ &= \sum_{j=1}^{J} \frac{1}{J} \left(t_W^j - t_B^j \right) \end{aligned} \tag{B.31}$$

where $w^j = \frac{1}{J}$, such that $D^{*,PW}$ can be interpreted as the average level of racial bias across judges – an estimate with clear economic interpretation.

Let the equal-weighted pairwise LATE estimator of racial bias, D^{PW}, be defined as:

$$D^{PW} = \sum_{j=1}^{J} \frac{1}{J} (\alpha_W^{j,j-1} - \alpha_B^{j,j-1}) \tag{B.32}$$

where each pairwise LATE, $\alpha_r^{j,j-1}$, is again the average treatment effect of compliers between judges $j-1$ and j.

Conditions for Consistency: Following the proofs for the IV estimator, D^{PW} provides a consistent estimate of racial bias $D^{*,PW}$ if (1) Z_i is continuous and (2) w^j is constant by race, which is satisfied because the weights are chosen ex post to be equal ($w^j = \frac{1}{J}$).

C.2. Empirical Implementation

Estimating the Pairwise LATEs: We estimate non-parametric LATEs using the following Wald estimator for each pair of judges j and judge $j-1$:

$$\hat{\alpha}_r^{j,j-1} = \frac{\mathbb{E}[Y_i | Z_i = z_j, r] - \mathbb{E}[Y_i | Z_i = z_{j-1}, r]}{\mathbb{E}[Released_i | Z_i = z_j, r] - \mathbb{E}[Released_i | Z_i = z_{j-1}, r]} \tag{B.33}$$

where $\mathbb{E}[Y_i | Z_i = z_j, r]$ is the probability a defendant of race r assigned to judge j is rearrested and $\mathbb{E}[Released_i | Z_i = z_j, r]$ is the probability a defendant of race r assigned to judge j is released. Following the above discussion, our equal-weighted estimate of racial bias is equal to the simple difference between the average estimated pairwise LATE for white defendants and the average estimated pairwise LATE for black defendants.

Monte Carlo Simulation: As discussed above, a fully non-parametric approach can yield a policy-relevant interpretation of racial bias with minimal assumptions, but often comes at the cost of statistical precision since any particular LATE is often estimated with considerable noise. We therefore begin by examining the performance of our non-parametric estimator using Monte Carlo simulations. Specifically, we create a simulated dataset with 170 judges, where each judge is assigned

500 cases with black defendants and 500 cases with white defendants. The latent risk of rearrest before disposition for each defendant is drawn from a uniform distribution between 0 and 1. Each judge releases defendants if and only if the risk of rearrest is less than his or her race-specific threshold. In the simulated data, each judge's threshold for white defendants is set to match the distribution of judge leniencies observed in the true data. For each judge, we then impose a 10 percentage point higher threshold for black defendants, so that the "true" level of racial bias in the simulated data is exactly equal to 0.100. The probability that a released defendant is rearrested ($Y_i = 1$) conditional on release is equal to the risk of the released defendant.

In each draw of the simulated data, we estimate non-parametric LATEs using the Wald estimator described above. Our estimate of racial bias in each draw of the simulated data is equal to the difference between the average release threshold for white defendants and the average release threshold for black defendants. We repeat this entire process 500 times and plot the resulting estimates of the average level of racial bias across all bail judges.

Panel A of Appendix Figure B3 presents the results from this Monte Carlo exercise. The average level of racial bias across all simulations is equal to 0.125, close to the true level. However, the variance of the estimates is extremely large, with nearly 20 percent of the simulations yielding an estimate of racial bias that is greater than one in absolute value. The high variance in the estimates stems from weak first stages between judges that are very close in the leniency distribution. We conclude from this exercise that a fully non-parametric approach yields uninformative estimates of average racial bias in our setting, and do not explore this approach further.[26]

D. Marginal Treatment Effects Framework

Our final estimator uses the MTE framework developed by Heckman and Vytlacil (1999, 2005) to estimate the average level of bias, $D^{*,w}$, where we impose equal weights for each judge. The MTE framework allows us to estimate judge-specific treatment effects for white and black defendants at the margin of release and choose a weighting scheme across all judges, but with the identification and estimation of the judge-specific estimates, t_r^j, coming at the cost of additional auxiliary assumptions.

In this subsection, we present a formal definition of the equal-weighted level of bias and our MTE estimator, provide details on the mapping of the MTE framework to our test of racial bias, provide proofs for consistency, and discuss the details of the empirical implementation and tests of the parametric assumptions.

[26] In unreported results, we also examine the performance of a non-parametric estimator where estimates of α_r^j are formed using a Wald estimator between judge j to judge $j-k$, where $k > 1$. We find that increasing k decreases variance in the simulated estimates, but increases estimation bias, as judges further away in the distribution are used to estimate judge j's threshold. Even with relatively large k, we find the MTE procedure described in Section D is more precise than the pairwise LATE procedure.

D.1. Definition and Consistency of MTE Estimator

Definition: Following the discussion of the equal-weighted non-parametric estimator, let the equal-weighted MTE estimate of racial bias, $D^{*,MTE}$ be defined as:

$$\begin{aligned} D^{*,MTE} &= \sum_{j=1}^{J} w^j \left(t_W^j - t_B^j \right) \\ &= \sum_{j=1}^{J} \frac{1}{J} \left(t_W^j - t_B^j \right) \end{aligned} \tag{B.34}$$

where $w^j = \frac{1}{J}$, such that $D^{*,MTE}$ can again be interpreted as the average level of racial bias across judges.

Let our equal-weighted MTE estimator of racial bias, D^{MTE}, be defined as:

$$D^{MTE} = \sum_{j=1}^{J} \frac{1}{J} \left(MTE_W(p_W^j) - MTE_B(p_B^j) \right) \tag{B.35}$$

where p_r^j is the probability judge j releases a defendant of race r (i.e. judge j's propensity score) and $MTE_r(p_r^j)$ is the estimated MTE at the propensity score for judge j calculated separately for each defendant of race r.

MTE Framework: To formally map our model of racial bias from the main text to the MTE framework developed by Heckman and Vytlacil (2005), we first characterize judge j's pre-trial release decision as:

$$Released_i(z_j, r) = \mathbb{1}\{\mathbb{E}[\alpha_i | r] \leq t_r^j\} \tag{B.36}$$

where $Released_i(z_j, r)$ indicates the probability defendant i of race r is released by judge j, and α_i, and t_r^j are defined as in the main text. Let $F_{\alpha,r}$ be the cumulative density function of $\mathbb{E}[\alpha_i | r]$, which we assume is continuous on the interval $[0, 1]$. Judge j's release decision can now be expressed as the following latent-index model:

$$\begin{aligned} Released_i(z_j, r) &= \mathbb{1}\{F_{\alpha,r}(\mathbb{E}[\alpha_i | r]) \leq F_{\alpha,r}(t_r^j)\} \\ &= \mathbb{1}\{U_{i,r} \leq p_r^j\} \end{aligned} \tag{B.37}$$

where $U_{i,r} \in [0, 1]$ by construction. In this latent-index model, defendants with $U_{i,r} \leq p_r^j$ are released, defendants with $U_{i,r} > p_r^j$ are detained, and defendants with $U_{i,r} = p_r^j$ are on the margin of release for judge j.

Following Heckman and Vytlacil (2005), we define the race-specific marginal treatment effect as the treatment effect for defendants on the margin of release:

$$MTE_r(u) = \mathbb{E}[\alpha_i | r, U_{i,r} = u] \tag{B.38}$$

where $\mathbb{E}[\alpha_i|r, U_{i,r} = p_r^j]$ denotes the treatment effect for a defendant of race r who is on the margin of release to a judge with propensity score equal p_r^j. For simplicity, we denote judge j's propensity score as p_r^j.

Using the above framework, we can now describe how the race-specific MTEs defined by Equation (B.38) allow us estimate racial bias for each judge in our sample. First, recall that the estimand of interest is the treatment effect of pre-trial release for white and black defendants at the margin of release:

$$\alpha_r^j = \mathbb{E}[\alpha_i|r, \mathbb{E}[\alpha_i|r] = t_r^j] \tag{B.39}$$

Because $\mathbb{E}[\alpha_i|r] = t_r^j$ can be replaced with the equivalent condition, $U_{i,r} = p_r^j$, both of which state defendant i is marginal to judge j, we can equate α_r^j to the MTE function at p_r^j:

$$\begin{aligned} \alpha_r^j &= \mathbb{E}[\alpha_i|r, \mathbb{E}[\alpha_i|r] = t_r^j] \\ &= \mathbb{E}[\alpha_i|r, U_{i,r} = p_r^j] \\ &= MTE_r(p_r^j) \end{aligned} \tag{B.40}$$

Equation (B.40) shows that we can use the race-specific MTEs to identify the race-specific treatment effect of each judge, α_r^j, and as a result, race-specific thresholds of release, t_r^j. We can then estimate the level of racial bias for each judge j, $t_W^j - t_B^j$. To see this, let judge j have a propensity score to release white defendants equal to p_W^j and a propensity to release black defendants equal to p_B^j. Given Equation (B.40), the level of racial bias for judge j is therefore equal to $MTE_W(p_W^j) - MTE_B(p_B^j)$. From these judge-specific estimates of racial bias, we can then ex post impose equal weights across judges to estimate D^{MTE}, the average level of racial bias.

Conditions for Consistency: In addition to the assumptions required for a causal interpretation of the IV estimator (existence, exclusion restriction, and monotonicity), our MTE estimator D^{MTE} provides a consistent estimate of $D^{*,MTE}$ if the race-specific MTEs are identified over the entire support of the propensity score calculated using variation in Z_i.

If Z_i is continuous, the local instrumental variables (LIV) estimand provides a consistent estimate of the MTE over the support of the propensity score with no additional assumptions (Heckman and Vytlacil 2005, Cornelissen et al. 2016). With a discrete instrument, however, our MTE estimator is only consistent under additional functional form restrictions that allow us to interpolate the MTEs between the values of the propensity score we observe in the data. In our MTE framework, if our specification of the MTE is flexible enough to capture the true shape of the MTE function, then there will be no infra-marginality bias. If the specification is too restrictive, then there may be misspecification bias in estimating the MTE.

Recall that our goal is to construct the average level of racial bias across judges:

$$\begin{aligned} D^{*,MTE} &= \sum_{j=1}^{J} \frac{1}{J} \left(t_W^j - t_B^j \right) \\ &= \sum_{j=1}^{J} \frac{1}{J} \left(\alpha_W^j - \alpha_B^j \right) \end{aligned} \tag{B.41}$$

With a continuous instrument, α_W^j and α_B^j are identified by evaluating $MTE(p_W^j)$ and $MTE(p_B^j)$. Heckman and Vytlacil (1999) show local instrumental variables (LIV) can be used to identify the MTE non-parametrically. With a discrete instrument, however, $MTE(p_r^j)$ is no longer non-parametrically identified.

Following Heckman and Vytlacil (2005) and Doyle (2007), we use a local polynomial function and information from the observed values of the propensity score to estimate the MTE curve over the full support of the propensity score. Specifically, we use a local quadratic estimator to approximate $\mathbb{E}[Y_i|p_r^j]$, and then estimate the MTE as the numerical derivative of the local quadratic function. In this estimation, we specify a bandwidth, and therefore use information from all judges in a given bandwidth to estimate the threshold for a given judge.

Let the estimated MTE be denoted by $\hat{MTE}(p_r^j)$. We can express our MTE estimator D^{MTE} as:

$$\begin{aligned} D^{MTE} = & \underbrace{\sum_{j=1}^{J} \frac{1}{J} \left(\hat{MTE}(p_W^j) - \hat{MTE}(p_B^j) \right)}_{\text{Estimated MTE}} + \\ & \underbrace{\sum_{j=1}^{J} \frac{1}{J} \left(MTE(p_W^j) - \hat{MTE}(p_W^j) \right) + \sum_{j=1}^{J} \frac{1}{J} \left(\hat{MTE}(p_B^j) - MTE(p_B^j) \right)}_{\text{infra-marginality bias}} \end{aligned} \tag{B.42}$$

In this case, infra-marginality bias arises because we allow for the possibility that the local quadratic function does not provide enough flexibility to accurately capture the shape of the MTE. If we assume our specification of the MTE is flexible enough to capture the shape of the MTE, then $\mathbb{E}[\hat{MTE}(p_r^j)] = MTE(p_r^j)$, indicating there is no infra-marginality bias. Therefore, if we correctly specify the form of the MTE function, then D^{MTE} provides a consistent estimate of $D^{*,MTE}$:

$$\begin{aligned} D^{MTE} &= \sum_{j=1}^{J} \frac{1}{J} \left(MTE_W(p_W^j) - MTE_B(p_B^j) \right) \\ &= \sum_{j=1}^{J} \frac{1}{J} \left(t_W^j - t_B^j \right) \\ &= D^{*,MTE} \end{aligned} \tag{B.43}$$

D.2. Empirical Implementation

Estimating the MTE Curve: We estimate D^{MTE} using a two-step procedure. First, we estimate the entire distribution of MTEs. To estimate each race-specific MTE, we estimate the derivative of our outcome measure (i.e. rearrest before case disposition) with respect to variation in the propensity score provided by our instrument (i.e. variation in the predicted probability of being released from the variation in judge leniency) separately for white and black defendants:

$$MTE_W(p_W^j) = \frac{\partial}{\partial p_W^j}\mathbb{E}(\ddot{Y}_i|p_W^j, W) \tag{B.44}$$

$$MTE_B(p_B^j) = \frac{\partial}{\partial p_B^j}\mathbb{E}(\ddot{Y}_i|p_B^j, B) \tag{B.45}$$

where p_r^j is the propensity score for release for judge j and defendant race r and $\ddot{Y}_i$ is rearrest residualized on all observables: an using exhaustive set of court-by-time fixed effects as well as our baseline crime and defendant controls: gender, age, whether the defendant had a prior offense in the past year, whether the defendant had a prior history of pre-trial crime in the past year, whether the defendant had a prior history of failure to appear in the past year, the number of charged offenses, indicators for crime type (drug, DUI, property, violent, or other), crime severity (felony or misdemeanor), and indicators for any missing characteristics.

Following Heckman, Urzua, and Vytlacil (2006) and Doyle (2007), we begin by residualizing our measure of pre-trial misconduct, pre-trial release, and judge leniency using the full set of fixed effects and observables. We can then calculate the race-specific propensity score using a regression of the residualized release variable on our residualized measure of judge leniency, capturing only the variation in pre-trial release due to variation in the instrument.[27] Next, we compute the numerical derivative of a smoothed function relating residualized pre-trial misconduct to the race-specific propensity score. Specifically, we estimate the relationship between the residualized misconduct variable and the race-specific propensity score using a local quadratic estimator. We then compute the numerical derivative of the local quadratic estimator for each race separately to obtain the race-specific MTEs. In unreported results, we also find nearly identical results using alternative estimation procedures, such as the global polynomials used in Kowalski (2016).

Second, we use the race-specific MTE distributions to calculate the level of racial bias for each judge j. We aggregate these judge-specific estimates of racial bias to calculate an equal-weighted

[27] A common approach in the MTE literature is to exploit variation in the propensity score that arises from covariates. Many treatment effect parameters, such as the average treatment effect, rely on having wide support of the propensity score. However, in practice, it is difficult to identify such strong instruments, so researchers rely on utilizing variation driven by observables. In our setting, we rely on the continuity of the propensity score to estimate the MTE, but require no assumptions concerning the range of the propensity score. In particular, the treatment effects we are interested in are identified by variation in judge leniency by definition.

estimate of racial bias:

$$D^{MTE} = \sum_{j=1}^{J} \frac{1}{J} \left(MTE_W(p_W^j) - MTE_B(p_B^j) \right) \tag{B.46}$$

We calculate standard errors of this equal-weighted estimate by bootstrapping this two-step procedure 500 times at the judge-by-shift level.

Monte Carlo Simulation: To examine the performance of our MTE estimator, we again use a Monte Carlo simulation. Following the simulation used to test the non-parametric estimator, we create a simulated dataset with 170 judges, where each judge is assigned 500 cases with black defendants and 500 cases with white defendants. The latent risk of rearrest before disposition for each defendant is drawn from a uniform distribution between 0 and 1. Each judge releases defendants if and only if the risk of rearrest is less than his or her race-specific threshold. In the simulated data, each judge's threshold for white defendants is set to match the distribution of judge leniencies observed in the true data. For each judge, we then impose a 10 percentage point higher threshold for black defendants, so that the "true" level of racial bias in the simulated data is exactly equal to 0.100. The probability that a released defendant is rearrested ($Y_i = 1$) conditional on release is equal to the risk of the released defendant.

In each draw of the simulated data, we use the MTE estimation procedure outlined above to estimate both the race-specific MTEs and the average level of racial bias when each judge is weighted equally. We repeat this entire process 500 times and plot the resulting estimates of the average level of racial bias across all bail judges.

Panel B of Appendix Figure B3 presents the results from this Monte Carlo exercise. The average level of racial bias across all simulations is equal to 0.090 with a standard deviation of only 0.051. In addition, the 10^{th} percentile of estimates is equal to 0.036 and the 90^{th} percentile equal to 0.143. These results stand in sharp contrast to the statistically uninformative results from our non-parametric estimator and suggest that, in practice, our MTE estimator is likely to yield statistically precise estimates of the average level of racial bias across all bail judges.

Testing the MTE Functional Form Assumption: Following Cornelissen et al. (2016), we test whether the MTE is misspecified by constructing a non-parametric IV estimate of racial bias by taking the correct weighted average of the MTE. Specifically, we re-estimate the IV weights from Equation (B.7), but substitute $p(z_j)$ in for z_j, given that we estimate the MTE curve over the distribution of the propensity score, and not the distribution of leniency. We denote these weights ω_r^{IV}. As shown in Heckman and Vytlacil (2005), the IV estimate, α_r^{IV} is related to the MTE_r by:

$$\alpha_r^{IV} = \int MTE_r(u)\omega_r^{IV}(u)du \tag{B.47}$$

Intuitively, the MTE approach relies on identifying the MTE curve. To do so, we must impose structure on the relationship between the propensity score and the outcome of interest. This implies

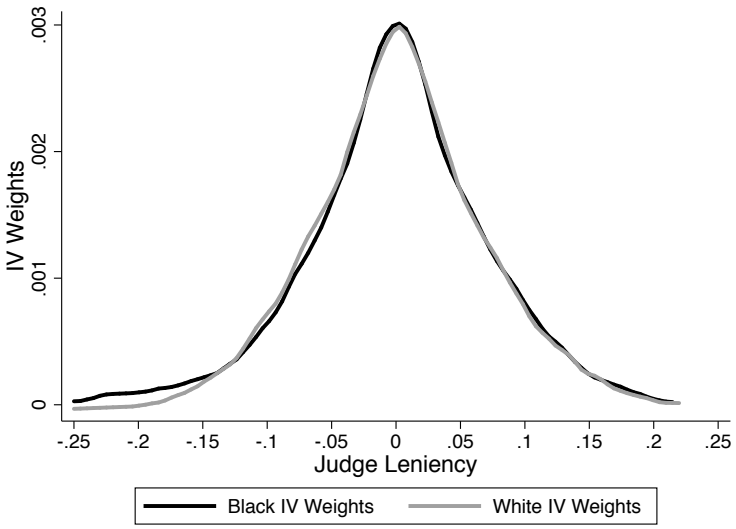
we also impose structure on the derivative of this relationship, which is equal to the MTE curve. If the structure does not bias our estimate of the MTE curve, then we should be able to construct the non-parametric IV by taking the weighted average of the MTE curve shown in Equation (B.47). However, if the estimated MTE is biased, then in general, the weighted average of the MTE will not be equal to the non-parametric IV estimate. We find that our MTE weighted by the IV weights is very close to the non-parametric IV estimate of racial bias. Specifically, the white IV estimate for the effect of release on rearrest is equal to 0.236, while the MTE weighted by the white IV weights yields an estimate of 0.261. Similarly, the black IV estimate for the effect of release on rearrest is equal to 0.014, while the MTE weighted by the black IV weights yields an estimate of 0.021. These results indicate that our MTE is likely to be correctly specified.

Appendix Table B1: Correlation between IV Weights and Observables

	White IV Weights x 100	Black IV Weights x 100
	(1)	(2)
Discrimination	0.424***	0.518***
	(0.066)	(0.062)
Philadelphia	0.117***	0.104***
	(0.016)	(0.016)
Case Load (100s)	0.004***	0.006***
	(0.001)	(0.001)
Average Leniency	0.044	0.000
	(0.055)	(0.054)
Experience	−0.000	0.002*
	(0.001)	(0.001)
Minority Judge	0.003	0.004
	(0.008)	(0.008)
Observations	552	552

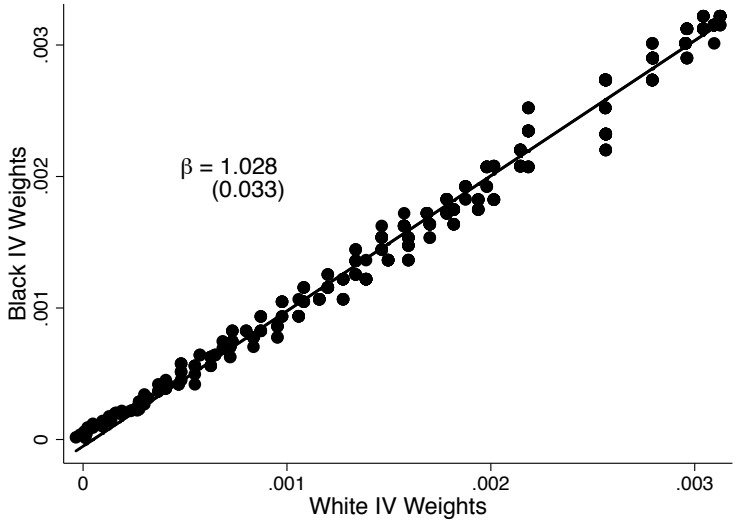
Note: This table estimates the relationship between instrumental variable weights assigned to a given judge-by-year cell on observables of the judge-by-year cell. To ease readability, the coefficients are multiplied by a 100. Column 1 presents results for IV weights calculated for white defendants. Column 2 presents results for IV weights calculated for black defendants. To compute the weight assigned to a judge-by-year cell, we first compute the continuous weights by constructing sample analogues to the terms which appear in Equation (B.7) following the procedure described in Cornelissen et al. (2016) and Appendix B. To move from the continuous weights to a weight associated with a given judge, we compute the average leniency of each judge-by-year cell in the data. We then compute the weight associated with the average leniency of the judge-by-year cell using the results from the continuous weights estimation. We divide the resulting weights by the sum total to ensure the discretized weights sum to one.

Appendix Figure B1: Distribution of IV Weights by Race Across Judge Leniency Distribution



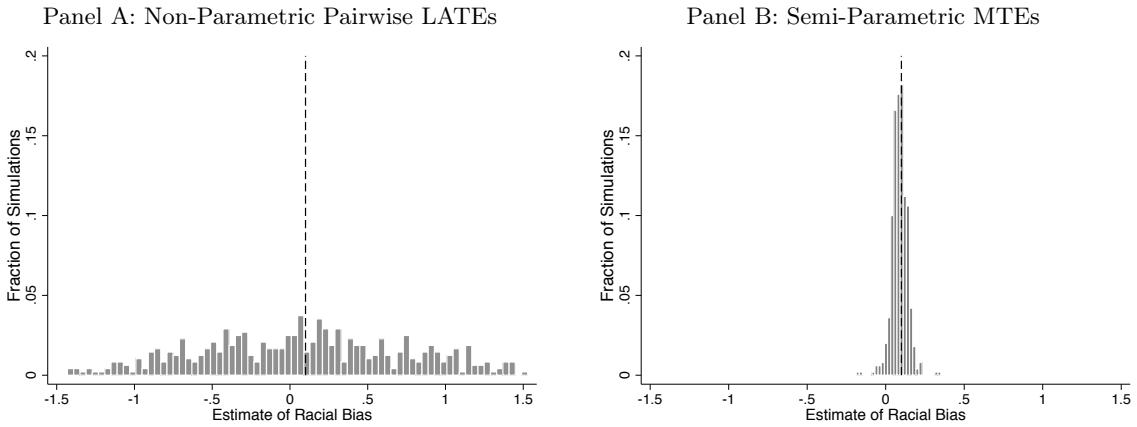
Note: This figure plots the instrumental variables weights over the distribution of judge leniency for both black and white defendants. To compute the instrumental variable weights, we first compute the continuous weights by constructing sample analogues to the terms which appear in Equation (B.7) following the procedure described in Cornelissen et al. (2016) and Appendix B. To move from the continuous weights to a weight associated with a given judge-by-year, we compute the average leniency of each judge-by-year cell in the data. We then compute the weight associated with the average leniency of the judge-by-year cell using the results from the continuous weights estimation. We divide the resulting weights by the sum total to ensure the discretized weights sum to one.

Appendix Figure B2: Correlation Between White IV Weights and Black IV Weights



Note: This figure plots the instrumental variables weight assigned to judge j in year t in the white leniency distribution vs. the instrumental variables weight assigned to judge j in year t in the black distribution. To compute the weight assigned to a judge-by-year cell, we first compute the continuous weights by constructing sample analogues to the terms which appear in Equation (B.7) following the procedure described in Cornelissen et al. (2016) and Appendix B. To move from the continuous weights to a weight associated with a given judge, we compute the average leniency of each judge-by-year cell in the data. We then compute the weight associated with the average leniency of the judge-by-year cell using the results from the continuous weights estimation. We divide the resulting weights by the sum total to ensure the discretized weights sum to one.

Appendix Figure B3: Monte Carlo Simulations of Racial Bias Estimators



Note: This figure reports the distribution of estimated racial bias using a race-specific judge leniency measure in simulated data with a "true" level of racial bias of 0.100. The simulated data include 170 judges, where each judge is assigned 500 black defendants and 500 white defendants. Defendant risk in the simulated data is drawn from a uniform distribution between 0 and 1. Judges release defendants if the risk is less than a judge-specific threshold, where the distribution of judge-specific threshold matches the empirical distribution of judge leniency. For each judge, we impose a 10 percentage point higher threshold for black defendants, so that the "true" level of racial bias in the simulated data is equal to 0.100. Panel A presents estimates from a non-parametric LATE procedure, where we form the Wald estimator between judge j and judge $j-1$ to estimate the release threshold for judge j. Panel B presents estimates from the MTE procedure. The estimate of racial bias is equal to the average estimated release threshold for white defendants minus the average estimated release threshold for black defendants across judges.

Appendix C: Simple Graphical Example

In this appendix, we use a series of simple graphical examples to illustrate how a judge IV estimator for racial bias improves upon the standard OLS estimator. We first consider the OLS estimator in settings with either a single race-neutral judge or a single racially biased judge, showing that the standard estimator suffers from infra-marginality bias whenever there are differences in the risk distributions of black and white defendants. We then use a simple two-judge example to illustrate how a judge IV estimator can alleviate the infra-marginality bias in both settings.

OLS Estimator: To illustrate the potential for infra-marginality bias when using a standard OLS estimator, we begin with the case of a single race-neutral judge. The judge perfectly observes risk and chooses the same threshold for white and black defendants, but the distributions of risk differ by defendant race. Panel A of Appendix Figure C1 illustrates such a case, where we assume that white defendants have more mass in the left tail of the risk distribution, i.e. that whites are, on average, less risky than blacks. Letting the vertical lines denote the judge's release threshold, standard OLS estimates of α_W and α_B measure the average risk of released defendants for white and black defendants, respectively. In the case illustrated in Panel A, the standard OLS estimator indicates that the judge is biased against white defendants, when, in reality, the judge is race-neutral.

To further illustrate this point, Panel B of Appendix Figure C1 considers the case of a single judge that is racially biased against black defendants. Once again, the distributions of risk differ by defendant race, but now the judge chooses different thresholds for white and black defendants. In the case illustrated in Panel B, white and black defendants have the exact same expected risk conditional on release. As a result, the standard OLS estimator indicates that the judge is race-neutral, when, in reality, the judge is biased against black defendants. Following the same logic, we could choose risk distributions and release thresholds such that the OLS estimator indicates racial bias against white defendants or racial bias against black defendants. In other words, the OLS estimator is uninformative about the extent of racial bias in bail decisions without strong assumptions about differences in the underlying distributions of risk by defendant race.

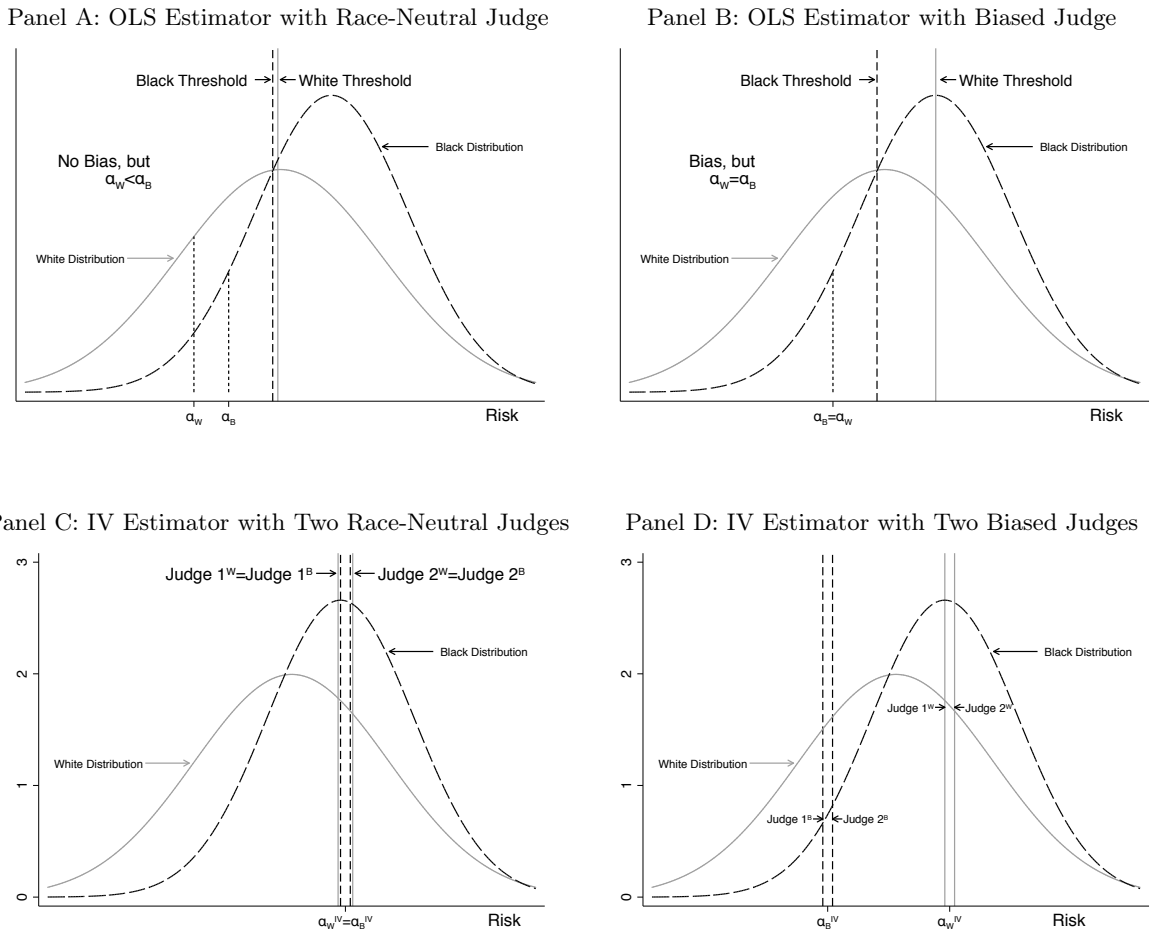
IV Estimators: We now illustrate how a judge IV estimator for racial bias can potentially solve this infra-marginality problem by focusing the analysis on defendants at the margin of release. We use a simple two-judge example to illustrate the intuition behind our approach, while maintaining our assumption that judges perfectly observe risk and that the distributions of risk differ by defendant race. Throughout, we assume that judge 2 is more lenient than judge 1.

Panel C of Appendix Figure C1 considers the case where both judges are race-neutral, such that both judges use the same thresholds of release for white and black defendants. In this case, an IV estimator using judge leniency as an instrument for pre-trial release will estimate the average risk for defendants who are released by the lenient judge but detained by the strict judge (i.e. the average risk of compliers), α_W^{IV} and α_B^{IV}. When the two judges are "close enough" in leniency, the IV estimator for racial bias will approximately estimate the risk of marginally released black defendants

and marginally released white defendants. Intuitively, the IV estimator measures misconduct risk only for defendants near the margin of release, essentially ignoring the risk of defendants who are infra-marginal to the judge thresholds. As our measure of judge leniency becomes more continuous, our IV estimator will consistently estimate racial bias as the difference between α_W^{IV} and α_B^{IV}. The IV estimator will therefore indicate that marginal black and marginal white defendants have similar misconduct rates, allowing us to correctly conclude that the judges are race-neutral.

To further illustrate this point, Panel D of Appendix Figure C1 considers the case where both judges are racially biased against black defendants, such that both judges have higher thresholds of release for white defendants relative to black defendants. Following the same logic as above, the IV estimator measures the pre-trial misconduct risk of marginally released white and black defendants, α_W^{IV} and α_B^{IV}, so long as the two judges are "close enough" in leniency. The IV estimator will therefore indicate that marginal black defendants are lower risk than marginal white defendants, allowing us to correctly conclude that judges are racially biased against black defendants.

Appendix Figure C1: Infra-marginality Bias with OLS and Judge IV Estimators



Note: These figures plot hypothetical risk distributions for white and black defendants. Panel A illustrates the OLS estimator with a race-neutral judge that chooses the same threshold for release for white and black defendants. Panel B illustrates the OLS estimator with a racially biased judge that chooses a higher threshold for release for white defendants compared to black defendants. Panel C illustrates the judge IV estimator with two race-neutral judges. Panel D illustrates the judge IV estimator with two racially biased judges.

Appendix D: Data Appendix

Judge Leniency: We calculate judge leniency as the leave-out mean residualized pre-trial release decisions of the assigned judge within a bail year. We use the residual pre-trial release decision after removing court-by-time fixed effects. In our main results, we define pre-trial release based on whether a defendant was ever released prior to case disposition.

Release on Recognizance: An indicator for whether the defendant was released on recognizance (ROR), where the defendant secures release on the promise to return to court for his next scheduled hearing. ROR is used for defendants who show minimal risk of flight, no history of failure to appear for court proceedings, and pose no apparent threat of harm to the public.

Non-Monetary Bail w/Conditions: An indicator for whether the defendant was released on non-monetary bail with conditions, also known as conditional release. Non-monetary conditions include monitoring, supervision, halfway houses, and treatments of various sorts, among other options.

Monetary Bail: An indicator for whether the defendant was assigned monetary bail. Under monetary bail, a defendant is generally required to post a bail payment to secure release, typically 10 percent of the bail amount, which can be posted directly by the defendant or by sureties such as bail bondsmen.

Bail Amount: Assigned monetary bail amount in thousands, set equal to zero for defendants who receive non-monetary bail with conditions or ROR.

Race: Indicator for whether the defendant is black (versus non-black).

Hispanic: We match the surnames in our data to census genealogical records of surnames. If the probability a given surname is Hispanic is greater than 70 percent, we label the defendant as Hispanic.

Prior Offense in Past Year: An indicator for whether the defendant had been charged for a prior offense in the past year of the bail hearing within the same county, set to missing for defendants who we cannot observe for a full year prior to their bail hearing.

Arrested on Bail in Past Year: An indicator for whether the defendant had been arrested while out on bail in the past year within the same county, set to missing for defendants who we cannot observe for a full year prior to their bail hearing.

Failed to Appear in Court in Past Year: An indicator for whether the defendant failed to appear in court while out on bail in the past year within the same county, set to missing for defendants who we cannot observe for a full year prior to their bail hearing. This variable is only available in Philadelphia.

Number of Offenses: Total number of charged offenses.

Felony Offense: An indicator for whether the defendant is charged with a felony offense.

Misdemeanor Offense: An indicator for whether the defendant is charged with only misdemeanor offenses.

Any Drug Offense: An indicator for whether the defendant is charged with a drug offense.

Any DUI Offense: An indicator for whether the defendant is charged with a DUI offense.

Any Violent Offense: An indicator for whether the defendant is charged with a violent offense.

Any Property Offense: An indicator for whether the defendant is charged with a property offense.

Rearrest Prior to Disposition: An indicator for whether the defendant was rearrested for a new crime prior to case disposition.

Failure to Appear in Court: An indicator for whether the defendant failed to appear for a required court appearance, as proxied by the issuance of a bench warrant. This outcome is only available in Philadelphia.

Failure to Appear in Court or Rearrest Prior to Disposition: An indicator for whether a defendant failed to appear in court or was rearrested in Philadelphia, and for whether a defendant was rearrested in Miami.

Judge Race: We collect information on judge race from court directories and conversations with court officials. All judges in Philadelphia are white. Information on judge race in Miami is missing for two of the 170 judges in our sample.

Judge Experience: We use historical court records back to 1999 to compute experience, which we define as the difference between bail year and start year (earliest 1999). In our sample, years of experience range from zero to 15 years.

Appendix E: Institutional Details

The institutional details described in this Appendix follow directly from Dobbie et al. (2018). Like the federal government, both Pennsylvania and Florida grant a constitutional right to some form of bail for most defendants. For instance, Article I, §14 of the Pennsylvania Constitution states that "[a]ll prisoners shall be bailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community...." Article I, §14 of the Florida Constitution states that "[u]nless charged with a capital offense or an offense punishable by life imprisonment...every person charged with a crime...shall be entitled to pretrial release on reasonable conditions."

Philadelphia County: In Philadelphia County, defendants are brought to one of six police stations immediately following their arrest, where they are interviewed by the city's Pre-Trial Services Bail Unit. The Philadelphia Bail Unit interviews all adults charged with offenses in Philadelphia through videoconference, collecting information on each defendant's charge severity, personal and financial history, family or community ties, and criminal history. The Bail Unit then uses this information to generate a release recommendation based on a four-by-ten grid of bail guidelines that is presented to the bail judge at the bail hearing. However, these bail guidelines are only followed by the bail judge about half the time, with judges often imposing monetary bail instead of the recommended non-monetary options (Shubik-Richards and Stemen 2010).

After the Pre-Trial Services interview is completed and the charges are approved by the Philadelphia District Attorney's Office, defendants are brought in for a bail hearing. Bail hearings are conducted through videoconference by the bail judge on duty, with representatives from both the district attorney and local public defender's offices (or private defense counsel) present. However, while a defense attorney is present at the bail hearing, there is usually no real opportunity for defendants to speak with the attorney prior to the hearing. At the hearing itself, the bail judge reads the charges against the defendant, informs the defendant of his right to counsel, sets bail after hearing from representatives from the prosecutor's office and the defendant's counsel, and schedules the next court date. After the bail hearing, the defendant has an opportunity to post bail, secure counsel, and notify others of the arrest. If the defendant is unable to post bail, he is detained but has the opportunity to petition for a bail modification in subsequent court proceedings.

Under the Pennsylvania Rules of Criminal Procedure, "the bail authority shall consider all available information as that information is relevant to the defendant's appearance or nonappearance at subsequent proceedings, or compliance or noncompliance with the conditions of the bail bond," including information such as the nature of the offense, the defendant's employment status and relationships, and whether the defendant has a record of bail violations or flight. Pa. R. Crim. P. 523. In setting monetary bail, "[t]he amount of the monetary condition shall not be greater than is necessary to reasonably ensure the defendant's appearance and compliance with the conditions of the bail bond." Pa. R. Crim. P. 524. Under Pa. R. Crim. 526, a required condition of any

bail bond is that the defendant "refrain from criminal activity." In Philadelphia, it is well known that bail judges consider the risk of new crime when setting bail (see Goldkamp and Gottfredson 1988), and in fact, the Philadelphia bail guidelines are designed to "reduce the risk of releasing dangerous defendants into the community while ensuring that defendants who pose minimal risk are not confined to prison to await trial."[28]

Miami-Dade County: The Miami-Dade bail system follows a similar procedure, with one important exception. As opposed to Philadelphia where all defendants are required to have a bail hearing, most defendants in Miami-Dade can be immediately released following arrest and booking by posting an amount designated by a standard bail schedule. The standard bail schedule ranks offenses according to their seriousness and assigns an amount of bond that must be posted before release. Critics have argued that this kind of standardized bail schedule discriminates against poor defendants by setting a fixed price for release according to the charged offense rather than taking into account a defendant's ability to pay, or propensity to flee or commit a new crime. Approximately 30 percent of all defendants in Miami-Dade are released prior to a bail hearing through the standard bail schedule, with the other 70 percent of defendants attending a bail hearing (Goldkamp and Gottfredson 1988).

If a defendant is unable to post the standard bail amount in Miami-Dade, there is a bail hearing within 24 hours of arrest where defendants can argue for a reduced bail amount. Miami-Dade conducts separate daily hearings for felony and misdemeanor cases through videoconference by the bail judge on duty. At the bail hearing, the court will determine whether or not there is sufficient probable cause to detain the arrestee and if so, the appropriate bail conditions. The standard bail amount may be lowered, raised, or remain the same as the standard bail amount depending on the case situation and the arguments made by defense counsel and the prosecutor. While monetary bail amounts at this stage often follow the standard bail schedule, the choice between monetary versus non-monetary bail conditions varies widely across judges in Miami-Dade (Goldkamp and Gottfredson 1988).

Under the Florida Rules of Criminal Procedure, "[t]he judicial officer shall impose the first ... conditions of release that will reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process." Fl. R. Crim. P. 3.131. As noted in Florida's bail statute, "[i]t is the intent of the Legislature that the primary consideration be the protection of the community from risk of physical harm to persons." Fla. Stat. Ann. §907.041(1).

Institutional Features Relevant to the Empirical Design: Our empirical strategy exploits variation in the pre-trial release tendencies of the assigned bail judge. There are three features of the Philadelphia and Miami-Dade bail systems that make them an appropriate setting for our research design. First, there are multiple bail judges serving simultaneously, allowing us to measure variation in bail decisions across judges. At any point in time, Philadelphia has six bail judges that only make bail decisions. In Miami-Dade, weekday cases are handled by a single bail judge, but weekend cases are

[28]See https://www.courts.phila.gov/pdf/notices/2012/6-12-12-Notice-to-Bar-Proposed-Bail-Guidelines.pdf.

handled by approximately 60 different judges on a rotating basis. These weekend bail judges are trial court judges from the misdemeanor and felony courts in Miami-Dade that assist the bail court with weekend cases.

Second, the assignment of judges is based on rotation systems, providing quasi-random variation in which bail judge a defendant is assigned to. In Philadelphia, the six bail judges serve rotating eight-hour shifts in order to balance caseloads. Three judges serve together every five days, with one bail judge serving the morning shift (7:30AM-3:30PM), another serving the afternoon shift (3:30PM-11:30PM), and the final judge serving the night shift (11:30PM-7:30AM). In Miami-Dade, the weekend bail judges rotate through the felony and misdemeanor bail hearings each weekend to ensure balanced caseloads during the year. Every Saturday and Sunday beginning at 9:00AM, one judge works the misdemeanor shift and another judge works the felony shift.

Third, there is very limited scope for influencing which bail judge will hear the case, as most individuals are brought for a bail hearing shortly following the arrest. In Philadelphia, all adults arrested and charged with a felony or misdemeanor appear before a bail judge for a formal bail hearing, which is usually scheduled within 24 hours of arrest. A defendant is automatically assigned to the bail judge on duty. There is also limited room for influencing which bail judge will hear the case in Miami-Dade, as arrested felony and misdemeanor defendants are brought in for their hearing within 24 hours following arrest to the bail judge on duty.

Appendix F: Model of Stereotypes

In this appendix, we consider whether a model of stereotypes can generate the pre-trial release rates we observe in our data. To do so, we assume a functional form for how judges form perceptions of risk and ask if this model can match the patterns we observe in the data.

Calculating Predicted Risk: We begin by estimating predicted risk using a machine learning algorithm that efficiently uses all observable crime and defendant characteristics. In short, we use a randomly-selected subset of the data to train the model using all individuals released on bail. In training the model, we must choose the shrinkage, the number of trees, and the depth of each tree. Following common practice, we choose the smallest shrinkage parameter (i.e. 0.005) that allows the training process to run in a reasonable time frame. We use a 5-fold cross validation on the training sample in order to choose the optimal number of trees for the predictions. The interaction depth is set to 5, which allows each tree to use at most 5 variables. Using the optimal number of trees from the cross validation step, predicted probabilities are then created for the full sample.

Following the construction of the continuous predicted risk variable, we split the predicted risk measure into 100 equal sized bins. One potential concern with this procedure is that observably high-risk defendants may actually be low-risk based on variables observed by the judges, but not by the econometrician. To better understand the importance of this issue, we follow Kleinberg et al. (2018) and plot the relationship between predicted risk and true risk in the test sample. We find that predicted risk is a strong predictor of true risk, indicating that the defendants released by judges do not have unusual unobservables which make their outcomes systematically diverge from what is expected (see Appendix Figure A3). This is true for both white and black defendants. Therefore, we interpret the predicted distributions of risk based on observables as the true distributions of risk throughout.

No Stereotypes Benchmark: Following the construction of our predicted risk measure, we compute the fraction of black defendants that would be released if they were treated the same as white defendants. This calculation will serve as a benchmark for the stereotype model discussed below. To make this benchmark calculation, we assume judges accurately predict the risk of white defendants so that we can generate a relationship between release and risk, which we can then apply to black defendants. Under this assumption, we find that the implied release rate for black defendants is 70.7 percent if they were treated the same as white defendants. This implied release rate is lower than the true release rate of white defendants (71.2 percent), but higher than the true release rate for black defendants (68.9 percent), consistent with our main finding that judges over-detain black defendants.

Model with Stereotypes: We can now consider whether a simple model of stereotypes can rationalize the difference in true release rates. Following Bordalo et al. (2016), we assume judges form beliefs about the distribution of risk through a representativeness-based discounting model. Basically, the weight attached to a given risk type t is increasing in the representativeness of t. Formally, let $\pi_{t,r}$

be the probability that a defendant of race r is in risk category $t \in \{1, ..., 100\}$. In our data, a defendant with $t = 1$ has a 2.7 percent expected probability of being rearrested before disposition while a defendant with $t = 100$ has a 74.5 percent probability of being rearrested before disposition.

Let $\pi^{st}_{t,r}$ be the stereotyped belief that a defendant of race r is in risk category t. The stereotyped beliefs for black defendants, $\pi^{st}_{t,B}$, is given by:

$$\pi^{st}_{t,B} = \pi_{t,B} \frac{\left(\frac{\pi_{t,B}}{\pi_{t,W}}\right)^{\theta}}{\sum_{s \in T} \pi_{s,B} \left(\frac{\pi_{s,B}}{\pi_{s,W}}\right)^{\theta}} \tag{F.1}$$

where θ captures the extent to which representativeness distorts beliefs and the representativeness ratio, $\frac{\pi_{t,B}}{\pi_{t,W}}$, is equal to the probability a defendant is black given risk category t divided by the probability a defendant is white given risk category t. Recall from Figure 3 that representativeness of blacks is strictly increasing in risk. Therefore, a representativeness-based discounting model will over-weight the right tail of risk for black defendants.

To compute the stereotyped distribution, we first assume a value of θ, and then compute $\pi_{t,r}$ for every risk category t and race r. We can then compute $\pi^{st}_{t,B}$ by plugging in the values for $\pi_{t,r}$ and the assumed value of θ into Equation (F.1).

From the distribution of $\pi^{st}_{t,B}$, we compute the implied average release rate by multiplying the fraction of defendants believed to be at a given risk level by the probability of release for that risk level and summing up over all risk levels. Formally,

$$\mathbb{E}[Released_i = 1 | r_i = B] = \sum_{s=1}^{100} \pi^{st}_{s,B} \mathbb{E}[Released_i = 1 | t = s, r_i = B] \tag{F.2}$$

In the equation above, we cannot compute $\mathbb{E}[Released_i = 1 | t = s, r_i = B]$ given that we explicitly assume judges make prediction errors for black defendants. That is, we do not know at what rate judges would release black defendants with risk equal to s, given that judges do not accurately predict risk for black defendants. However, in a stereotypes model, we can replace $\mathbb{E}[Released_i = 1 | t = s, r_i = B] = \mathbb{E}[Released_i = 1 | t = s, r_i = W]$ (i.e. given that if there is no taste-based discrimination, then conditional on perceived risk, the release rate will be equal between races). Under our additional assumption that judges accurately predict the risk of whites, we can estimate $\mathbb{E}[Released_i = 1 | t = s, r_i = W]$ for all s. Therefore, we can compute every value on the right hand side of Equation (F.2), from which we can back out the average release rate for black defendants from the stereotyped distribution.

We find that $\theta = 1.9$ rationalizes the average release rate for blacks we observe in the data (68.8 percent). That is, if judges use a representativeness-based discounting model with $\theta = 1.9$ to form perceptions of the risk distribution, we would expect judges to release 68.8 percent of all black defendants. To understand how far these beliefs are from the true distribution of risk, we plot the stereotyped distribution for blacks with $\theta = 1.9$ alongside the true distribution of risk for blacks

in Appendix Figure A4. The average risk in the stereotyped distribution is about 5.4 percentage points greater than the mean in the true distribution of risk.

STATE OF NORTH CAROLINA
ORANGE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO: 13 CR [redacted]

STATE OF NORTH CAROLINA

V.

[redacted],
Defendant

MOTION TO UNSECURE OR REDUCE BOND

NOW COMES the Accused, by and through Counsel, pursuant to the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 19 and 27 of the North Carolina Constitution, and N.C.G.S. §15A-531 et. seq., and shows the Court that he is confined in the Orange County Jail awaiting trial on the charge of possession of five or more counterfeit instruments, a class G felony. Mr. [redacted], who has no prior record, is being held under a bond in the amount of $1,000,000, which is excessive. He has been held in custody for this charge since 18 December 2013. §15A-538(a) allows Mr. [redacted] to apply to this Court for relief from bond requirements imposed in district court.

WHEREFORE, Mr. [redacted] prays that an Order issue unsecuring or reducing his bond, and that this matter be set for hearing on 8 January 2014.

RESPECTFULLY submitted this 2nd day of January, 2014.

Mani Dexter
Attorney for Mr. [redacted]
100 Europa Drive, Suite 341
Chapel Hill, NC 27517
(919) 967-0504
mani@tyndalldexter.com

CERTIFICATE OF SERVICE

I certify that this motion has been served on the following by hand delivery:

District Attorney's Office
Pittsboro, NC

This is the 2nd day of January, 2014.

_____

Mani Dexter

STATE OF NORTH CAROLINA
ORANGE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO: 13 CR [redacted]

STATE OF NORTH CAROLINA

V.

[redacted],
Defendant

ORDER

THIS CAUSE coming on for hearing and being heard before the undersigned presiding judge and it appearing to the Court that a bond of $ _____ SECURED / UNSECURED will be adequate to assure the presence of the Defendant at trial;

IT IS HEREBY ORDERED that the bond in the above-entitled cause shall be and same is reduced from $1,000,000 Secured to $ _____ SECURED / UNSECURED.

IT IS SO ORDERED this the _____ day of January 2014.

_____
SUPERIOR COURT JUDGE PRESIDING

STATE OF NORTH CAROLINA
COUNTY OF ORANGE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISON

IN THE MATTER OF
[redacted],

PETITION FOR WRIT OF HABEAS CORPUS

NOW COMES [redacted], by and through counsel, and moves this Court to grant him a writ of habeas corpus as he is being held illegally by the Orange County jail.

In support of this motion, Mr. [redacted] presents the attached affidavit, which is incorporated by reference herein.

WHEREFORE, counsel moves this Court to issue a Writ of Habeas Corpus for Mr. [redacted].

RESPECTFULLY SUBMITTED, this the ___ day of June, 2010.

MANI DEXTER
ATTORNEY FOR [or ON BEHALF OF] MR. [redacted]
AMOS GRANGER TYNDALL, P.A.
312 West Franklin Street
Chapel Hill, NC 27516
(919) 967-0504

STATE OF NORTH CAROLINA
COUNTY OF ORANGE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISON

IN THE MATTER OF
[redacted],

AFFIDAVIT IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW Mani Dexter, attorney for [or "on behalf of," depending on specifics of the situation] [redacted], and being duly sworn, deposes and says the following:

1. The information contained in this affidavit is information obtained by counsel through counsel's investigation, personal knowledge and observations of counsel, confidential sources of information, and review of documents in the case file.
2. On Thursday, June 3, 2010 at 12:30 pm, Mr. [redacted] entered a guilty plea in Orange County District Court to the misdemeanor charge of possession of a handgun by a minor. Mr. [redacted] was sentenced to 12 days to be served in the Orange County jail, and given credit for the 12 days he spent in custody since his arrest on May 22, 2010.
3. At the time of his plea on June 3rd, Mr. [redacted] was under an immigration detainer that required the Orange County jail to hold him for a period not to exceed 48 hours (excluding Saturdays and Sundays and federal holidays). Attached as ***Exhibit 1***. This 48-hour period is specified in federal regulations (8 CFR 287.7).
4. Immediately after Mr. [redacted]'s plea was entered on June 3rd, ADA Byron Beasley walked over to the jail and informed them about the plea.
5. As of Monday, June 07, 2010, at 2:00 pm, Mr. [redacted] was still in custody at the Orange County jail. This is past the allowable 48 hours, even excluding the two weekend days.
6. Personnel at the Orange County jail indicated that Immigration would be coming on Tuesday, June 8, 2010 to pick up Mr. [redacted], but that no additional paperwork authorizing Mr. [redacted] to be held existed.
7. There is no authority to hold Mr. [redacted] any longer at the Orange County jail.
8. Mr. [redacted] is being held illegally at the Orange County jail and must be released.

FURTHER AFFIANT SAYS NOT.

_____
Mani Dexter

Sworn to and subscribed before me
this the ___ day of April, 2010.

_____
Notary Public
My commission expires:_____

STATE OF NORTH CAROLINA
COUNTY OF ORANGE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISON

IN THE MATTER OF

[redacted],

WRIT OF HABEAS CORPUS

TO Orange County Jail:

You are ordered to bring [redacted], by whatever name he may be called, before Judge _____, on _____, to _____, together with the official records of his confinement.

This, the ____ day of June, 2010.

THE HONORABLE _____
Superior Court Judge

TO THE SHERIFF OF ORANGE COUNTY:

You are hereby ordered to serve the foregoing writ of habeas corpus upon Orange County Jail.

THE HONORABLE _____
Superior Court Judge

RETURN

RECEIVED on the ____ day of June, 2010. Served by reading and delivering a copy to _____ on the _____ day of June, 2010.

_____
Sheriff/Deputy Sheriff

For the Record

An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System

By Elizabeth Hinton, Assistant Professor, Department of History and Department of African and African American Studies, Harvard University, LeShae Henderson, Special Assistant, Research, Vera Institute of Justice, and Cindy Reed, Senior Editor, Vera Institute of Justice

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Summary

The over-representation of black Americans in the nation's justice system is well documented. Black men comprise about 13 percent of the male population, but about 35 percent of those incarcerated. One in three black men born today can expect to be incarcerated in his lifetime, compared to one in six Latino men and one in 17 white men. Black women are similarly impacted: one in 18 black women born in 2001 is likely to be incarcerated sometime in her life, compared to one in 111 white women. The underlying reasons for this dis-proportionate representation are rooted in the history of the United States and perpetuated by current practices within the nation's justice system.

This brief presents an overview of the ways in which America's history of racism and oppression continues to manifest in the criminal justice system, and a summary of research demonstrating how the system perpetuates the disparate treatment of black people. The evidence presented here helps account for the hugely disproportionate impact of mass incarceration on millions of black people, their families, and their communities. This brief explains that:

- Discriminatory criminal justice policies and practices have historically and unjustifiably targeted black people since the Reconstruction Era, including Black Codes, vagrancy laws, and convict leasing, all of which were used to continue post-slavery control over newly-freed people.
- This discrimination continues today in often less overt ways, including through disparity in the enforcement of seemingly race-neutral laws. For example, while rates of drug use are similar across racial and ethnic groups, black people are arrested and sentenced on drug charges at much higher rates than white people.
- Bias by decision makers at all stages of the justice process disadvantages black people. Studies have found that they are more likely to be stopped by the police, detained pretrial, charged with more serious crimes, and sentenced more harshly than white people.
- Living in poor communities exposes people to risk factors for both offending and arrest, and a history of structural racism and inequality of opportunity means that black people are more likely to be living in such conditions of concentrated poverty.

In addition to the clear injustice of a criminal justice system that disproportionately impacts black people, maintaining these racial disparities has a high cost for individuals, families, and communities. At the individual level, a criminal conviction has a negative impact on both employability and access to housing and public services. At the community level, disproportionately incarcerating people from poor communities removes economic resources and drives cycles of poverty and justice system involvement, making criminal justice contact the norm in the lives of a growing number of black Americans.

About these briefs

Public policy—including decisions related to criminal justice and immigration—has far-reaching consequences, but too often is swayed by political rhetoric and unfounded assumptions. The Vera Institute of Justice has created a series of briefing papers to provide an accessible summary of the latest evidence concerning justice-related topics. By summarizing and synthesizing existing research, identifying landmark studies and key resources and, in some cases, providing original analysis of data, these briefs offer a balanced and nuanced examination of some of the significant justice issues of our time.

A snapshot of current disparities in incarceration

Present day disparities show that the burden of the tough on crime and mass incarceration eras has not fallen equally on all Americans, but has excessively and unfairly burdened black people. Though these disparities have narrowed in recent years, there still remains a wide gulf between black and white incarceration rates.[1] Black people are represented in the American criminal justice system in unwarranted numbers given their share of the population.[2]

- Black men comprise about 13 percent of the U.S. male population, but nearly 35 percent of all men who are under state or federal jurisdiction with a sentence of more than one year.[3]
- One in three black men born in 2001 can expect to be incarcerated in his lifetime, compared to one in six Latino men and one in 17 white men.[4]
- Black people are incarcerated in state prisons at a rate 5.1 times greater than that of white people.[5]
- One in 18 black women born in 2001 will be incarcerated sometime in her life, compared to one in 45 Latina women and one in 111 white women.[6]
- Forty-four percent of incarcerated women are black, although black women make up about 13 percent of the female U.S. population.[7]

As this brief demonstrates, these racial disparities are no accident, but rather are rooted in a history of oppression and discriminatory decision making that have deliberately targeted black people and helped create an inaccurate picture of crime that deceptively links them with criminality. (See "Black people have historically been targeted by intentionally discriminatory criminal laws," below.) They are compounded by the racial biases that research has shown to exist in individual actors across the criminal justice system—from police and prosecutors to judges and juries—that lead to disproportionate levels of stops, searches, arrests, and pretrial detention for black people, as well as harsher plea bargaining and sentencing outcomes compared to similarly situated white people. (See "Bias by criminal justice system actors can lead to disproportionate criminal justice involvement for black people" at page 7.) Underlying all of this are deep and systemic inequities that have resulted in inordinate numbers of black Americans living in overpoliced, poor communities, surrounded by economic and educational disadvantage—known drivers of criminal behavior—resulting in a tenacious cycle of criminal justice involvement for too many black individuals and their families. (See "Communities of color are disproportionately impacted by extreme poverty and its connection to crime" at page 10.)

Black people have historically been targeted by intentionally discriminatory criminal laws

Racial disparities in the criminal justice system have deep roots in American history and penal policy. In the South, following Emancipation, black Americans were specific targets of unique forms of policing, sentencing, and confinement. Laws that capitalized on a loophole in the 13th Amendment that states citizens cannot be enslaved *unless* convicted of a crime intentionally targeted newly emancipated black people as a means of surveilling them and exploiting their labor. In 1865 and 1866, the former Confederate legislatures quickly enacted a new set of laws known as the **Black Codes** to force former slaves back into an exploitative labor system that resembled the plantation regime in all but name.[8] Although these codes did recognize the new legal status of black Americans, in most states newly-freed people could not vote, serve on juries, or testify in court.[9] **Vagrancy laws** at the center of the Black Codes meant that any black person who could not prove he or she worked for a white employer could be arrested.[10] These "vagrants" most often entered a system of incarceration administered by private industry. Known as **convict leasing**, this system allowed for the virtual enslavement of people who had been convicted of a crime, even if those "crimes" were for things like "walking without a purpose" or "walking at night," for which law enforcement officials in the South aggressively targeted black people.[11]

Northern states also turned to the criminal justice system to exert social control over free black Americans. Policymakers in the North did not legally target black Americans as explicitly as did their southern counterparts, but disparate enforcement of various laws against "suspicious characters," disorderly conduct, keeping and visiting disorderly houses, drunkenness, and violations of city ordinances made possible new forms of everyday surveillance and punishment in the lives of black people in the Northeast, Midwest, and West.[12] Though such criminal justice

involvement was based on racist policies, the results were nevertheless used as evidence to link black people and crime. After Reconstruction, scholars, policymakers, and reformers analyzed the disparate rates of black incarceration in the North as empirical "proof" of the "criminal nature" of black Americans.[13]

Higher rates of imprisonment of black people in both the North and South deeply informed ongoing national debates about racial differences. The publication of the 1890 census and the prison statistics it included laid the groundwork for discussions about black Americans as a distinctly dangerous population.[14] Coming 25 years after the Civil War and measuring the first generation removed from slavery, the census figures indicated that black people represented 12 percent of the nation's population, but 30 percent of those incarcerated.[15] The high arrest and incarceration rates of black Americans—though based on the racist policies discussed above—served to create what historian Khalil Gibran Muhammad has called a "statistical discourse" about black crime in the popular and political imagination, and this data deeply informed national discussions about racial differences that continue to this day.[16] Indeed, a 2010 study found that white Americans overestimate the share of burglaries, illegal drug sales, and juvenile crime committed by black people by approximately 20 to 30 percent.[17] (See "The myth of black-on-black crime," on page 4.)

These distorted notions of criminality continued to shape political discourse and policy decisions throughout the 20th century. In 1965, President Lyndon Johnson declared the "War on Crime" and began the process of expanding and modernizing American law enforcement.[18] Johnson made his declaration despite stable or decreasing crime levels. Perceived increases in crime in urban centers at the time may be tied in part to changes in law enforcement practices and crime reporting as jurisdictions vied for newly-available federal funding for law enforcement under his initiatives.[19] Nevertheless, a discourse about high crime in urban areas—areas largely populated by black people—had taken hold in the national consciousness.[20]

Statistics linking black people and crime have historically overstated the problem of crime in black communities and produced a skewed depiction of American crime as a whole.[21] The FBI's Uniform Crime Report—one commonly cited source for U.S. crime statistics—fails to measure criminal justice outcomes beyond the point of arrest, and thus does not account for whether or not suspects are convicted.[22] In the 1970s, black people had the highest rate of arrest for the crimes of murder, robbery, and rape—crimes that also had the lowest percentage of arrestees who were eventually convicted.[23] Yet statistical data on crime based on arrest rates deepened federal policymakers' racialized perception of the problem, informing crime control strategies that intensified law enforcement in low-income communities of color from the 1960s onwards.[24] For instance, in trying to understand where and when certain crimes occur, researchers from the National Commission on Law Enforcement and Administration of Justice spoke only with law enforcement agencies and officers stationed in low-income black communities. This skewed the data—which intentionally ignored the disproportionate police presence in these neighborhoods as well as delinquency among middle class, white, young men—yet was used to craft strategies for the War on Crime, such as increased patrol and surveillance in low-income communities of color.[25]

Even present-day race-neutral laws and policies can have disparate impacts on black people

Legislators in the United States no longer explicitly write laws in the racially discriminatory manner that marked the Reconstruction Era. But even laws that are neutral on their face can disparately impact black people.[26] The "War on Drugs," for example, inspired policies like drug-free zones and habitual offender laws that produced differential outcomes by race.

- **Drug-free zone laws** prohibit the use or sale of drugs in proximity of certain protected areas like schools, playgrounds, parks, and public housing projects.[27] Those who use or sell drugs within a certain distance from these areas typically receive punitive sentences, such as mandatory minimums (up to eight years in some states), sentence enhancements (which allow judges to increase a person's sentence beyond the normal range), or doubling of the maximum penalty for the underlying offense (as in Washington, DC).[28] Because of residential segregation—which pushes low-income black people to high density areas of the city and white people often to less dense suburbs—coupled with the high density of the neighborhoods where schools in urban areas are located, people of color are disproportionately impacted by these laws.[29] In Massachusetts, for instance, a 2004 review of

The myth of "black-on-black" crime

The notion that black people commit violence against other black people at greater levels than do members of other racial and ethnic groups is sometimes colloquially referred to as "black-on-black crime." The term was originally used by those in the black community to express concerns about the safety of their neighborhoods, but has been wielded more broadly by the media and observers to portray violent crimes committed by black people.[a] Recently, the term has been invoked to counter #BlackLivesMatter protests of police shootings of black men by suggesting that the "real" problem is black men shooting each other.[b] These notions of criminality have consequences. Studies have shown that "people with racial associations of crime are more punitive regardless of whether they are overtly racially prejudiced," making them more likely to support policies such as the death penalty.[c]

But the notion that black-on-black intraracial violence is greater than intraracial violence for other groups is not borne out by statistics. A report from the Bureau of Justice Statistics found that *most* violence occurs between victims and offenders of the same race, regardless of race: 57 percent of the nearly 3.7 million reported violent crimes committed against white victims were perpetrated by white offenders; while of the 850,720 reported violent crimes committed against black victims, 63 percent were committed by black people.[d] Nor is there an epidemic of black-on-black violence: the rate of both black-on-black and white-on-white nonfatal violence declined 79 percent between 1993 and 2015.[e] The number of homicides involving both a black victim and black perpetrator fell from 7,361 in 1991 to 2,570 in 2016.[f]

The myth of black-on-black crime is likely fostered at least in part by the way that crime is measured. Federal government crime reporting portrays a skewed picture of the relationship between race and offending. The FBI's Uniform Crime Report, which is considered the official measure of the national crime rate, has always emphasized street crime to the exclusion of organized and white-collar crime.[g] As such, the figures that inform law enforcement strategies and priorities tend to reflect the crimes committed by low-income and unemployed Americans who, in part because of structural inequalities, are disproportionately black. (See "Communities of color are disproportionately impacted by extreme poverty and its connection to crime" at page 10.) To the extent that black-on-black crime exists, it is better understood as a function of structural racism that has led to more black people living in conditions of concentrated poverty than as an inherently racial issue.

[a] For an overview of the history and usage of the phrase "black-on-black crime," see Brentin Mock, "The Origins of the Phrase 'Black-on-Black Crime,'" CityLab, June 11, 2015, https://perma.cc/8267-8442. Also see Zhai Yun Tan, "What Does 'Black-on-Black Crime' Actually Mean?" *Christian Science Monitor*, September 22, 2016, https://perma.cc/85Q2-TURC.

[b] Heather MacDonald, "New Data: It's Still about Black-on-Black Crime," *National Review*, December 12, 2014, https://perma.cc/JP6G-K83X; and Alexandrea Boguhn, "Right-Wing Media Push 'Black-on-Black' Crime Canard to Deflect from Ferguson Police Shooting," Media Matters for America, August 18, 2014 (collecting news articles), https://perma.cc/LUB4-2SHE. Also see Jamelle Bouie, "The Trayvon Martin Killing and the Myth of Black-on-Black Crime," Daily Beast, July 15, 2013, https://perma.cc/5SUB-CA34.

[c] Nazgol Ghandnoosh, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies* (Washington, DC: The Sentencing Project, 2014), 19, https://perma.cc/PW6M-CSQA.

[d] Rachel E. Morgan, *Race and Hispanic Origin of Victims and Offenders, 2012-15* (Washington, DC: Bureau of Justice Statistics, 2017), 2, https://perma.cc/4XNR-3DKX. Also see David Neiwart, "White Supremacists' Favorite Myths about Black Crime Rates Take Another Hit from BJS Study," Southern Poverty Law Center, October 23, 2017, https://perma.cc/2CK7-5QEF.

[e] Morgan, *Race and Hispanic Origin of Victims and Offenders* (2017), at 4.

[f] For 1991 figures, see James Alan Fox and Marianne W. Zawitz, *Homicide Trends in the United States* (Washington, DC: BJS, 2010) (trends by race), https://perma.cc/TFD2-8QRD. For 2016 figures, see Federal Bureau of Investigation, "2016 Crime in the United States: Expanded Homicide Data Table 3," https://perma.cc/4UFN-KUK7.

[g] See Federal Bureau of Investigation, "Uniform Crime Reporting Statistics: UCR Offense Definitions," https://perma.cc/2ZTB-ASCK.

sentencing data showed that black and Latino people accounted for 80 percent of drug-free zone convictions, even though 45 percent of those arrested statewide for drug offenses were white.[30]

- **Habitual offender and "three strikes" laws** penalize individuals with repeat offenses more harshly, typically increasing the sentence length for each conviction.[31] Under these laws, individuals charged with seemingly minor crimes, like possession of a controlled substance, can incur significantly enhanced sentences.[32] More and deeper criminal justice system involvement of black people is driven by overpolicing (see discussion of proactive policing, below), which leads to more arrests for black people; bias by criminal justice system actors (see "Bias by system actors can lead to disproportionate criminal justice involvement for black people" at page 7), which leads to more convictions; and structural inequality (see "Communities of color are disproportionately impacted by extreme poverty and its connection to crime" at page 10), which surrounds black people with the drivers of criminal behavior. Disproportionate numbers of black people are ensnared in the criminal justice system on multiple occasions, setting them up to be subject to the harsh impact of these laws.[33]
- Location-based proactive policing practices like **hot spots policing** increase preventive police patrols in "micro-geographic locations" determined by data to have high concentrations of crime.[34] Such practices arose in response to violent crime in the 1980s and 1990s, and were combined with policing strategies like **zero tolerance** and the "**broken windows**" model, which focused police efforts on low-level quality-of-life crimes like public drunkenness, loitering, or littering under a theory that eliminating such small-scale disorder would also decrease more serious offenses.[35] Such strategies can disparately impact communities of color. In one study of law enforcement and open-air drug markets—places where drugs are sold in the open, typically outdoors or out of cars—in Seattle, researchers found that police officers are more likely to target such markets because the drug trade is visible and easier to access.[36] Even so, the study found that police targeted black open-air markets over white ones.[37] A similar study using the same data calculated both the percentage of people who delivered drugs who were black and white, as well as the percentages of drug-related arrests based on race. Researchers found that black people represented about 47 percent of those delivering crack cocaine, but 79 percent of those arrested; while white people constituted about 41 percent of those delivering the drug, but only 9 percent of those arrested.[38]

  Moreover, a 2018 report on proactive policing concluded that the targeting of physical locations that are deemed high risk by police data is likely to lead to "large racial disparities in the volume and nature of police-citizen encounters."[39] According to legal scholar Jonathan Simon, this strategy to reduce violent crime "produced its own racially neutral rationale for targeting neighborhoods of high poverty and crime, which were generally almost 100 percent Black or Black and Hispanic."[40] For example, a 2016 NYPD inspector general's report found that "the rate of quality-of-life enforcement in precincts citywide was positively correlated with higher proportions of black and Hispanic residents...."[41]

One well-known example of the disproportionate effect of race-neutral laws is New York's experiment with enhanced sentencing for drug offenses.[42] In 1973, New York State enacted the so-called "**Rockefeller drug laws**," a set of statutes that established mandatory minimum prison sentences for felony drug convictions.[43] Under these laws, someone convicted of selling two ounces—or possessing four ounces—of heroin, morphine, opium, cocaine, or marijuana faced a minimum of 15 years in prison.[44] The statutes provide a stark example of the ways in which laws written in race-neutral terms can still impact people of different racial groups in markedly different ways. Research on the impacts of the Rockefeller drug laws, and later reforms to them, has found the following:

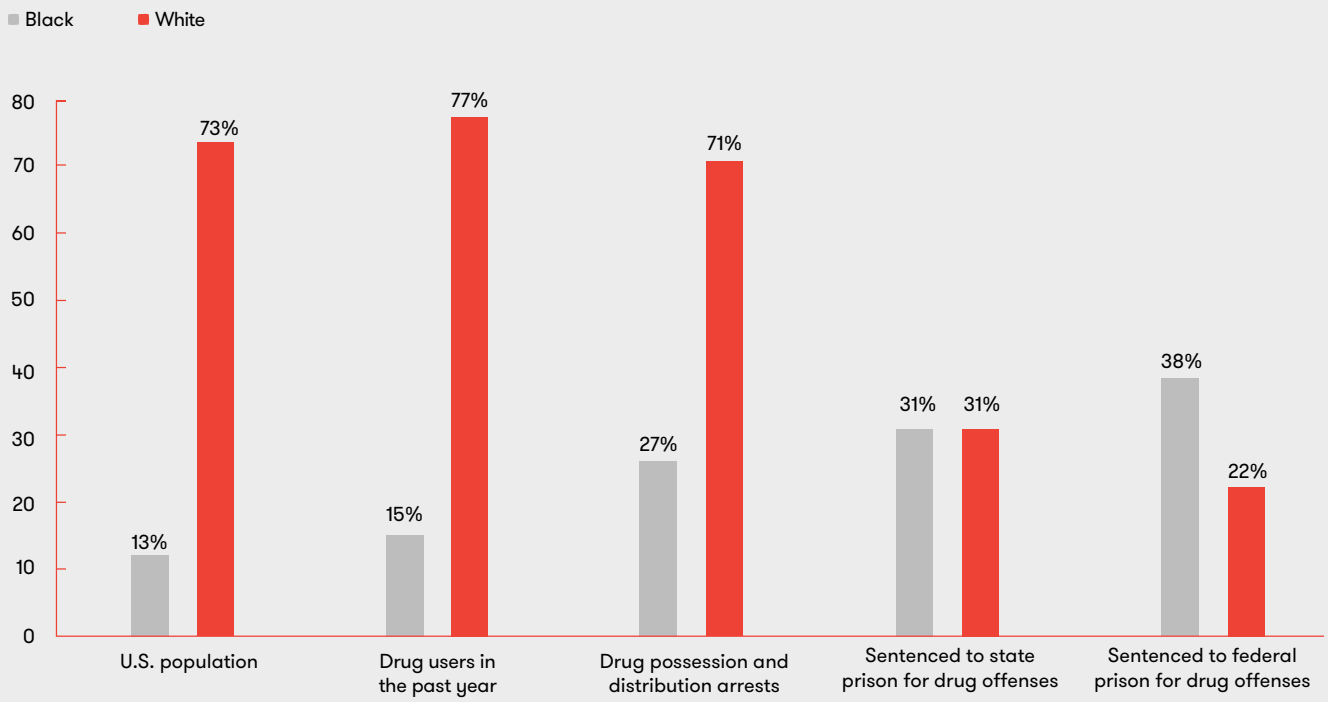
- The number of people incarcerated for drug offenses in New York State grew from 1,488 to 22,266 between 1973 and 1999—a nearly 15-fold increase—due in part to these laws.[45]
- That impact did not fall equally on people of all races. In 2001, for every one white male aged 21 to 44 incarcerated under the Rockefeller Laws, 40 black males of similar age were incarcerated for the same offense.[46]
- A study of 2009 reforms to the Rockefeller drug laws found that removing mandatory minimum sentences and increasing access to treatment reduced racial disparities in prison sentences and decreased rates of re-arrest. However, following the reforms, black people arrested on felony drug charges were still nearly twice as likely to receive a prison sentence compared to similarly situated white people.[47]

Drug laws: A case study in disparate impact

Drug offending provides an important case study because information from public surveys consistently demonstrates that rates of drug use are fairly consistent across racial and ethnic groups. However, the practices of law enforcement agencies and the courts have led to widely disparate outcomes depending on a person's race. Black people make up about 13 percent of the U.S. population and 15 percent of drug users who are 18 years old or older. Yet 27 percent of those arrested for drug possession and distribution, 38 percent of those federally-sentenced for drug-related crimes, and 33 percent of those sentenced by states for drug-related crimes, are black. (See Figure 1, below.) In other words, the risk of incarceration in the federal system for someone who uses drugs monthly and is black is more than seven times that of his or her white counterpart.

Figure 1

Racial disparities in drug arrests and sentencing, 2016



Sources: Adapted from Lawrence D. Bobo and Victor Thompson, "Racialized Mass Incarceration: Poverty, Prejudice, and Punishment" in *Doing Race: 21 Essays for the 21st Century*, edited by Hazel Rose Markus and Paula M. L. Moya (New York: Norton, 2010), 322-55. U.S. population data from the U.S. Census Bureau, American Community Survey, 2015. Monthly drug users data from the Substance Use and Mental Health Services Administration, *Results from the 2016 National Survey on Drug Use and Health: Detailed Tables*. Drug arrest data from Federal Bureau of Investigation, Uniform Crime Reports, Crime in the United States, 2016. Prison sentences data from E. Ann Carson, *Prisoners in 2016* (Washington, DC: U.S. Bureau of Justice Statistics, 2018).

New York's laws were the first in a wave of similar policies across the country. The federal government—and many states—enacted mandatory minimums that called for longer sentences for crack cocaine offenses—a drug more heavily used among black people—over powder cocaine—a drug more commonly used among white people.[48] Combined, these drug laws contributed to substantial growth in the number of black people behind bars and the extreme racial disparities that characterize jails and prisons across the United States today.[49] (See "Drug laws: A case study in disparate impact," above.)

Bias by system actors can lead to disproportionate criminal justice involvement for black people

Beyond laws and policies that disparately impact black people, the bias of individual actors in the criminal justice system—police, prosecutors, judges, and juries—can further disproportionately involve black people, leading to more frequent stops, searches, and arrests, as well as higher rates of pretrial detention, harsher plea bargaining outcomes, and more severe sentences than similarly situated white people. Some of this bias may be the result of overt racism but, more often, it manifests as implicit bias. Implicit bias is the "automatic positive or negative preference for a group, based on one's subconscious thoughts," which can produce discriminatory behavior even if individuals are unaware that such biases form the bases of their decisions.[50] Implicit bias affects everyone, but is of particular import when it results in unequal treatment by criminal justice actors.[51] Such biases impact individual stages of the process, like policing, and also accumulate over multiple stages, through case processing, prosecution, and disposition.[52] The cumulative effect of such individual biases contributes to disproportionately negative outcomes for black Americans.

Studies have found police are more likely to stop, search, and arrest black people

Because police are the gateway to the court and prison systems, understanding how bias affects policing practices is critical to understanding larger racial disparities in American criminal justice. Studies have shown that police officers can hold implicit biases that affect their decisions toward black individuals.[53] For example, a 2004 study found that when police officers were asked "who looks criminal?" and shown a series of pictures, they more often chose black faces than white ones.[54] Likewise, in another 2004 study, researchers primed police officers to think about crimes using words like "violent," "stop," and "arrest," then showed them a series of photographs. The study found that once primed, the officers focused more quickly on black male faces and remembered those faces to have features that have been considered to be stereotypically black—such as a broad nose, thick lips, and dark skin.[55]

The best available evidence suggests that police bias toward black Americans, coupled with strategic decisions to deploy certain law enforcement practices—like hot spots policing—more heavily in black communities, increases the likelihood of encounters with police and negative outcomes like stops, searches, use of force, and arrest.[56]

- Studies on police use of force reveal that black people are more likely than white people to experience use of force by police. A study of police use of non-fatal force from 2002 to 2011 found that in street stops, 14 percent of black people experienced non-fatal force compared to 6.9 percent of white people stopped by the police.[57]
- Studies have found that police are more likely to pull over and search black drivers despite lower contraband hit rates. In a study of investigatory traffic stops in Kansas City among drivers under 25 years old, 28 percent of black men and 17 percent of black women were pulled over in 2011 for an investigatory stop, compared to 13 percent of white men and 7 percent of white women.[58] In 2016, a Police Accountability Task Force in Chicago found that police searched black and Latino drivers four times as often as white drivers. However, police found contraband on white drivers twice as often as black and Latino drivers.[59] In a similar study in 2017 at Stanford University, researchers developed a "threshold test" to quantify how officers initiate searches. The study found that police in North Carolina employ a lower search threshold to black and Latino people than they do to white people and Asian people, searching 5.4 percent of black people pulled over compared to 3.1 percent of white people.[60]
- Studies have shown similar disparities in police pedestrian stops. A study of 125,000 pedestrian stops by police in New York City found black people were stopped more than 23 percent more often than white people—even when controlling for "race-specific estimates of crime"—representing over half of the stops and only 26 percent of the city's population.[61] Moreover, stops of black people were also less likely to lead to an arrest.[62]
- Studies have also shown that police are more likely to arrest black people. A meta-analysis of 23 research studies that focused on the relationship between race and the likelihood of an arrest between 1977 and 2004 found that black people were more likely to be arrested than their white counterparts, even when controlling for factors like the seriousness of the offense and the suspect's prior record.[63] Similarly, a study of the 1997 National Longitudinal Survey of Youth data found that after

controlling for differences in drug offending, non-drug offending, and neighborhood context, racial disparities in drug-related arrests still persist. This finding suggests that just being black significantly raises one's chances of arrest.[64] Moreover, a 2010 ACLU study found that black people were 3.7 times more likely to be arrested for marijuana possession than white people, even though both groups use the drug at similar rates.[65]

Prosecutor bias can lead to harsher outcomes for black people

Biased decision making by prosecutors also negatively impacts people of color. Prosecutors hold a particularly outsized role in the criminal justice process, with discretionary decision-making power over charging and plea bargains.[66] Their recommendations also can anchor courtroom discussions about pretrial detention, bail amounts, and sentencing.[67] Research shows that bias can affect how prosecutors exercise their discretion in the cases of black people.[68]

- A 2012 review by the Vera Institute of Justice of 34 studies looked at the effect of prosecutorial decision making on racial disparities in sentencing and at five other discretion points.[69] A greater number of studies found that people of color are more likely to be prosecuted, held in pretrial detention, and to receive other harsh treatment.[70]
- A 2013 study found that federal prosecutors are more likely to charge black people than similarly situated white people with offenses that carry higher mandatory minimum sentences.[71] A 2006 study found that state prosecutors are more likely to charge black people under habitual offender statutes than similarly-situated white people.[72]
- Implicit bias can also impact the plea bargaining phase, by which the vast majority of criminal cases are resolved.[73] A 2017 study of more than 48,000 misdemeanor and felony cases in Wisconsin between 2000 and 2006 found that white people were 25 percent more likely to have their top charge dropped or reduced by prosecutors than black people.[74] Disparities were especially glaring when misdemeanor cases only were considered: white people were nearly 75 percent more likely than black people to see all misdemeanor charges carrying a potential sentence of incarceration dropped, dismissed, or amended to lesser charges.[75] The result of these disparities is that black people originally charged with misdemeanors are not only more likely to be convicted, they are more likely to be sentenced to incarceration than white people.

Judicial bias can lead to worse criminal justice outcomes for black people

Judges too have been found to hold implicit biases that can impact their treatment of the black people whose cases are before them. For example, a 2009 study of judges' implicit biases found that white judges were more motivated to be fair when they were told that the accused was black.[76] When not explicitly told the race of the defendant, but primed with cues that implied the defendant was black, judges imposed moderately harsher sentences.[77] Because judges oversee every stage of the court process, their biases can lead to harsher outcomes at multiple discretion points in a case, from pretrial detention through sentencing.[78]

- A 2009 study of drug offense convictions in three U.S. district courts found that black people had higher odds of pretrial detention than white people. Moreover, those charged for offenses related to crack cocaine—a charge more common among black people than white people—were more likely to be held pretrial than those charged for offenses involving powder cocaine. Whether a defendant is held pretrial has downstream effects on sentencing: this study found that men who were in custody during their sentencing hearings received sentences about eight months longer on average than those who were released before their hearings.[79]
- A 2013 review of 50 years of studies on racial disparities in bail practices found that black people are subject to pretrial detention more frequently, and have bail set at higher amounts, than white people who have similar criminal histories and are facing similar charges. Studies documented this disparity in state and federal cases as well as juvenile justice proceedings, and in all regions of the country.[80]
- In a review of 40 studies into the linkage between race and ethnicity and sentencing severity, researchers found that at both the state and federal levels, black people were more likely to receive more severe sentences than their white counterparts. This finding holds true even when controlling for differences in criminal histories and the effects of policies that have a disparate impact on people of color, like the drug laws and hot spots policing practices discussed above.[81] Moreover, a 2005 analysis of 40 studies on racial disparities in sentencing at the state and federal levels found that 43 percent of studies at the state level and 68 percent at the federal level reported direct racially discriminatory sentencing outcomes, impacting

both the initial decision to incarcerate and the length of any ultimate sentence to incarceration.[82]

- A study of capital cases in Philadelphia found that when the victim was white and the accused black, defendants who were perceived to have a more "stereotypically Black appearance" were more than twice as likely to receive a death sentence as black people on trial who were perceived as less so. The accused person's appearance made no difference, however, when both the victim and the accused were black.[83]
- Multiple studies demonstrate the impact of skin color on sentencing, with lighter-skinned black people often receiving more lenient treatment and darker-skinned black people receiving more punitive sentences. For instance, when controlling for the type of offense, socioeconomic status, and demographic indicators among a subset of incarcerated men in Georgia from 1995 to 2002, dark-skinned black men received prison sentences a year-and-a-half longer—and the lightest-skinned black men about three-and-a-half months longer—than their white counterparts.[84] A 2015 study of men facing first-time felony charges found that darker-skinned black men received sentences that were, on average, 400 days longer than their white counterparts, while medium-skinned black men received sentences about 200 days longer than their white counterparts. On average, black men received a sentence 270 days longer than white men.[85]
- A study of cases in which men were charged with felony crimes in urban U.S. counties in 2000 found that black defendants were more likely to be detained pretrial; that pretrial detention impacted the likelihood of a guilty plea for black, white, and Latino defendants; and that both detention and guilty pleas affected sentence outcomes. Taken together, the effects of cumulative bias increased the probability that the average black person charged with a felony would go to prison by 26 percent.[86]

Studies have found evidence of racial bias against black people in jury verdicts and sentencing

The potential racial bias of jurors in criminal cases has been examined in studies using archival analysis of case verdicts, post-trial juror interviews, and mock jury experiments in which researchers can randomly assign subjects to "juries" and control for and isolate variables of interest.[87] Such studies have examined both the impact of the racial composition of juries on sentences, as well as the effect of the defendant's race on jurors' decision making. The results are complex and the scholarship is incomplete, and while some research attributes racial discrimination by jurors to a bias against defendants who belong to a race different than their own, studies do show evidence that implicit bias may influence white jurors in some cases where the accused is black.[88]

- In a 2003 review of empirical research on race and juries, the authors found complex relationships between implicit juror bias and a defendant's race depending on the type of case at issue. In studies that used summaries of trials that were more "racially charged," like a summary of the O.J. Simpson case, white mock jurors appeared less likely to exhibit bias. When studies used trials that were not racially charged, racial biases were found, suggesting that the white mock jurors were motivated to appear less racist the more racially salient the case before them.[89]
- A 2005 meta-analysis of 34 studies on mock jury verdict decisions and 16 studies on mock juror sentencing decisions found a notable effect of racial bias on mock jurors' decision making. The study shows that mock jurors are more likely to render both guilty verdicts and longer sentences to defendants whose race differsd from their own, suggesting that jurors are more lenient toward members of their own racial groups.[90]
- A 2010 study found that mock jurors showed racial bias toward darker-skinned individuals, evaluating ambiguous evidence as a greater indication of guilt than they did for lighter-skinned people. Moreover, when asked to rate the defendant's level of guilt on a scale of 1 to 100, mock jurors perceived the darker-skinned individuals to be more guilty than lighter-skinned individuals. Perhaps most notably, the study found that many mock jurors could not recall whether the defendant was a lighter- or darker-skinned individual, implying that the defendant's skin tone was not consciously, but rather implicitly, considered in their evaluation of guilt. These findings held true regardless of the race of the mock juror (though none of the jurors were black).[91]

Communities of color are disproportionately impacted by extreme poverty and its connection to crime

The historical legacy of slavery and racist policymaking and norms in America has had significant and long-lasting effects on racial inequality. Research shows that well after slavery ended, de-industrialization, discriminatory housing practices known as red-lining, and white flight from neighborhoods as black families migrated north pushed large numbers of black people into poverty, perpetuating economic inequalities between white and black people.[92] These neighborhoods are characterized by an extreme concentration of disadvantage where formal employment opportunities and access to quality education are limited, and neighborhood resources are scarce.[93]

While these factors describe the structural realities of extreme poverty, they are also known drivers of criminal conduct, independent of race or ethnicity.[94] Researchers have found higher levels of violent crime in poor urban neighborhoods, regardless of race. Studies demonstrate that when white men are living in an environment characterized by poverty, unemployment, and single-parent households, they are more likely to commit homicide and other violent crimes than black men confronting a similar set of structural impediments.[95]

But the realities of poverty disproportionately affect black people: 22 percent of black people lived in poverty in 2016, compared to approximately 9 percent of white people.[96] Thus, higher rates of poverty and the cumulative effects of structural racism mean black people are exposed to the structural risk factors that make crime more likely at greater rates than their white counterparts. Compounded with justice system laws and practices that have disparate impacts and bias among justice system actors, discussed above, black people are consequently arrested for certain crimes at higher rates.[97] Put differently, racial disparities in the justice system are deeply rooted in historical racism that manifests today in structural inequalities—from the differences in the quality of education to unemployment rates to household wealth.[98]

The criminal justice system does not only punish those accused and convicted of crimes. With such large numbers of black Americans being arrested and incarcerated, it also impacts entire communities. The widening reach of the criminal justice system in low-income communities of color—including higher rates of arrest and incarceration—further depletes resources and social capital in these places, perpetuating poverty and criminal justice involvement.

- **Parental incarceration is now commonplace for black children.** One in 25 white children born in 1990 had an incarcerated parent at some point during childhood, compared to one in four black children.[99] The negative impact of having an incarcerated parent can include criminal justice involvement, behavioral health issues, low educational attainment, and lack of economic resources.[100]
- **Disparities in incarceration of black men impacts women and families.** With such high incarceration rates for black men, women are often left to raise children alone while their partners cycle in and out of jail and prisons, increasing the number of households within communities of color headed by women and single parents or individual family members.[101] Beyond the economic challenges these women face, in 2014 researchers found that having a family member who is incarcerated negatively impacts women's cardiovascular health.[102]
- **The social and economic consequences of a criminal record impede successful reentry.** People who have been incarcerated experience collateral consequences of conviction that hinder their ability to access employment, housing, education, and other supports following their release from prison, making reentry difficult and increasing the chances of recidivism.[103]

Conclusion

Highly visible events—from Michael Brown in Ferguson, Missouri, to Eric Garner in Staten Island, New York; from Sandra Bland in Texas and Stephon Clark in California to Philando Castile in Minnesota—in which the lives of black men, women, and boys ended after encounters with law enforcement, have served to elevate public awareness of disproportionate police violence. However, the ways in which the criminal justice system operates to disadvantage people of color are systemic and ingrained, and more often subtle.

Focusing on high profile incidents of violence and abuse, while essential, will only make a small dent in the disparities present in the justice system that undercut the life potential of people who live in communities of color.

The evidence for racial disparities in the criminal justice system is well documented. However, there is no evidence that these widely disproportionate rates of criminal justice contact and incarceration are making us safer. To the contrary, studies have shown that concentrated incarceration in poor communities erodes community resources and may actually increase crime.[104] The disproportionate racial impact of certain laws and policies, as well as biased decision making by justice system actors, leads to higher rates of arrest and incarceration in low-income communities of color which, in turn, increases economic strain, further reduces income, and stifles wealth creation. Consequently, current approaches to criminal justice are extending levels of discrimination that are typically associated in the popular consciousness with a pre-civil rights era, but still exist today.

Resources

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Jeremy Travis, Bruce Western, and Steve Redburn, eds. The Growth of Incarceration in the United States: Exploring Causes and Consequences. Washington, DC: National Academies Press, 2014, https://perma.cc/3PKW-CDNQ.

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Endnotes

1 For disparities in jail populations, see Ram Subramanian, Kristine Riley, and Chris Mai, *Divided Justice: Trends in Black and White Jail Incarceration, 1990-2013* (New York: Vera Institute of Justice, 2017), 21-22 & figure 7 (in 1990, black people were nearly seven times more likely than white people to be held in local jails; in 2013, they remained 3.6 times more likely to be incarcerated in jail than white people), https://perma.cc/VCK2-DNA2. For disparities in prison populations, see Eli Hager, "A Mass Incarceration Mystery," Marshall Project, December 15, 2017 (Marshall Project analysis of yearly reports by the Bureau of Justice Statistics and the FBI's Uniform Crime Reporting system), https://perma.cc/R6MB-58BY.

2 Black people are not the only racial and ethnic minorities who experience racial discrimination and overrepresentation in the criminal justice system. Latinos, for instance, are 17 percent of the U.S. population but make up 23 percent of those with a prison sentence of more than one year. E. Ann Carson, *Prisoners in 2016* (Washington, DC: BJS, 2018) (calculated from table 10), https://perma.cc/T8PE-TVJ2. The Bureau of Justice Statistics' 1999 report on Native American incarceration found that Native American people were incarcerated at a rate about 38 percent higher than the national rate of incarceration, with 4 percent of the adult Native American population behind bars on any given day. The Sentencing Project, *Fact Sheet: Trends in U.S. Corrections* (Washington, DC: The Sentencing Project, 2017), viii, https://perma.cc/ZQV7-AVQ2. Native Hawaiian people likewise experience significant overrepresentation at each stage of the criminal justice process in Hawaii, comprising 24 percent of the state's population but 36 percent of those admitted to prison or jail. See Office of Hawaiian Affairs, *The Disparate Treatment of Native Hawaiians in the Criminal Justice System* (Honolulu, HI: Office of Hawaiian Affairs, 2010), 33, https://perma.cc/5N34-DV9L. This brief focuses on criminal justice disparities as they impact black Americans due in no small part to the fact that Latino crime patterns are importantly absent from the FBI Uniform Crime Report and prison records, in part because the FBI decided not to measure Latino arrest rates. For a brief period between 1980 and 1987, the FBI began to collect crime data by ethnicity in an attempt to fill that statistical void. Before that window, and until as recently as 2014, the majority of available statistics tabulated arrest data by race, with categories for white, black, Asian or Pacific Islander, and American Indian or Alaska Native. As such, Latinos largely vanished from American crime data in the 20th century. Works that have helped bridge the existing statistical gaps by enhancing our view of the criminalization and policing of Latino Americans include Rodolfo F. Acuña, *Occupied America: A History of Chicanos* (New York: Pearson, 2014); Juanita Díaz-Cotto, *Chicana Lives and Criminal Justice: Voices from El Barrio* (Austin, TX: University of Texas Press, 2006); Edward J. Escobar, *Race, Police, and the Making of a Political Identity: Mexican Americans and the Los Angeles Police Department, 1900–1945* (Berkeley, CA: University of California Press, 1999); Kelly Lytle Hernández, *Migra! A History of the U.S. Border Patrol* (Berkeley, CA: University of California Press, 2010); Kelly Lytle Hernández, *City of Inmates: Conquest, Rebellion, and the Rise of Human Caging in Los Angeles, 1771–1965* (Chapel Hill, NC: University of North Carolina Press, 2017); Suzanne Oboler, ed., *Behind Bars: Latino/as and Prison in the United States* (New York: Palgrave Macmillan, 2009); and Victor M. Rios, *Punished: Policing the Lives of Black and Latino Boys* (New York: New York University Press, 2011). Some of the best analysis of Latino crime and incarceration rates can be found in Michael Tonry and Matthew Melewski, "The Malign Effects of Drug and Crime Control on Black Americans," in *Crime and Justice: A Review of Research—Volume 37*, edited by Michael Tonry (Chicago: University of Chicago Press, 2008); and Jeremy Travis, Bruce Western, and Steve Redburn, eds., *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (Washington, DC: National Academies Press, 2014), 61-64. On white-collar crime, see Max Schanzenbach and Michael L. Yager, "Prison Time, Fines, and Federal White-Collar Criminals: The Anatomy of a Racial Disparity," *Journal of Criminal Law and Criminology* 96, no. 2 (2005-2006), 757-94, https://perma.cc/ZWN9-622X.

3 For the percent of black men in the U.S. population, see U.S. Census Bureau, "ACS Demographic and Housing Estimates 2012-2016 American Community Survey 5-Year Estimates," https://perma.cc/85BE-KN7Q. For the percent of black men incarcerated in state and federal prisons, see E. Ann Carson, *Prisoners in 2016* (2018), 15 & table 10.

4 The Sentencing Project, *Trends in U.S. Corrections* (Washington, DC: The Sentencing Project, 2017), 5, https://perma.cc/G3Y4-JE3L.

5 Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* (Washington, DC: The Sentencing Project, 2016), 3, https://perma.cc/9WZB-F93P.

6 The Sentencing Project, *Trends in U.S. Corrections* (2017), at 5.

7 For the percentage of women incarcerated, see Elizabeth Swavola, Kristine Riley, and Ram Subramanian, *Overlooked: Women and Jails in an Era of Reform* (New York: Vera Institute of Justice, 2016), 11, https://perma.cc/YW3D-Y8JF. For the percentage of black women in the population, see U.S. Census Bureau, "ACS DEMOGRAPHIC AND HOUSING ESTIMATES, 2012-2016 American Community Survey 5-Year Estimates," https://perma.cc/PF25-4LKN.

8 Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2010), 28-29.

9 Constitutional Rights Foundation, "The Southern 'Black Codes' of 1865-66," https://perma.cc/YTH8-3N5Z.

10 On vagrancy laws, see Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (New York: Anchor, 2009); Alex Lichtenstein, *Twice the Work of Free Labor: The Political Economy of Convict Labor in the New South* (London: Verso, 1996); and David M. Oshinsky: *"Worse than Slavery": Parchman Farm and the Ordeal of Jim Crow Justice* (New York: Free Press, 1997).

11 On convict leasing, see generally Douglas A. Blackmon, *Slavery by Another Name* (2009). On specific vagrancy laws, see Shaun King, "We Must Fully Unpack the Complicated Evils of our Justice System in Order to Build the Sophisticated Solutions We Need," Medium, March 9, 2018, https://perma.cc/TY3W-XTR4. See also Sarah Haley, *No Mercy Here: Gender, Punishment, and the Making of Jim Crow Modernity* (Chapel Hill, NC: University of North Carolina Press, 2016); and Talitha L. LeFlouria, *Chained in Silence: Black Women and Convict Labor in the New South* (Chapel Hill, NC: University of North Carolina Press, 2015).

12 See Blackmon, *Slavery by Another Name* (2009), at 233.

13 See Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America* (Cambridge, MA: Harvard University Press, 2010), 4. See also David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Boston: Little Brown, 1971), which offers the most sustained consideration of these ties.

14 Elizabeth Hinton, *From the War on Poverty to the War on Crime* (2016), at 19.

15 Muhammad, *The Condemnation of Blackness* (2010), at 3-4.

16 See ibid. at 4.

17 Ted Chiricos, Kelly Welch, and Marc Gertz, "Reconsidering the Relationship Between Perceived Neighborhood Racial Composition and Whites' Perceptions of Victimization Risk: Do Racial Stereotypes Matter?," *Criminology* 50, no. 1 (2012), 145-86, 155-56 & 160.

18 Hinton, *From the War on Poverty to the War on Crime* (2016), at 1-3.

19 Ibid. at 6. Also see Jeremy Travis, Bruce Western, and Steve Redburn, eds., *The Growth of Incarceration in the United States* (2014), 110 (discussing establishment of Office of Law Enforcement Assistance to award grants aimed at improving and expanding law enforcement), https://perma.cc/KZY6-RUGF; and David Weisburd and Malay K. Majmundar, eds., *Proactive Policing: Effects on Crime and Communities* (Washington, DC: National Academies Press, 2018), 268 (discussing the federal Justice Assistance Grant program for local law enforcement, which "increased the level of policing in areas that recorded more violent crimes, which in many areas has led to greater policing of poorer and/or more predominantly [b]lack communities"). For example, the number of recorded robberies and burglaries in New York City grew threefold from 48,000 in 1965 to 143,000 in 1966. One thing that had changed in the interim: crime reporting reforms were implemented by Mayor John Lindsay in 1966. Hinton, *From the War on Poverty to the War on Crime* (2016), at 6.

20 See Hinton, *From the War on Poverty to the War on Crime* (2016), at 6.

21 See generally Muhammad, *The Condemnation of Blackness* (2010) (chronicling the link between the misinterpretation of crime statistics and notions of black criminality in American history).

22 The UCR collects information on the following "crimes reported to law enforcement agencies:" murder and non-negligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, and arson. Federal Bureau of Investigation, "Uniform Crime Reporting Statistics: The Nation's Two Crime Measures," https://perma.cc/YF7M-D7SM.

23 Gwynne Pierson, "Institutional Racism and Crime Clearance," in *Black Perspectives on Crime and the Criminal Justice System*, edited by Robert L. Woodson (Boston: G. K. Hall, 1977), 110.

24 On the relationship between social science research and its direct impact on federal policy, see Hinton, *From the War on Poverty to the War on Crime* (2016), especially chapters 2, 3, and 6.

25 Ibid. at 83-86.

26 Salma S. Safiedine, Jihad J. Komis, and Christine M. Kulumani, "Policy Reform at the Forefront of Racial Justice: The Racial Justice Improvement Project," *Criminal Justice* 31, no. 3 (2016), 25-30, 25 ("a policy can be race-neutral or socioeconomically neutral on its face, and still have unintended negative racial and socioeconomic impacts on the individual and, based on large concentrations, the local community at large").

27 Judith Greene, Kevin Pranis, and Jason Ziedenberg, *Disparity by Design: How Drug-Free Zone Laws Impact Racial Disparity—and Fail to Protect Youth* (Washington, DC: Justice Policy Institute, 2006), 5, https://perma.cc/D247-ZSF5.

28 Nicole D. Porter and Tyler Clemons, *Drug-Free Zone Laws: An Overview of State Policies* (Washington, DC: The Sentencing Project, 2013), 2-3, https://perma.cc/KU23-JZF4.

29 Greene, Pranis, and Ziedenberg, *Disparity by Design* (2006), https://perma.cc/R86F-UFY2. In New Jersey, for example, the

states' dense urban areas are predominantly populated by black and Latino people, while its suburbs are primarily populated by white people. As a 2005 state commission on the state's drug-free zone laws noted, "[T]he more densely populated the area, the greater number of schools. The more schools per square mile, the greater number of drug-free zones. The greater number of zones in a municipality, the more zones intersect with one another, creating oddly shaped, overlapping entities that leave little else unencumbered." Ibid. at 26. As a result, drug-free zones cover great swaths of the state's majority black and Latino cities: 76 percent of Newark, and over half of the cities of Camden and Jersey City. Ibid.

30 Greene, Pranis, and Ziedenberg, *Disparity by Design* (2006), at 15-17. As shown by this study and several others in this brief, black people are not the only group to be affected disproportionately by either the racially neutral laws discussed in this section or the implicit bias of criminal justice system actors discussed in the following section. More research is needed to isolate the impacts of these laws, policies, and practices on other racial and ethnic groups.

31 Three-strikes laws were enacted beginning in 1993 by about half the states and the federal government to mandate enhanced sentences on the third "strike"—up to life without the possibility of parole—for people charged with certain repeat offenses. See Elsa Y. Chen, "Impacts of 'Three Strikes and You're Out' on Crime Trends in California and Throughout the United States," *Journal of Contemporary Criminal Justice*, 24, no. 4 (2008), 345-70, https://perma.cc/V5SE-J5PN.

32 James Austin, John Clark, Patricia Hardyman, and D. Alan Henry, *'Three Strikes and You're Out': The Implementation and Impact of Strike Laws* (unpublished research paper), https://perma.cc/5DAA-VR3K.

33 Marc Mauer, "Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities," *Ohio State Journal of Criminal Law* 5 no. 1 (2007), 19-46, 29-30, https://perma.cc/9AGE-LCUQ. Black people are more likely to come into contact with police simply because they tend to live in cities with populations over 250,000, which, because of federal funding programs, have more police officers per capita. See David Weisburd and Malay K. Majmundar, eds., *Proactive Policing: Effects on Crime and Communities* (Washington, DC: National Academies Press, 2018), 269-70.

34 Weisburd and Majmundar, *Proactive Policing* (2018), 46-47 & 122-29. Perhaps the most well-known hot spots policing model is New York City's Compstat system, a data-driven program developed in the 1990s to map and respond to concentrations of crime in the city, which later became the norm for departments across the country. See generally Bureau of Justice Assistance (BJA) and Police Executive Research Forum (PERF), *Compstat: Its Origins, Evolution, and Future in Law Enforcement Agencies* (Washington, DC: BJA & PERF, 2013), 3-7, https://perma.cc/TJJ9-KTTQ.

35 On the rise of proactive policing strategies, see Weisburd and Majmundar, *Proactive Policing* (2018), at 1; and Prisoner Reentry Institute (PRI), *Pretrial Practice: Rethinking the Front End of the Criminal Justice System* (New York: PRI, 2016), 4-5, https://perma.cc/6GTX-GU8V. On broken windows policing, see Weisburd and Majmundar, *Proactive Policing* (2018), at 70-73 & 163. The authors found that broken windows policing has little impact on public safety. Ibid. at 8 ("available program evaluations suggest that aggressive, misdemeanor arrest-based approaches to control disorder generate small to null impacts on crime").

36 Katherine Beckett, Kris Nyrop, Lori Pfingst, and Melissa Bowen, "Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle," *Social Problems* 52, no. 3 (2005), 419-41, 434, https://perma.cc/8SU6-744M.

37 Ibid. at 435.

38 Katherine Beckett, Kris Nyrop, and Lori Pfingst, "Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests" *Criminology* 44, no. 1 (2006), 105-37, 118, https://perma.cc/N5PR-HTU3.

39 Weisburd and Majmundar, *Proactive Policing* (2018), 301, conclusion 7-1.

40 PRI, *Pretrial Practice* (2016), at 5.

41 Mark G. Peters and Philip K. Eure, *An Analysis of Quality-of-Life Summonses, Quality-of-Life Misdemeanor Arrests, and Felony Crime in New York City, 2010-2015* (New York: NYPD Office of the Inspector General), 5, https://perma.cc/6CDG-LCGC.

42 Brian Mann, "The Drug Laws that Changed How We Punish," NPR, February 14, 2013, https://perma.cc/P6GG-KMNS.

43 The 1973 drug law was enacted as Chapters 276, 277, 278, 676, and 1051 of the 1973 Penal Laws of New York State. Significant subsequent amendments were contained in Chapters 785 and 832. For a summary of the major provisions of the 1973 law, see National Institute of Law Enforcement and Criminal Justice, U.S. Department of Justice, *The Nation's Toughest Drug Law: Evaluating the New York Experience—Final Report of the Joint Committee on New York Drug Law Evaluation* (Washington, DC: 1978), 33 & appendix, https://perma.cc/WM5W-WFRN.

44 Jim Parsons, Qing Wei, Christian Henrichson, Ernest Drucker, and Jennifer Trone, *End of an Era? The Impact of Drug Law Reform in New York City* (New York: Vera Institute of Justice, 2015), 5, https://perma.cc/PQ3L-YBD7.

45 New York State Division of Criminal Justice Services (DCJS), *Felony Drug Arrest, Indictment and Commitment Trends 1973-2008* (Albany, NY: DCJS, 2010), 6, https://perma.cc/33S2-JEXM.

46 Ernest Drucker, *A Plague of Prisons: The Epidemiology of Mass Incarceration in America* (New York: The New Press, 2011), 58-61 & table 5.5.

47 Parsons, et al., *End of an Era?* (2015), at 17.

48 Anti-Drug Abuse Act of 1986, P.L. 99-570. 100 Stat. 3207, October 27, 1986, https://www.gpo.gov/fdsys/pkg/STATUTE-100/pdf/STATUTE-100-Pg3207.pdf. On the federal crack cocaine law and its impacts, see generally Deborah J. Vagins and Jesselyn McCurdy, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law* (Washington, DC: ACLU, 2006), https://perma.cc/43RP-M8JK; and Families Against Mandatory Minimums (FAMM), *A Brief History of Crack Cocaine Sentencing Laws* (Washington, DC: FAMM, 2013), https://perma.cc/5LNK-3QGU. The law, which contained a 100-to-one ratio between sentences for crack versus powder cocaine, was repealed in 2010. The Fair Sentencing Act of 2010, SB 1789 (2010), https://perma.cc/6P89-KEP4. For an overview of state-level crack cocaine sentencing disparities, see Nicole D. Porter and Valerie Wright, *Cracked Justice* (Washington, DC: The Sentencing Project, 2011), 3, https://perma.cc/FZ8D-ZDPT.

49 See Alexander, *The New Jim Crow* (2010).

50 U.S. Department of Justice, *Understanding Bias: A Resource Guide* (Washington, DC: U.S. Department of Justice, 2015), 2, https://perma.cc/XE84-7ME8.

51 On the prevalence of implicit bias generally, see Justin D. Levinson, "Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering," *Duke Law Journal* 57, no. 2 (2007), 345-424, 351-52 (a number of studies have shown that "racially biased implicit attitudes and stereotypes" are "real, pervasive, and difficult to change"), https://perma.cc/LYY8-5GLA.

52 Disparate treatment can emerge from any one decision point in the process or at multiple points, interacting in complex ways. Subramanian, Riley, and Mai, *Divided Justice* (2017), 24 & n.16. While in many instances disparities increase at each cumulative step of the criminal justice process, some research shows that this is not always the case. Sometimes, initial disparities can "correct" themselves later in the justice process. A study looking at "corrections" for bias in law enforcement in Driving While Intoxicated (DWI) cases in North Carolina found that Latino men were almost two-thirds more likely to have the DWI charges against them dropped than similarly situated whites. For those who were charged, moreover, Latino men were sent to jail for less time than their white counterparts. See Christopher L. Griffin, Jr., Frank A. Sloan, and Lindsey M. Eldred, "Corrections for Racial Disparities in Law Enforcement," *William & Mary Law Review* 55, no. 4 (2014),1365-1427, 1388-89 and table 3, https://perma.cc/2468-MY86. Also see Besiki Kutateladze, Whitney Tymas, and Mary Crowley, *Race and Prosecution in Manhattan* (New York: Vera Institute of Justice, 2014), 3 (researchers found that people of color were more likely than similarly-situated white people to have their cases dismissed. Researchers speculated that this could have been because of leniency or because prosecutors believed that the arrest charges in these cases were not viable), https://perma.cc/V5F3-EJU9; and Vera Institute of Justice, *A Prosecutor's Guide for Advancing Racial Equity* (New York: Vera Institute of Justice, 2014), 15 (in Mecklenburg County, North Carolina (Charlotte), black people "were more likely to have more arrest charges and more serious arrest charges than whites," but also were "more likely to have their top arrest charge rejected"), https://perma.cc/3Y9C-7R2E.

53 Implicit bias (as opposed to explicit bias) refers to attitudes and beliefs that individuals hold about people without their conscious knowledge. Thus, it is possible for individuals to act in biased ways toward certain groups of people without making a conscious decision to do so. Because most actions occur without conscious thought, implicit biases have a significant influence over people's behavior. For more information about implicit bias and how it can lead to discrimination, see The Perception Institute, https://perma.cc/2PNS-7X4G. See also Katheryn Russell-Brown, "Making Implicit Bias Explicit: Black Men and the Police," in *Policing the Black Man: Arrest, Prosecution, and Imprisonment*, edited by Angela J. Davis (New York: Pantheon, 2017), 135-60.

54 Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie, and Paul G. Davies, "Seeing Black: Race, Crime, and Visual Processing," *Journal of Personality and Social Psychology* 87, no. 6 (2004), 876-93, at 878, https://perma.cc/XS7F-3B48.

55 Ibid. at 885-86.

56 On overpolicing communities of color, see Paul Butler, *Chokehold: Policing Black Men* (New York: The New Press, 2017), chapters 2 and 3; Marc Mauer, "The Endurance of Racial Disparity in the Criminal Justice System," in *Policing the Black Man: Arrest, Prosecution, and Imprisonment*, edited by Angela J. Davis (New York: Pantheon, 2017), 40-46; Alice Goffman, "On the Run: Wanted Men in a Philadelphia Ghetto," *American Sociological Review* 74, no. 3 (2009), 339-57, http://journals.sagepub.com/doi/abs/10.1177/000312240907400301; and Hinton, *From the War on Poverty to the War on Crime* (2016). Modern policing has direct roots in practices that explicitly targeted people based on their race: the modern police force in the United States evolved out of slave patrols and night watches, which

sought to control the movement and behavior of black people and Native Americans. See Philip S. Foner, *History of Black Americans: From Africa to the Emergence of the Cotton Kingdom* (Westport, CT: Greenwood, 1975), 206.

57 Shelley Hyland, Lynn Langton, and Elizabeth Davis, *Police Use of Nonfatal Force, 2002–11* (Washington, DC: Bureau of Justice Statistics, 2015), 4, https://perma.cc/GX75-PQND.

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Intersection of Defendants' Race, Gender, and Age in Prosecutorial Decision Making," *Journal of Criminal Justice* 38, no. 2 (2010), 185-92 (discussing the ways in which age and gender modify racially charged decision making); and Tina L. Freiburger and Kareem L. Jordan. "A Multilevel Analysis of Race on the Decision to Petition a Case in the Juvenile Court," *Race and Justice* 1, no. 2 (2011), 185-201, 188 ("Not all research examining race and juvenile court processing has found minority disadvantage. In fact, several studies have produced contradicting results at different decision points").

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95 Danielle Corinne Kuhl, Lauren J. Krivo, and Ruth D. Peterson, "Neighborhood Violent Crime," American Journal of Sociology 114, no. 6 (2009), 1765-1802. On violence in poor communities of color, see Elijah Anderson, Code of the Street: Decency, Violence, and the Moral Life of the Inner City (New York: W. W. Norton & Company, 1999); and Bruce Western, "Lifetimes of Violence in a Sample of Released Prisoners," RSF: The Russell Sage Foundation Journal of the Social Sciences 1, no. 2 (2015), 14-30. A full discussion of these structural factors is beyond the scope of this brief. For a more in-depth examination of the systemic factors contributing to poverty and inequality and their impact on crime, see generally Wilson, The Truly Disadvantaged (1987); Sampson and Wilson, "Toward a Theory of Race, Crime, and Urban Inequality" (1995); and Shelby, Dark Ghettos (2016).

96 Jessica L. Semega, Kayla R. Fontenot, and Melissa A. Kollar, Income and Poverty in the United States: 2016, (Washington, DC: U.S. Census Bureau, 2017), 12,https://perma.cc/B47L-YK2N. Also see Robert J. Sampson and Janet L. Lauritsen, "Racial and Ethnic Disparities in Crime and Criminal Justice in the United States," Crime and Justice 21, no. 1 (1997), 311-74, 324-30, https://perma.cc/HZP7-PEZG; and Michael K. Brown, Martin Carnoy, Elliot Currie, et al., Whitewashing Race: The Myth of a Color-Blind Society (Berkeley, CA: University of California Press, 2003), 153-59.

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non-negligent manslaughter arrests. Nazgol Ghandnoosh, Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies (Washington, DC: The Sentencing Project, 2014), 20 (citing Federal Bureau of Investigation, "Crime in the United States 2015," table 43A (arrests by race and ethnicity, 2015), https://perma.cc/AKG8-EYNV, https://perma.cc/TA8F-SFEH. Arrest rates are an imperfect measure of actual rates of offending, however, given the history of overpolicing primarily black communities. When comparing arrest rates to imprisonment rates for different offenses, Alfred Blumstein found that in 1991 "[d]ifferential arrest rates accounted for the over-representation of blacks in prison by 89 percent for robbery, 75 percent for burglary, and 50 percent for drug crimes." Ghandnoosh, Race and Punishment (2014), at 21 (citing Alfred Blumstein, "Racial Disproportionality of U.S. Prison Populations Revisited," University of Colorado Law Review 64, no. 3 (1993), 743-60).

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102 Hedwig Lee, Christopher Wildeman, Emily Wang, et al., "A Heavy Burden: The Cardiovascular Health Consequences of Having a Family Member Incarcerated," American Journal of Public Health 104, no. 3 (2014), 421-27, https://perma.cc/6TGX-8SMT.

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104 Don Stemen, The Prison Paradox: More Incarceration Will Not Make Us Safer (New York: Vera Institute of Justice, 2017), 2 (citing Todd R. Clear, "The Effects of High Imprisonment Rates on Communities," Crime and Justice 37, no. 1 (2008)), https://perma.cc/5TBR-WSDC.

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Misdemeanor Defender Training

Ethical Issues in District Court

IDS OFFICE OF INDIGENT DEFENSE SERVICES SAFEGUARDING JUSTICE

1

Ethics for Public Defense: What are the Rules?

Attorney/Client Relationship
- Confidences
- Rights

Attorney/Others Relationship
- Honesty and Candor
- Overreaching

2

Rule 1.6 (a)

Cannot reveal information acquired during professional relationship without consent, unless permitted by (b)

Exceptions?
- RPC/court order
- Commission of a crime
- Reasonably certain death or bodily harm
- Prevent or mitigate client's crime or fraud in using lawyer services

3

Rule 1.2 (d)

Cannot advise a client to engage in conduct she knows to be criminal or fraudulent but

- may discuss the legal consequences of any proposed course of conduct

4

Rule 3.1

May not assert factually or legally frivolous positions but

- may defend a proceeding by requiring that all elements of the case be established

5

Rule 4.1

Must be truthful but

- no obligation to inform opposing party of relevant facts

6

Cases and Rulings

2014 Formal Ethics Opinion 5

In civil case, attorney must advise client regarding legal impact of postings on social media sites. If counsel determines that removing existing postings does not constitute spoilation, counsel may advise client to remove postings, but should advise client to retain a copy. Counsel may advise client to increase privacy settings if such advice does not violate the law or a court order. [But see Rule 3.4]

7

Cases and Rulings

2018 Formal Ethics Opinion 5

Yes, if

- it's displayed on public portion of person's page

! Rule 4.1 – Lawyer cannot use deception to gain access to restricted social media

! Rule 8.4(c) – Lawyer cannot instruct a third party to use deception to gain access

8

Rule 4.2 (a)

Cannot communicate about the case with someone she knows is represented by another

- unless with consent of other lawyer or authorized by law.

9

Cases and Rulings

RPC 93

Counsel may not speak with represented persons, even when not technically co-defendants, and even when persons initiate contact, without permission of their counsel

10

Rule 1.14

Must

- Maintain a normal client-lawyer relationship
- Keep client's information confidential
  - Exception only to extent necessary to protect client's interests

May

- Take protective action
  - substantial physical, financial or other harm and
  - cannot act in own interest

11

The Host with the Most

12

Cases and Rulings

98 Formal Ethics Opinion 2

May explain the effects of service of process but may not advise client to evade service

13

Rule 3.4

Cannot and cannot help/ counsel another to

- unlawfully obstruct another party's access to evidence
- unlawfully destroy or conceal

No obligation to inform opposing party of relevant facts

14

Cases and Rulings

RPC 221 (1995)

Absent legal authority otherwise, lawyer may

- take possession,
- examine,
- return evidence to its source, and
- advise source of legal consequences of possession or destruction of evidence

BUT

- 2007 FEO 2 – lawyer may not take possession of contraband

15

Rule 1. 2(a)(1)

Defendant has the authority to decide

- plead guilty/ go to trial
- testify
- after consultation with the lawyer

16

Rule 1.4

Must keep client informed

- Giving client sufficient information to make informed decisions
- Can fulfill by providing a summary and consulting with the client about relevance

17

Cases and Rulings

2011 Formal Ethics Opinion 3

Cannot assist client in fraudulent conduct, but

- May advise client on consequences of any proposed course of conduct

18

Cases and Rulings

2011 Formal Ethics Opinion 3

Cannot enter a notice of appeal simply for delay or for frivolous reason, but

seeking to enforce your client's constitutional right to a trial de novo is not simply for delay or frivolous

19

Cases and Rulings

2005 Formal Ethics Opinion 3

Cannot threaten to report an opposing party or witness to immigration to gain advantage in civil settlement

2009 Formal Ethics Opinion 5

May seek information about immigration status in discovery

BUT

may not report status to ICE unless required to do so by law

20

Current Clients

21

Rule 1.7

Cannot represent if the representation involves a concurrent conflict of interest

22

Concurrent Conflict of Interest

Will representing one client

- be directly adverse to the other?
- materially limited responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer?

23

Exceptions

Do you

- reasonably believe you can provide competent and diligent representation all clients?

Is the representation

- prohibited by law?

Does it involve a claim by one client against the other?

Has the client given written consent?

24

Rule 1.8

Caution

Cannot use client information to the disadvantage of the client

UNLESS

- the client gives informed consent

25

Former Clients

26

Rule 1.9

Cannot

- represent another person in the same or a substantially related matter if
- Current client's interests are materially adverse to the former's interests

UNLESS

- former client gives informed consent, confirmed in writing

27

Rule 1.9

Cannot

- use former client's information to the disadvantage of the former client

EXCEPT

- as the rules allow or require

OR

- the information is generally known

28

Cases and Rulings

2010 Formal Ethics Opinion 3

1. Client A is a witness in case **and**
2. You represent Client B in that case **and**
3. In order to effectively represent Client B, you would have to cross-examine Client A, **then**

Concurrent Conflict of Interest

and

Conflict Cannot be Waived

29

Cases and Rulings

2011 Formal Ethics Opinion 2

Delay on the part of a former client in objecting to conflict of interest is not, by itself, a waiver of the conflict, but is one factor to consider in whether the lawyer must now withdraw from representing their current client

30

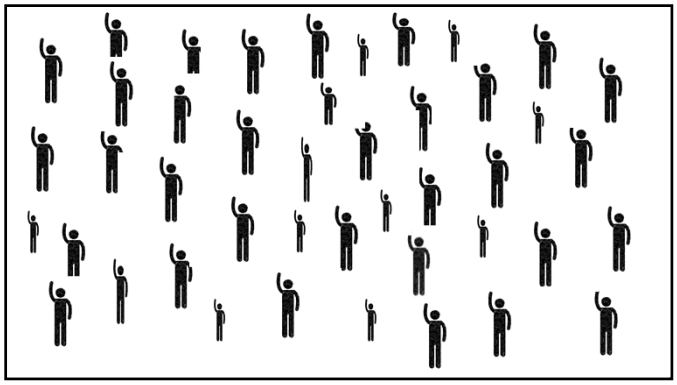
CLIENT INTERVIEWING

D. Tucker Charns
Chief Regional Defender
Indigent Defense Services

1

2

3



4

JAMA Original Investigation
Medical Education
November 30, 2018

Prevalence of and Factors Associated With Patient Nondisclosure of Medically Relevant Information to Clinicians

Andrea Gurmankin Levy, PhD, MBE[1]; Aaron M. Scherer, PhD[2]; Brian J. Zikmund-Fisher, PhD[3]; et al
Knoll Larkin, MPH[4]; Geoffrey D. Barnes, MD, MSc[5]; Angela Fagerlin, PhD[6]

5

Patients lie to their doctors.

6

81% of patients said they had lied to their doctors about exercise, diet, medication and stress reduction.

7

50% reported they did not speak up about not understanding the doctor.

8

Why would people lie to someone who is trying to help them?

9

Fear of shame.
Fear of being judged.

10

Why do clients lie to lawyers?

11

Fear of shame.
Fear of being judged.
And…

12

Fear we are not on their side.

13

Fear we won't work hard for them if they tell us everything.

14

?

15

Trust.

16

Our own experiences.

17

The experiences of many of our clients.

18

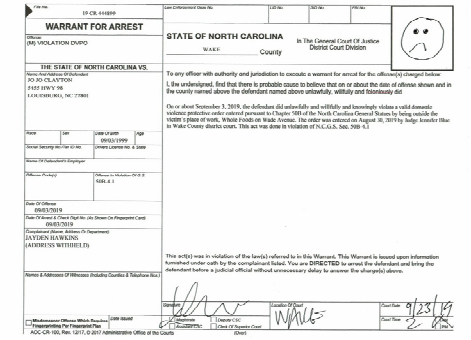
It takes time.

It saves time.

19

First contact is not always the first interview.

20



WARRANT FOR ARREST

STATE OF NORTH CAROLINA

WAKE County

In The General Court Of Justice
District Court Division

THE STATE OF NORTH CAROLINA VS.

(M) VIOLATION DVPO

JO JO CLAYTON
7455 HWY 96
LOUISBURG, NC 27801

09/03/1999

09/03/2019

09/03/2019

JAYDEN HAWKINS
(ADDRESS WITHHELD)

To any officer with authority and jurisdiction to execute a warrant for arrest for the offense(s) charged below:

I, the undersigned, find that there is probable cause to believe that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did

On or about September 3, 2019, the defendant did unlawfully and willfully and knowingly violate a valid domestic violence protective order entered pursuant to Chapter 50B of the North Carolina General Statues by being outside the victim's place of work, Whole Foods on Wade Avenue. The order was entered on August 30, 2019 by Judge Jennifer Blue in Wake County district court. This act was done in violation of N.C.G.S. Stat. 50B-4.1

This act(s) was in violation of the law(s) referred to in this Warrant. This Warrant is issued upon information furnished under oath by the complainant listed. You are DIRECTED to arrest the defendant and bring the defendant before a judicial official without unnecessary delay to answer the charge(s) above.

9/23/19

21

22

Jayden (Client)

Jo Jo (Complainant)

23

Jo Jo (Complainant)

Jayden (Client)

24


25


26

When we think we know the story, we don't hear the story.

27

Blink: The Power of Thinking Without Thinking –
Malcolm Gladwell

"(First) judgments are, first of all, enormously quick: they rely on the thinnest slices of experience…they are also unconscious."

28

How to affect the blink of the client and start earning trust.

29

Before they ever meet you, see what they see.

30

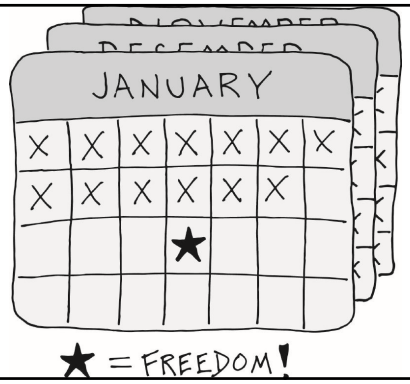
31

32

33

34

35



36

37

38

39

Before you lay eyes on them…

40

Review the pleadings.

Review for conflicts.

Know the elements/defenses/sentences.

Know the range of collateral consequences.

Know the next court date.

41

The interview.

42

Meet the client as soon as possible after the event.

43

In the interview, the attorney talks first.

44

Average time patient speaks before doctor interrupts:

11 seconds

Journal of General Internal Medicine
January 2019, Volume 34, Issue 1, pp 36–40 | Cite as
Eliciting the Patient's Agenda- Secondary Analysis of Recorded Clinical Encounters

45

Explain confidentiality.

46

Explain the elements/proof.
Explain the possible defenses.

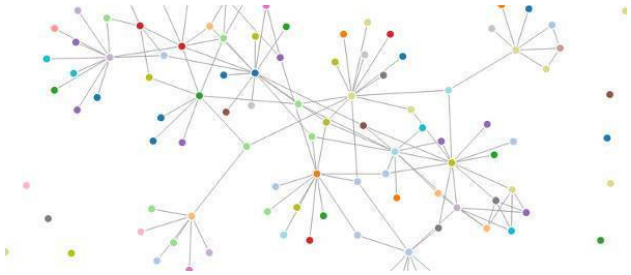
47

Explain possible outcomes.
Explain the process.

48

The fully informed client's expressed outcome controls.

49



50

The interview intake sheet.

51

You don't know what you need to know.

52

My client is 22 years old, she finished 11th grade and she is not presently working so she will need at least 60 days to pay any fines or costs if they are not assessed on probation. I have 1.5 hours in the case.

53

"I am so ashamed."

That is what Ms. Taylor, who turned 28 this spring, said to me when we first met. She has lost her job at Mr. Tire, which she had for over a year. She gave up her car because she could not afford a repair. She is looking for work on a bus line that allows her to take care of rent, food and the needs for her 8 year old daughter.

54

If you ask questions about the event, be mindful of how you ask the questions.

55

"I hear you that you are innocent and not even there. Can you tell me who else was there?"

56

"I hear you that you are innocent and you weren't drunk. Can you tell me how much you drank?"

57

Instead of…

“What did you tell the officer?”

58

Ask:

“What is the officer going to say you said?”

59

Instead of…

“Where did they find the drugs on you?”

60

Ask:

"Where will they say they found the drugs?"

61

Allows you to ask without accusing.

62

63

64

65

At the jail or holding cell with little time.

66

In the hallway.

67

On the phone.

68

When you think you care more about the case then your client does.

69

Clients who won't talk.
Clients who won't call back.
Clients who won't see you.

70

Client who missed court.

71

For the client whose family/friend insists on being present.

72

- Are you a real lawyer?
- Will you work harder if I pay you?
- Don’t you work for the State?
- How many cases have you won?
- When did you finish law school?
- Did you go to law school?
- When do I meet the attorney?
- **Why should I trust you?**

73

Show them.

74

Your job is tougher.

75

The rewards are there.

76

"We are all broken by something. We have all hurt someone and have been hurt. We all share the condition of brokenness even if our brokenness is not equivalent."

- Bryan Stevenson

77

78

Questions?

79

>SAMPLE ENGAGMENT LETTER, OUT OF CUSTODY<

>LETTERHEAD<

MR./MS. CLIENT

RE: State vs. YOU
CR
(County)

YOUR NEXT COURT DATE:

Dear Mr./Ms. Client:

The court has appointed me to represent you on the above-listed charges. I look forward to working with you. Please call my office when you get this letter to set up an appointment to discuss your case. **You must appear on your court date even if we do not speak before that date.**

When we meet, we will go over what you need to know about my representation on these charges. Here is what you need to know now:

1. The best way to reach me is _____.
2. You should only speak to me about your case. Any other person, including family and friends, can be forced to testify about what you tell them about the facts of the case. Do not speak to any witnesses.
3. You must be in court and on time for your court date. If you are not there or are late, the court may *revoke your bond, increase your bond, and order you to be jailed.*
4. When you come to our meeting and to court, please bring all of your paperwork with you.

Again, I do look forward to meeting you. Call me to set up an appointment.

Sincerely,

Your Attorney

>SAMPLE ENGAGMENT LETTER, OUT OF CUSTODY<

>LETTERHEAD<

MR./MS. CLIENT

RE: State vs. YOU
CR
(County)

NEXT COURT DATE:

Dear Mr./Ms. Client:

The court has appointed me to represent you on the above-listed charges. I look forward to working with you. I understand that you are in jail. I will come to meet you within the next three business days.

When we meet, we will go over what you need to know about my representation on these charges. Here is what you need to know now:

1. I do not accept calls from the jail. They are recorded and can be used against you. [OR] I do accept calls from the jail. [Because they are recorded and can be used against you, I will only talk to you about very limited matters.]
2. Any call from the jail from you to anyone will be recorded and used against you. You should only speak to me about your case. Any other person, including family, friends and anyone at the jail can be forced to testify about what you tell them.
3. If a law enforcement officer, including a probation officer, comes to see you, tell them that you cannot speak to them without an attorney present. They should call me.

When you are called out for our meeting, please bring all of your paperwork with you. Again, I look forward to working with you.

Sincerely,

Your Attorney

AGREEMENT OF UNDERSTANDING

1. The best way to reach me is _____. Always leave a call back number.
2. If your contact information changes, tell me immediately.
3. I can only assist you in cases to which the court has appointed me. If you need representation on other cases, let me know. If you have an attorney for any other case, let me know that, too.
4. You should only speak to me about your case. Any other person, including family and friends, can be forced to testify about what you tell them about the case.
5. You must be in court and on time for your court date. If you are not there or are late, the court may revoke your bond, increase your bond, and order you to be put in jail.
6. If your case is continued, you will get a new court date. It is your responsibility to know and remember your next court date.
7. To check on a court date, you can go online: https://www.nccourts.gov/court-dates
8. You can sign up for court date notifications by text or email here: https://www3.nccourts.org/onlineservices/notifications/menu.sp
9. If you are arrested on this or a new charge, you or someone for you should call me right away.
10. I will only talk to a family member with your permission. I may ask that you limit the number of persons with whom I will discuss your case.

Client Interviewing

D. Tucker Charns
Chief Regional Defender
Indigent Defense Services
New Misdemeanor Training November 2020

CLIENT INTERVIEW CHECK LIST

BEFORE THE INTERVIEW

- ☐ Check custody status
- ☐ Review warrants and affidavit
- ☐ Review for conflicts with witnesses
- ☐ Review for conflicts with co-defendants
- ☐ Look for indications that client may need an interpreter for interview
- ☐ Check for any other pending charges
- ☐ If there was a prior attorney on this charge, ask for file (client may need waiver)
- ☐ Print out/know the elements of the offenses
- ☐ Print out/know the defenses to the charges
- ☐ Print out/know the sentences of the offenses
- ☐ Print out/know the collateral consequences
- ☐ Know the next court date
- ☐ Know the conditions of release

THE INTERVIEW

- ☐ Introduce yourself
- ☐ Explain confidentiality
- ☐ Go over the elements of the offenses
- ☐ Go over lesser-included charges and the defenses of the charges
- ☐ Go over possible sentences
- ☐ Go over range of collateral consequences
- ☐ Discover immigration status
- ☐ Go over any court orders/conditions of bond
- ☐ Discuss client's personal information, story of the case, concerns, best outcome
- ☐ Discuss fines, costs, fees and ability to pay
- ☐ Discuss any further investigation/waivers
- ☐ Discuss not contacting witnesses, officers
- ☐ Discuss policy on calls from them, family, friends
- ☐ Go over the process in court
    - ☐ what time to arrive
    - ☐ what to wear/not wear
    - ☐ what to bring/not bring
    - ☐ what to expect when name called
    - ☐ what it means to wait for attorney/remain and attorney will find client
    - ☐ if another attorney calls client's name
    - ☐ don't leave the court room unless a break/time expectations
    - ☐ will the witness be there/what to do if the client sees the witness
    - ☐ how to contact attorney if client is late/will miss court
    - ☐ what happens if client is late/does not appear

AFTER THE INTERVIEW

- ☐ Have client sign up court date notification service: https://www.nccourts.gov/court-dates
- ☐ Consider if you need to get funds for expert/fact investigator
- ☐ Consider if you need to contact IDS for an immigration consult
- ☐ Synopsis for yourself or any substitute counsel
- ☐ Understand and record the client's goal at this point
- ☐ Calendar any ticklers
- ☐ Keep any promises

CLIENT QUESTIONNAIRE

THIS INFORMATION IS CONFIDENTIAL AND PROTECTED BY ATTORNEY-CLIENT PRIVILEGE.

YOUR INFORMATION

Your full name: _____

Race/Ethnicity: _____ Your age: _____ Your date of birth: _____

Where you live: _____ How long have you lived there? _____

Phone number: _____

Available for texting?_____

Email addresses: _____

Best way to get a message to you: _____

YOUR FAMILY

Are you (circle one) Single Engaged Married Living with a Partner Separated Divorced

If you are engaged/married/living together, name of spouse/partner: _____

If you have children, please complete this information:

Name	Age	If under 21, where do they live and with whom
_____	____	_____
_____	____	_____
_____	____	_____
_____	____	_____
_____	____	_____
_____	____	_____

Do you pay child support or does someone pay child support to you? YES NO

If you pay child support, how much do you pay each month? $_____

If you pay, is it a court-ordered payment? YES NO

For any of your children, has the other parent lost parental rights or missing, dead or incarcerated?

YES NO

If yes, please give details:

_____

_____

Is there any pending action to terminate your parental rights or any DSS involvement? YES NO

Have you lost your parental rights? YES NO

If so, please list the names of the children for which your parental rights have been terminated:

_____

Will you need to make child care arrangements when you go to court? YES NO

If you have sisters and/or brothers, please complete this information:

Name	Age	Occupation:
_____	____	_____
_____	____	_____
_____	____	_____
_____	____	_____
_____	____	_____

Complete this information about your parents or guardians:

Mother's name: _____ Age or date deceased _____

Mother's work: _____

Father's name: _____ Age or date deceased _____

Father's work: _____

Were you raised primarily by one parent or both? One Both Neither

If you were raised primarily by one parent, which one? Mother Father Other

If you were raised by someone other than your parents, please complete this information:

Name: _____ Age or date deceased: _____

Relationship to you: _____ Their work: _____

Name: _____ Age or date deceased: _____

Relationship to you: _____ Their work: _____

Do any of your family members have a health condition for which you provide care? YES NO

If yes, who is it, what is the condition and how do you care for them? _____

_____

YOUR WORK HISTORY

What kind of work do you do? _____

If you are working now, where do you work? _____

How much are you paid weekly or monthly? _____

What are the days and times you usually work: _____

How long have you had this job? _____

Does your employer know you have been arrested/charged? YES NO

May we contact your employer? YES NO

If you are not working now, how are you supporting yourself? _____

List your past jobs and when you worked there:

Where	What you did	When
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

NOTE: Certain criminal convictions can prevent you from working in a particular job or from getting or keeping an occupational license.

If you have any kind of occupational license, such as barber or health care, what is it? _____

Do you now or do you plan to work in the following (circle all that apply):

- schools or school services
- healthcare
- a place that cares for the elderly/disabled
- private security
- airlines
- transportation
- child care
- government employment
- military/tribal or tribal casinos

NOTE: If you work in schools, long-term care, transportation, child care, elderly care and certain other fields, you may be required to report your arrest or any conviction to your employer. Other employers may have these requirements in your work contract.

HOUSING

Who lives with you? _____

_____

In your house, who pays or helps pay the rent, utilities, living expenses (such as food, cell phone)?

_____

_____

NOTE: If you are convicted of a criminal offense, depending on the conviction, you and/or your family can be evicted or have problems renting any kind of housing in the future. If you live in subsidized housing, you could lose that funding.

If you rent, do you have a lease? YES NO If yes, when is your lease up? _____
Do you live in subsidized housing? YES NO
Have you been threatened with eviction? YES NO

If you are convicted of certain sex offenses, you may not be able to live within 1000 feet of a school, daycare or other places with children, even if you or the person with who you live owns the home.
Is your home within 1000 feet of such a place? YES NO

EDUCATION

How far did you go in school/last school attended? _____
If you are attending school now, what is the name of the school and your current grade?

_____

NOTE: If you are convicted of certain crimes, like possession of a weapon at school or committing sex crimes or arson at a school, you will be expelled from school. Other crimes, such as assault or bomb threats, can also result in suspension or expulsion. You may be able to petition to get back into school after a period of time has passed.

Are you in school? YES NO
Have you talked to any school officials about your case or received any communication about your case from them? YES NO

If you have, to whom did you speak or what was the communication? _____

_____

STUDENT LOANS

In many cases, a drug conviction while a student is receiving student loans will affect the loan and the ability to get student loans will likely be suspended for at least a year. You should check with your loan advisor at school.

Are you receiving student loans? YES NO

Will you need student loans in the future? YES NO

YOUR HEALTH

Do you have any physical illness or disabilities? YES NO

If yes, describe the condition, how you are being treated and how they affect you:

_____

_____

_____

Are you taking any prescribed medicine? YES NO

If yes, what is it? _____

Are you being treated for any mental health condition, including addiction?

YES NO

If yes, describe the condition(s) and how you are being treated: _____

_____

_____

_____

_____

Do you have/ever been told that you have addiction issues, including alcohol? YES NO

If yes, have you ever received treatment? YES NO

If yes, when and where? _____

Are you interested in treatment now? YES NO

PUBLIC BENEFITS

NOTE: In many states, including North Carolina, if you are convicted of a drug-related felony you will be unable to receive cash assistance, like TANF (Temporary Assistance for Needy Families, also called WF, Work First). Some other convictions and time in custody may affect other public benefits.

Do you receive public assistance, including SSI: YES NO
If yes, list them and how much you receive:

_____

_____

YOUR CITIZENSHIP

If you are not a U.S. citizen, a plea or a criminal conviction could lead to your removal from the United States. This office has access to consults with immigration lawyers through Indigent Defense Services. Please answer these questions:
Where were you born? _____

Are you aware of any immigration proceedings pending and, if so, what are they?

_____

_____

MILITARY SERVICE:

Have you ever served in the military? YES NO
If yes, which branch of the military? _____
If yes, when did you serve? _____
If yes, what type of discharge did you receive? _____
NOTE: Men age 18-26 must register for the Selective Service. Failure to register can result in denial of certain types of government loans and benefits. If you are a man over 18 and have not registered and are likely to be incarcerated until after your 26th birthday, you should try to register now.

If you are a man between the ages of 18-26, are have you registered? YES NO

TRANSPORTATION

What transportation do you use most? BUS I DRIVE SOMEONE DRIVES ME

Other: _____ How will you get to court? _____

DRIVER'S LICENSE

NOTE: Certain drug and alcohol convictions can affect your ability to get or keep a driver's license.

Do you have a driver's license? YES NO
If yes, in which state? _____

If your driving record is relevant to the charges, your attorney will review it with you.

PROPERTY TAKEN

If the police took any of your personal property, such as a cell phone, car or computer, it may not be possible to have it returned until after the case is concluded. Your attorney may seek a return before or at the time of disposition. Your attorney will not be able to do this after the conviction. Was any property taken from you? YES NO
If yes, do you have the receipt/return of service for that property? YES NO
What property was taken? _____

_____

ANY CONVICTIONS

If you have any prior convictions, list them below and include the county or state and the dates of the convictions. Your attorney will review your record as provided by the State with you.

_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____ _____

Are you on probation or post-supervision release? NO
YES- PROBATION YES- POST-SUPERVISION RELEASE
If you are on probation or post-supervision release, does your probation officer know about these new charges?
YES NO

ANY OTHER PENDING CHARGES

Do you have any other charges pending anywhere? YES NO

If yes, what are the other charges? _____

_____

_____

If yes, in which county or State are you charged? _____

If yes, who is your attorney for the other charges? _____

THE PRESENT CHARGES

Date of arrest: _____

Location of the arrest: _____

Officer/Agency: _____

Were you or your house or car searched? YES NO

Was there a search warrant? YES NO

Do you recall signing anything? YES NO

Will the officer say you said something? YES NO

Will the officer say they took something from you or from your car or house? YES NO

Client's memory of arrest, search, statements, witnesses, character witnesses:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

**********DO NOT WRITE BELOW THIS LINE: ATTORNEY SECTION ONLY**********

What does the client want/client's best possible outcome? _____

_____

_____

_____

_____

_____

Attorney's analysis of an evaluation of the case, defense, need for investigation and next steps (add dates):_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

CLIENT INTERVIEW SHEET

Interviewer Today's Date

Client Name As Charged:

_____

First Middle Last

Charge(s)

Date(s) of Offense:

Court dates:

First Appearance;
Probable Cause:
Bond:

Arraignment (Waiver filed?):
Motions:

Plea or Trial date:
Sentencing:
Judge:

CURRENT BAIL/CUSTODY:

(Make initial contact with clients no later than 72 hours after date receive court appointment)
IN CUSTODY: Yes or No

Where confined: Bond:

Date placed in custody
Date released

Bond you could make:

Bond amount others could make (list name, phone, amount):

Bondsman Amount

Bond Posted by:
Contact Information:

Property or Other Major Assets that could be utilized or potentially forfeited as a result of these charges? (any co-owned?)

Conditions of Release:

TELL JAILED CLIENT: (1) Don't discuss your case with anyone except your lawyer or the office investigator/office intern, (2) sign nothing and waive no rights, (3) decline to participate in any lineup, further questioning, or testing without your lawyer being present - but if the police persist, you should cooperate fully with them and not do anything to call attention to yourself, (4) try to present as good an appearance as possible in future court appearances.

FACTS OF CASE - Client's Version

Client's Description of Facts:

Allow client to provide facts without interruption and then go back and clarify and seek more details. Note any photos, records, or other evidence that you may need to obtain. Any witnesses need to subpoena? Motions to explore?

PRIOR ATTORNEYS:

Prior Attorneys in Present Case?

_____

Prior Attorneys in Previous Cases?

_____

PERSONAL DATA - CLIENT

True Name:
Aliases (AKA--known by any other names):

Age: Birthplace: Birthdate:

Sex: [ ] Male [ ] Female

Height: _____ Ft. _____ In.

Weight: _____ Lbs.

Race: [ ] White [ ] Black [ ] Hispanic [ ] Asian [ ] Other

Driver's License Number:

Is your license suspended? Why?

Do you need your license for employment?

Social Security Number:

Home Address:

Lived There Since?

Phone Numbers: (Best way to reach client quickly?)

Email/Other:

Alternate Address or Method of Contact:

Alternate Phone Numbers:

Emphasize to client importance of maintaining contact and updating information.

HOUSING:

Have you been banned from any property?

Has your landlord threatened to evict you: yes/no

Do you live in subsidized rental housing or have a Section 8 voucher: yes/no

IMMIGRATION STATUS:

☐ U.S. Citizen ☐ Resident Alien ☐ Non-resident Alien

How long have you been in the United States:

Have you ever been removed from the U.S. or been refused admission at the border: yes ☐; no ☐

EMPLOYMENT:

Current Occupation:
Future Goals:

Present Employer:
Address: [ ] Do NOT contact
Is employer aware of charges?
Willing to write letter/speak on behalf of client?
Work Phone: How long employed?

Supervisor's Name and Phone

Present Take Home Salary: Month/Week/Hour
Schedule/Hours:

If not presently working, how do you support yourself?
Do you receive public assistance (e.g. welfare, food stamps, SSI, etc.): yes ☐; no ☐

If yes, list the benefits you receive and how much you get:

Who all is dependent on your financial support?

List Prior Employers

Ability and Willingness to Make Restitution:

Belong to Organizations or Clubs:

Skills/Interests:

FAMILY AND COMMUNITY TIES:

Marital Status: [ ] Married [ ] Single [ ] Divorced [ ] Separated []Widowed

SPOUSE (if living) or Significant Other:

Contact Information:

CHILDREN

Names of Children Ages

Who Children Live with?

Contact Info:
Do you pay child/spousal support?
(If yes, how much for whom?)

FATHER (if living) MOTHER (if living)

Name
Address
Nationality

Name
Address
Nationality

Age
Health Issues
Occupation
Phone/Contact
Employer
How Long

Age
Health Issues
Occupation
Phone/Contact
Employer
How Long

Who raised you?
Were your parents separated during your childhood?
Ever in DSS custody or live with someone other than parents?

BROTHERS/SISTERS

Name	Age	Address & Phone	Occupation

FRIENDS:
Who do you associate with?
Who influences you the most?

EDUCATION:

High School: (Where and When)

Last grade completed: Graduated: GED:

Technical School or College Name:
Completed?
License/Certification/Degree:

Special Training:

Receiving or planning to apply for Student Loans or Other Financial Aid?

Favorite Teachers:
Grades:

School Discipline/Suspensions:
Educational Evaluations/Testing:
Individualized Education Plan?

Special Educational Needs:

RELIGIOUS BACKGROUND:

Church: Clergyman Name:

Currently Active:
Previously Active:

MILITARY SERVICE Yes _____ No _____ Former Current

If Yes, What branch? Service Number

Time in Service _____ Type of Discharge: Honorable _____ Other _____

Honors/Medals_____

Combat Duty _____ Time and Place

POSSIBLE CHARACTER WITNESSES, e.g., close friends/relatives/landlord/ employer/probation officer. Include the names of four people who will be willing to come to court and testify that you are a good and honest person.

Names:
Address
Phone contact
Occupation
Age
How Know?
How Long?

PRIOR CRIMINAL RECORD (Arrests, convictions, probation, parole). Explain to the client that the prosecution will have access to FBI and DPS records and that if we are surprised, it may have a bad effect on the outcome of the case.

Charge	Date	Convicted	Court Sentence	County/State

Prior Violence?

Own or have access to weapons?

Ever the Victim of a Violent Crime?

PROBATION/PAROLE: Are you presently on probation or parole? Yes____ No____

If yes, where

Probation/Parole Officer:

Conditions of Probation:

Pending Violations:

OUTSTANDING WARRANTS (Traffic or other):

MEDICAL BACKGROUND:

Are you taking any medication under prescription?
If yes, name of doctor, what type and frequency?

Present and Permanent Injuries/Disabilities. (Look for bruises on portions of body that might confirm allegations of self-defense or police mistreatment.)

Present Physical Illnesses/Symptoms:

Current Medical Care:

Doctor's Name:
Address:
Phone:

Ever been unconscious (when, where, how, who treated you)?
Serious Physical Injuries (and all head injuries):
Type/Cause/Dates

Hospitalizations: give hospital name, address, city and dates of hospitalization.

Vision/Hearing? (needs corrective lenses or hearing aids?)
Doctor:

Do you use other drugs or pills? (Look for needle tracks or other signs.)
Type:

Present Frequency of Use
Do you use alcohol? Yes _____ No _____ Frequency/Volume?

If heavy drinker, since (date):
Are you currently in a treatment? Type/Where? Dates/Times of classes/appointments?

Have you ever been committed to inpatient mental health/substance abuse treatment?(Give hospital or institution name and address, also give date(s) of stay(s)?)

Have you ever undergone psychiatric counseling or treatment? (Give name and address of psychiatrist as well as date (s) of treatment.)

Have you ever undergone psychiatric or psychological evaluation? (Give circumstances, dates, names and addresses of evaluators.)

WITNESSES:

Witnesses to the events on which the charge is based (including the complainant and persons who may be prosecution witnesses; for each get name, correct spelling, aliases, nicknames.) (Please indicate if immediate contact is advised for any reason.)

Contact Information: Names/Address/Phone Numbers:

Other information that will help in locating witness, i.e., where he works, hangs out, if on relief, where he picks up check:

What witness knows:

COMPLAINANT/PROSECUTION WITNESS:

Name/Address/Contact Information:

Relationship to Client:

Any other Background Information on Complainant:

CO-DEFENDANTS

Are there any co-defendants?

Names/Contact Information:

Do the co-defendants have attorneys?

ARREST INFORMATION:

Date and Time of Arrest:

Exact Location of Arrest:

Who was with client when he was arrested? Were companions arrested?

Was client drunk at time of arrest or had he taken alcohol recently?

Was client under the influence of narcotics, or had he taken narcotics recently?

How was client treated during arrest or thereafter? (Describe any injuries.)

Names of Arresting Officers:
Did they have an arrest warrant?
What did they say the charge was?
What questions did they ask the client?

What did the client tell them?

Did police at the time of the arrest or any other time, take property from the client's person, home, place of work, automobile, place where the client was, home or place of any other person?

Kind of Property, e.g., clothing, weapon, drugs, writing, etc.:

Did police have a search warrant?

Describe circumstances under which property was taken.

Did client ask for anyone? Did anyone come to location?

AFTER ARREST:

Give every location to which client was taken by police:

Exact time of confinement in each place:

Officers present in each place: names, ranks, descriptions of each officer significantly involved in the investigation:

INTERROGATION:

Where did it take place?

When and how long?

Interrogating Officers:

Other Persons Present:

What specific questions did the officers ask (this is often a good means of learning something about the prosecution's case)?

Did the police confront the client with any evidence against him?

Did the police tell the client that any person had incriminated her, or that any co-defendant had confessed?

Did any co-defendant confess or incriminate the defendant in his presence?

Did client tell the police anything else?

What, in detail?

Did client make a written statement?

Was his oral statement written down?

Did client sign anything?

Were there any recording devices present?

Other circumstances occurring at the time of the client's statement, in detail:

Was the client previously warned/told of any rights(What did officer say?):

That he had the right to remain silent?

That anything he said could be used against him?

That client had a right to a lawyer before making a statement

That if he could not afford a lawyer, one would be appointed him before making any statement?

What did client say to these warnings?

EXAMINATIONS, TESTS, INSPECTIONS

Was client given any physical examination?

Was a blood or urine sample taken?

Was hair taken or combed?

Was a narcotics or alcohol test administered, or body inspection of any sort made?

Was the client examined by paramedics, doctor, or psychiatrist?

Describe the Examination, Test or inspection:

Persons Present

Did anyone say anything about the examination, test or inspection results?

Was permission asked of the client to make the examination, test or inspection?

Was he told he had the right to refuse or to have an attorney present?

EYEWITNESS IDENTIFICATION:

Was the client exhibited in a lineup or brought before any person under any circumstances for identification?

Where? When?
Describe the situation.

All persons present (including police, number of identifying witnesses, number of other persons in lineup, and their age, sex, race, dress, co-defendants, etc.)

What did the police say to the identifying witness?

What did the identifying witness say?

Was the client asked to say anything?

Was the client expressly asked for permission to place him in the lineup and/or to be exhibited for identification purposes?

Was he told that he had a right to refuse or to have an attorney present?

Was he asked to do anything (move, walk around, speak?

What did he say or do?

Was the client asked to re-enact anything (same sub-questions as for lineup)?

PRIOR JUDICIAL PROCEEDINGS

Has client appeared in Court?
When?

What Court?

Nature of Proceedings:

Who was involved?

Did the client testify?

Was he represented by a lawyer? (Include name or description of lawyer, and circumstances of representation.)

What else happened?

TALK WITH CLIENT ABOUT WHAT TO EXPECT, TIMELINE OF CASE, HOW OFTEN AND HOW WILL COMMUNICATE, DEADLINES FOR GETTING ADDITIONAL INFORMATION, FUTURE COURT DATES, APPEARANCES/BEHAVIOR, OTHER COUNSEL/ADVICE…

MEMO TO FILE:

This client has promised to send us the following information:

The following things need to be done in connection with this file:

___ Appearance letter needed to:

___ Photographs of:

___Statements from the following witnesses:

Name	Address	Phone	Facts Needed

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.

Introduction to Structured Sentencing

Jamie Markham

November 2020

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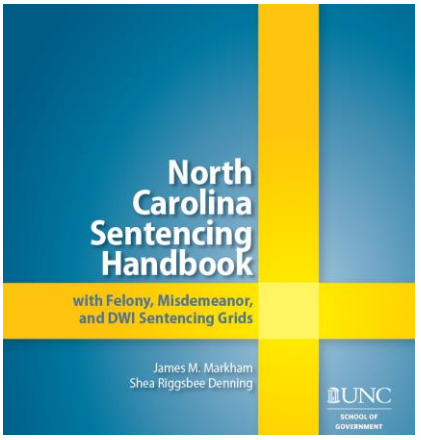

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Structured Sentencing

- Applies to most felonies and misdemeanors
- Excludes DWI
- Some crimes have special rules
  - –E.g., Shoplifting
  - –Page 60

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Misdemeanor Offenses Committed on or after **December 1, 2013**

OFFENSE CLASS	PRIOR CONVICTION LEVEL I No Prior Convictions	II One to Four Prior Convictions		III Five or More Prior Convictions
A1	C/I/A 1–60 days	C/I/A 1–75 days		C/I/A 1–150 days
1	C 1–45 days	C/I/A 1–45 days		C/I/A 1–120 days
2	C 1–30 days	C/I 1–45 days		C/I/A 1–60 days
		One to Three Prior Convictions	Four Prior Convictions	
3	C Fine Only* 1–10 days	C Fine Only* 1–15 days	C/I 1–15 days	C/I/A 1–20 days

*Unless otherwise provided for a specific offense, the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine.
A—Active Punishment **I**—Intermediate Punishment **C**—Community Punishment

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Basic Steps

- Step 1: Determine the Applicable Law
- Step 2: Determine the Offense Class
- Step 3: Determine the Prior Conviction Level
- Step 4: Select a Sentence of Imprisonment
- Step 5: Choose a Sentence Disposition
- Step 6: Review Additional Issues, as Appropriate

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Sentence Types

- Jail
- Supervised probation
- Special probation (probation with split)
- Unsupervised probation
- Fines and restitution
- Multiple convictions
- Diversions

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Misdemeanor Offenses Committed on or after **December 1, 2013**

OFFENSE CLASS	PRIOR CONVICTION LEVEL I No Prior Convictions	II One to Four Prior Convictions		III Five or More Prior Convictions
A1				C/I/A 1–150 days
1				C/I/A 1–120 days
2				C/I/A 1–60 days
		One to Three Prior Convictions	Four Prior Convictions	
3	1–10 days	1–15 days		C/I/A 1–20 days

Assault on a Female

Larceny ($1,000 or less)

Resist, delay, obstruct an officer

Possess marijuana (1/2 oz.)

Unless otherwise provided for a specific offense, the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine.

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

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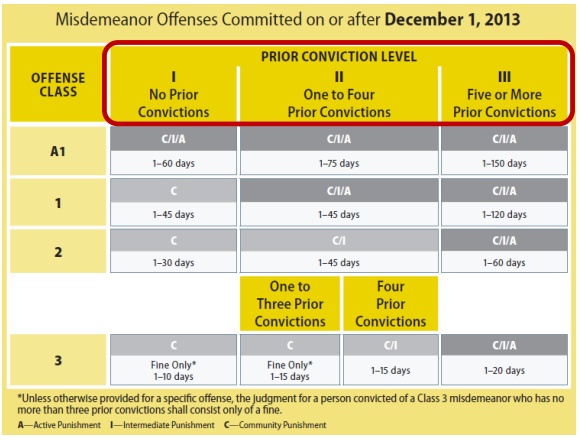

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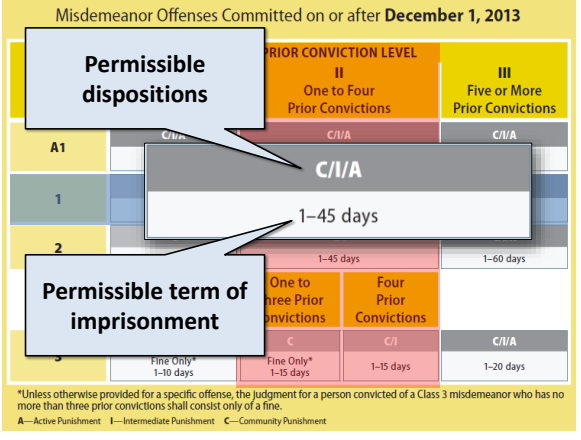

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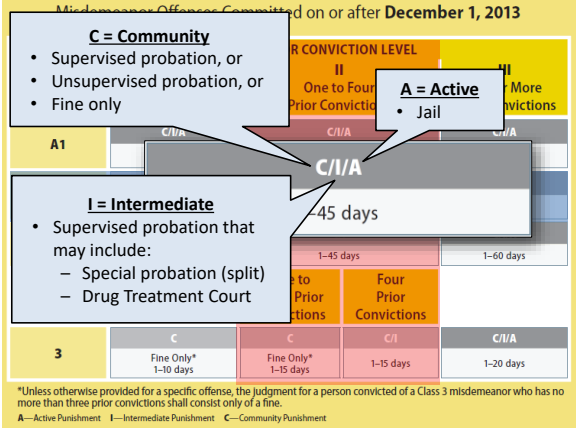

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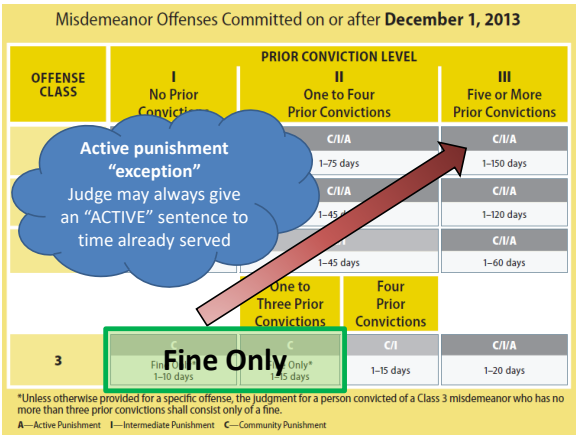

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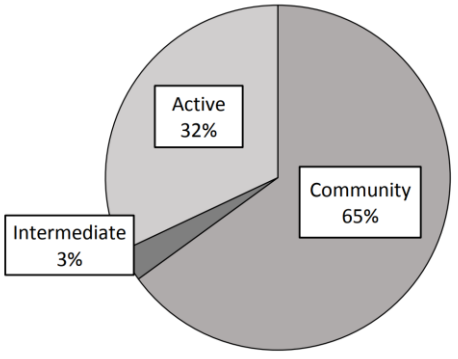

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Offense Class (p. 11)

- Appendix B

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Appendix B: Offense Class Table for Misdemeanors

Class A1	
Assault by Pointing a Gun (G.S. 14-34)	
*Assault in Presence of Minor (G.S. 14-33(d))	
Assault Inflicting Serious Injury (G.S. 14-33(c)(1))	
Assault on Child under 12 Years of Age (G.S. 14-33(c)(3))	
Assault on Female (G.S. 14-33(c)(2))	
Assault on Government Officer or Employee (G.S. 14-33(c)(4))	
Assault on Handicapped Person (G.S. 14-32.1)	
Assault on School Employee or Volunteer (G.S. 14-33(c)(6))	
Assault with Deadly Weapon (G.S. 14-33(c)(1))	
Child Abuse (G.S. 14-318.2)	
First-Degree Trespass, Utility Premises or Agricultural Center (G.S. 14-159.12)	
Food Stamp Fraud, $100–$500 (G.S. 108A-53.1)	
Interfering with Emergency Communication (G.S. 14-286.2)	
Misdemeanor Death by Vehicle (G.S. 20-141.1)	Class 1 for offenses before 12/1/2009
Secretly Peeping, Second Offense or with Photo Device (G.S. 14-202)	
Sexual Battery (G.S. 14-27.33)	Was G.S. 14-27.5A for offenses before 12/1/
*Stalking, First Offense (G.S. 14-277.3A)	
Violation of a Valid Protective Order (G.S. 50B-4.1(a))	

Class 1
Aggressive Driving (G.S. 20-141.6)
Breaking into Coin-Operated Machine, First Offense (G.S. 14-56.1)
Breaking or Entering Buildings (G.S. 14-54(b))
Communicating Threats (G.S. 14-277.1)
Contributing to the Delinquency of a Juvenile (G.S. 14-316.1)
Cruelty to Animals (G.S. 14-360)
Cyber-Bullying, Defendant 18 or Older (G.S. 14-458.1)
Disclosure of Private Images, Defendant under 18, First Offense (G.S. 14-190.5A)

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Offense Class (p. 11)

- Appendix B
- Attempt: One class lower
- Conspiracy: One class lower
- Solicitation: Always Class 3

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Prior Conviction Level (p. 11-12)

- State's burden to prove
  - Preponderance of the evidence
  - Stipulation, court/DMV records, or any other reliable method
- Ethics: No intentional underreporting

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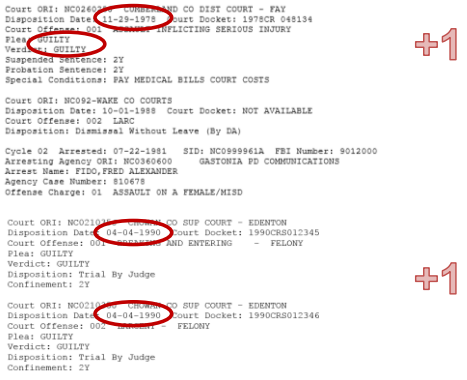
Prior Conviction Level (p. 11-12)

- **Count**
  - Any prior conviction, felony or misdemeanor
  - Convictions from other jurisdictions
  - Old convictions
  - Traffic convictions
  - Prayer for judgment continued (PJC)
- **Do Not Count**
  - Infractions
  - Juvenile adjudications
  - Contempt
  - Probation revocations
    - Count only one conviction from each session of district court and each week of superior court


Court ORI: NC0260[illegible] CUMBERLAND CO DIST COURT - FAY
Disposition Date: 11-29-1978 Court Docket: 1978CR 048134
Court Offense: 001 ASSAULT INFLICTING SERIOUS INJURY
Plea: GUILTY
Verdict: GUILTY
Suspended Sentence: 2Y
Probation Sentence: 2Y
Special Conditions: PAY MEDICAL BILLS COURT COSTS

Court ORI: NC092-WAKE CO COURTS
Disposition Date: 10-01-1988 Court Docket: NOT AVAILABLE
Court Offense: 002 LARC
Disposition: Dismissal Without Leave (By DA)

Cycle 02 Arrested: 07-22-1981 SID: NC0999961A FBI Number: 9012000
Arresting Agency ORI: NC0360600 GASTONIA PD COMMUNICATIONS
Arrest Name: FIDO,FRED ALEXANDER
Agency Case Number: 810678
Offense Charge: 01 ASSAULT ON A FEMALE/MISD

Court ORI: NC021[illegible] CUMBERLAND CO SUP COURT - EDENTON
Disposition Date: 04-04-1990 Court Docket: 1990CRS012345
Court Offense: 001 [illegible] AND ENTERING - FELONY
Plea: GUILTY
Verdict: GUILTY
Disposition: Trial By Judge
Confinement: 2Y

Court ORI: NC021[illegible] CUMBERLAND CO SUP COURT - EDENTON
Disposition Date: 04-04-1990 Court Docket: 1990CRS012346
Court Offense: 002 [illegible] - FELONY
Plea: GUILTY
Verdict: GUILTY
Disposition: Trial By Judge
Confinement: 2Y

+1

+1

Prior Conviction Level

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

PRIOR CONVICTION LEVEL ▶ [ ]

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Exercise 1

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Exercise 1

- Communicating Threats
- Prior convictions: 5
- Jail credit: None

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What is the longest permissible Active sentence?

150 days

120 days

75 days

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Misdemeanor Offenses Committed on or after **December 1, 2013**

OFFENSE CLASS	PRIOR CONVICTION LEVEL I No Prior Convictions	II One to Four Prior Convictions	III Five or More Prior Convictions
A1	C/I/A 1–60 days	C/I/A 1–120 days	C/I/A 1–120 days
1	C 1–45 days	1–120 days	1–120 days
2	C 1–30 days	1–45 days	1–60 days
		One to Three Prior Convictions / Four Prior Convictions	
3	C Fine Only* 1–10 days	C Fine Only* 1–15 days	C/I 1–15 days / C/I/A 1–20 days

*Unless otherwise provided for a specific offense, the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine.

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

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Active Sentences

- Defendant goes directly to jail
- Place of confinement
  - 90 days or less: Local jail
  - Over 90 days: Statewide Misdemeanant Confinement Program

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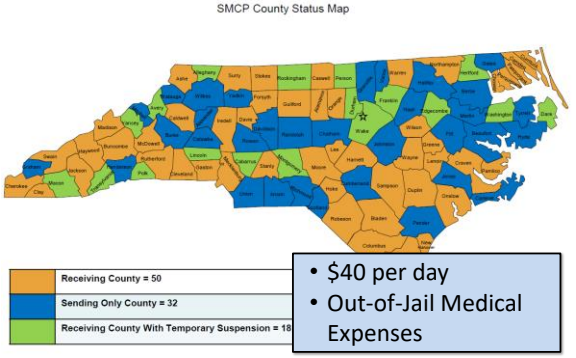

- $40 per day
- Out-of-Jail Medical Expenses

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Appendix G: Place of Confinement Chart

	Felony G.S. 15A-1352(b)	Misdemeanor G.S. 15A-1352(a)	Driving While Impaired (DWI) G.S. 15A-1352(f)
Active	Division of Adult Correction and Juvenile Justice (DACJJ)	*Sentences imposed on/after 10/1/2014:* ≤ 90 days: Local jail > 90 days: Statewide Misdemeanant Confinement Program (SMCP) *Sentences imposed before 10/1/2014:* ≤ 90 days: Local jail 91–180 days: SMCP > 180 days: DACJJ	*Sentences imposed on/after 12/1/2015:* SMCP, regardless of [illegible] *Sentences imposed [illegible] (G.S. 20-176(c1)):* • Defendants with [illegible] or jail imprisonment for a Ch. 20 offense: Local jail • Defendants with a prior DWI or prior jail imprisonment for a Ch. 20 offense: ≤ 90 days: Local jail 91–180 days: Local jail or DACJJ, in court's discretion > 180 days: DACJJ
Split Sentence at Sentencing G.S. 15A-1351(a)	*Continuous:* Local jail or DACJJ *Noncontinuous:* Local jail or treatment facility	Local jail or treatment facility	Local jail or treatment facility
Split Sentence as a Modification of Probation G.S. 15A-1344(e)	*Continuous:* Local jail or DACJJ *Noncontinuous:* Local jail or treatment facility	*Continuous:* Local jail or DACJJ *Noncontinuous:* Local jail or treatment facility	*Continuous:* Local jail or DACJJ *Noncontinuous:* Local jail or treatment facility
Confinement in Response to Violation (CRV) G.S. 15A-1344(d2)	DACJJ	Place of confinement indicated in the judgment suspending sentence	Place of confinement indicated in the judgment suspending sentence
Quick Dip G.S. 15A-1343(a1)(3) and -1343.2	Local jail	Local jail	N/A
Nonpayment of Fine G.S. 15A-1352	DACJJ	Local jail	N/A
Probation Revocation	Place of confinement indicated in the judgment suspending sentence	Place of confinement indicated in the judgment suspending sentence	Place of confinement indicated in the judgment suspending sentence

p. 59

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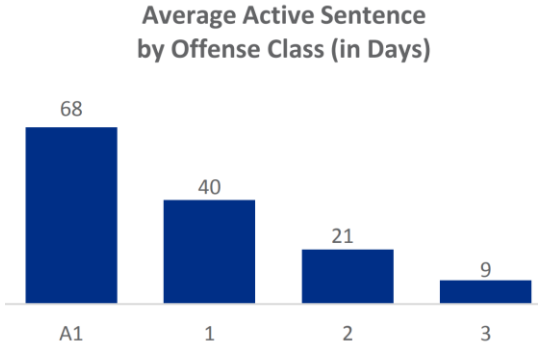

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Credits

- Jail credit (p. 21)
  - **Concurrent sentences:** All get credit
  - **Consecutive sentences:** One gets credit
- Sentence reduction credit (p. 22)
  - **Earned time:** 4 days/month
  - **Good time (DWI):** Cuts time in half

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Probationary Sentences

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Probation (p. 26)

- Term of imprisonment
- Type of probation
- Period of probation
- Conditions of probation
- Delegated authority

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Probation (p. 26)

- Term of imprisonment
- Type of probation
- Period of probation
- Conditions of probation
- Delegated authority

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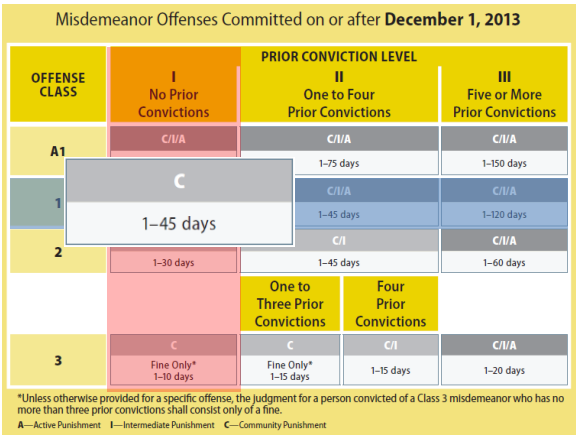

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Probation (p. 26)

- Term of imprisonment
- Type of probation
- Period of probation
- Conditions of probation
- Delegated authority

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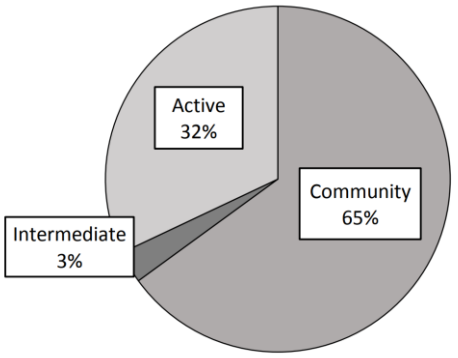
Community

- Supervised or unsupervised probation that MAY NOT include
  - Special probation
  - Drug treatment court

Intermediate

- Supervised probation that MAY include
  - Special probation
  - Drug treatment court

36

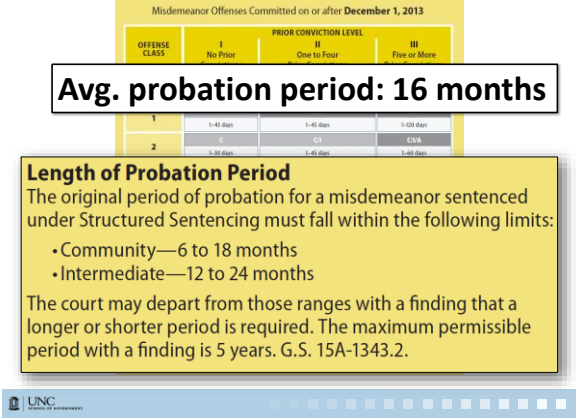


37

Probation (p. 28)

- Term of imprisonment
- Type of probation
- Period of probation
- Conditions of probation
- Delegated authority

38



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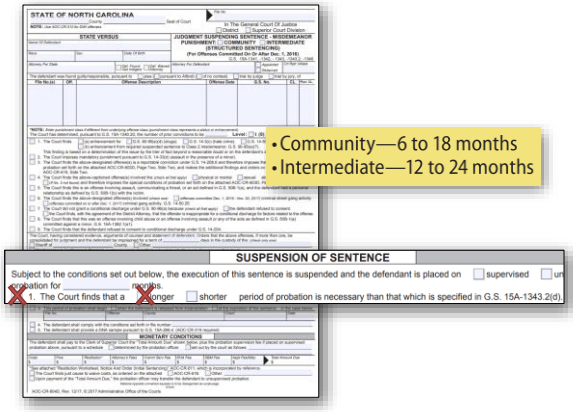

40

Probation (p. 28-32)

- Term of imprisonment
- Type of probation
- Period of probation
- Conditions of probation
- Delegated authority

41

Probation Conditions (p. 28-32)

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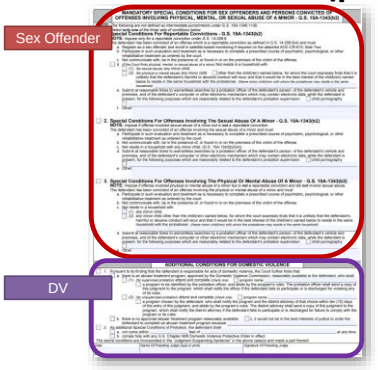
Probation Conditions (p. 28-32)



43

Probation (p. 32)

- Term of imprisonment
- Type of probation
- Period of probation
- Conditions of probation
- Delegated authority

44

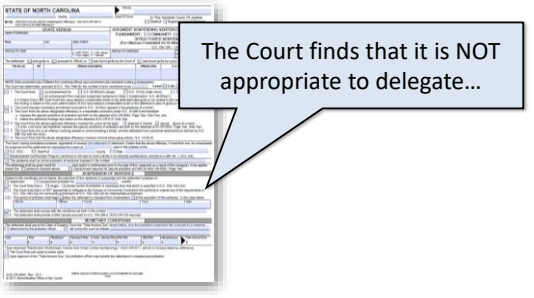
Delegated Authority

- Conditions a probation officer may impose without court action
  - Community service
  - Additional reporting
  - Substance abuse assessment/treatment
  - House arrest
  - Curfew with electronic monitoring
  - Educational/vocational programming
  - **2- or 3-day "quick dip" in the jail**

45

Delegated Authority

- Applies unless the court "un-delegates" it



46

Exercise 2

47

Exercise 2

- Misdemeanor larceny
- Prior convictions: 0
- Jail credit: None

48

What is the longest period of supervised probation the court may order without a finding?

6 months

18 months

24 months

5 years

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Misdemeanor Offenses Committed on or after **December 1, 2013**

OFFENSE CLASS	PRIOR CONVICTION LEVEL I No Prior Convictions	II One to Four Prior Convictions	III Five or More Prior Convictions
A1	C/I/A	C/I/A 1–75 days	C/I/A 1–150 days
1	C 1–45 days	C/I/A 1–45 days	C/I/A 1–120 days
2		C/I	C/I/A 1–60 days
3			C/I/A 1–20 days

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

- Community—6 to 18 months
- Intermediate—12 to 24 months

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

Class 3 misdemeanor who has no

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

50

Special probation (split sentence)

- Intermediate punishment
- Jail confinement as a condition of probation
- Up to ¼ the maximum imposed sentence
- May be noncontinuous (e.g., weekends)
- Optional $40/day jail fee

Exercise 3

52

Exercise 3

4

Prior Conviction Level

✓	12/23/1999	Felony larceny (Virginia)
✓	4/22/2006	PJC for disorderly conduct
✗	1/18/2007	Failure to stop at stop sign
✓	6/19/2008	2nd degree trespass
✓	9/12/2014	Intoxicated & disruptive
✗	9/12/2014	2nd degree trespass
✗	7/6/2018	Criminal contempt

53

Exercise 3

- Assault on a Female
- Prior convictions: 4
- Jail credit: 3 days

54

What is the longest permissible split sentence?

37 days

34 days

18 days

15 days

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55

Misdemeanor Offenses Committed on or after **December 1, 2013**

OFFENSE CLASS	I No Prior Convictions	PRIOR CONVICTION LEVEL II One to Four Prior Convictions	III Five or More Prior Convictions
A1	C/I/A 1–60 days	C/I/A 1–75 days	C/I/A 1–150 days
1	C 1–45 days	C/I/A 1–45 days	C/I/A 1–120 days
2	C 1–30 days	C/I 1–45 days	C/I/A 1–60 days
		One to Three Prior Convictions	Four Prior Convictions	
3	C Fine Only* 1–10 days	C Fine Only* 1–15 days	C/I 1–15 days	C/I/A 1–20 days

*Unless otherwise provided for a specific offense, the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine.

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

56

Special probation (split sentence)

- Intermediate punishment
- Jail confinement as a condition of probation
- Up to ¼ the maximum imposed sentence
- May be noncontinuous (e.g., weekends)
- Optional $40/day jail fee
- *Judge's discretion whether to apply jail credit to the split sentence or to the suspended term*

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Sentence Types

- ✓ Jail
- ✓ Supervised probation
- ✓ Special probation (probation with split)
- Unsupervised probation
- Fines and restitution
- Multiple convictions
- Diversions

58

Sentence Types

- ✓ Jail
- ✓ Supervised probation
- ✓ Special probation (probation with split)
- Unsupervised probation
- Fines and restitution
- Multiple convictions
- Diversions

⊘ Intermediate
⊘ Sex offenders

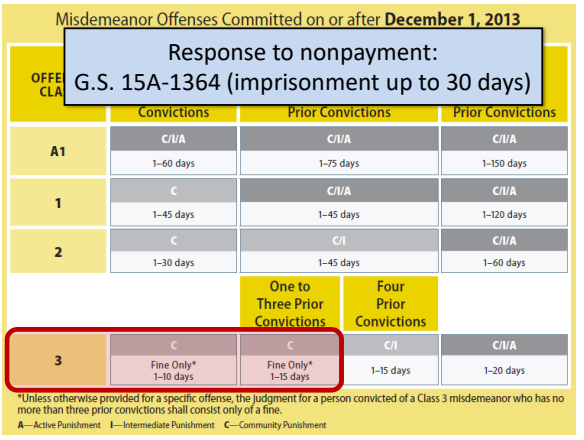
59

Sentence Types

- ✓ Jail
- ✓ Supervised probation
- ✓ Special probation (probation with split)
- ✓ Unsupervised probation
- Fines and restitution
- Multiple convictions
- Diversions

- Class A1—Court discretion
- Class 1—Court discretion
- Class 2—$1,000
- Class 3—$200

60



61

Restitution (p. 19)

- Compensation to victim
  - **Limited to crimes of conviction (State v. Murphy)**
- Must have proof or stipulation
- Court must consider defendant's ability to pay

62

Sentence Types

- ✓ Jail
- ✓ Supervised probation
- ✓ Special probation (probation with split)
- ✓ Unsupervised probation
- ✓ Fines and restitution
- Multiple convictions
- Diversions

63

Sentencing Multiple Convictions

- Page 20-21
  - –Consolidation
  - –Concurrent sentences
  - –Consecutive sentences
  - –Multiple probationary sentences

64

Limit on Consecutive Sentences

- The cumulative term of imprisonment may not exceed twice the maximum authorized sentence for the class and prior conviction level of the most serious offense
- If all convictions are for Class 3 misdemeanors, they may not run consecutively

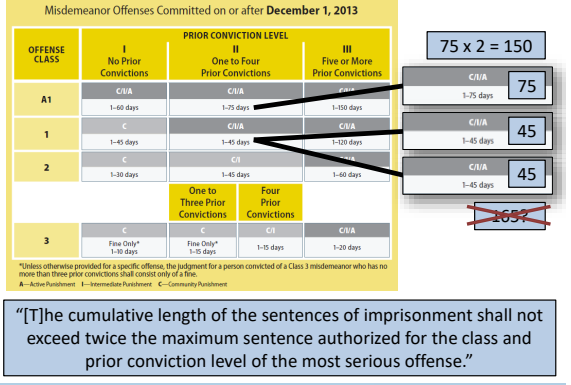
65

Exercise 4

66

Exercise 4

- Convictions
  - Sexual battery (Class A1)
  - Larceny (Class 1)
  - Injury to personal property (Class 1)
- Prior Conviction Level II
- What is the longest permissible consecutive sentence?



"[T]he cumulative length of the sentences of imprisonment shall not exceed twice the maximum sentence authorized for the class and prior conviction level of the most serious offense."

Sex Offenders

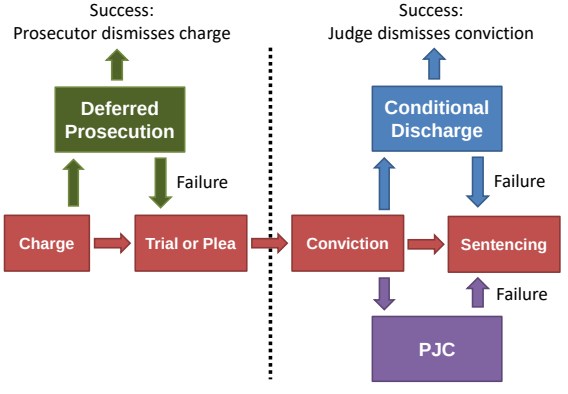
- Reportable sex crimes (p. 19; p. 58)
  - Sex offender registration (30 years or lifetime)
  - Satellite-based monitoring (SBM)
  - Additional probation conditions (p. 32)
  - No unsupervised probation
  - Optional: Permanent no-contact order

Sentence Types

- ✓ Jail
- ✓ Supervised probation
- ✓ Special probation (probation with split)
- ✓ Unsupervised probation
- ✓ Fine only
- ✓ Multiple convictions
- Diversions

Diversions (p. 23-24)

- Deferred prosecution
- Conditional discharge
- Prayer for Judgment Continued (PJC)



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Deferred Prosecution

- Statutory deferred. G.S. 15A-1341(a1)
  - Misdemeanors, Class H/I felonies
  - No prior probation
  - 2-year probation maximum
  - Should not include acceptance of plea
- Informal deferred

Cond e

Mandatory for consenting defendants unless both State and judge oppose (State v. Dail)

- **G.S. 90-96(a)** — **Drug possession/paraphernalia**
- G.S. 90-96(a1) — Drug possession/paraphernalia
- G.S. 90-113.14 — Toxic Vapor offenses
- **G.S. 15A-1341(a4)** — **Any Class H/I felony or misdemeanor**
- G.S. 15A-1341(a5) — Drug Treatment Court
- G.S. 15A-1341(a
- G.S. 14-50.29 — der 19 years old

Requires joint motion of State and defendant

PJC

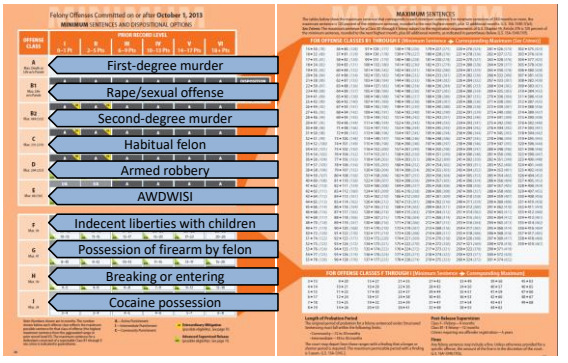
- After adjudication of guilt, continuation without entry of judgment
- Permissible in any case, except:
  - DWI
  - Solicitation of prostitution
  - Speeding in excess of 25 mph over limit
  - Passing a stopped school bus
- May not include conditions beyond obeying the law and paying costs
- No subsequent authority to "dismiss"

Sentence Types

- ✓ Jail
- ✓ Supervised probation
- ✓ Special probation (probation with split)
- ✓ Unsupervised probation
- ✓ Fine only
- ✓ Multiple convictions
- ✓ Diversions

76

77



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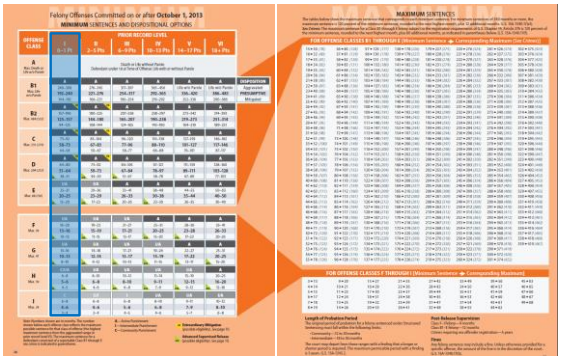

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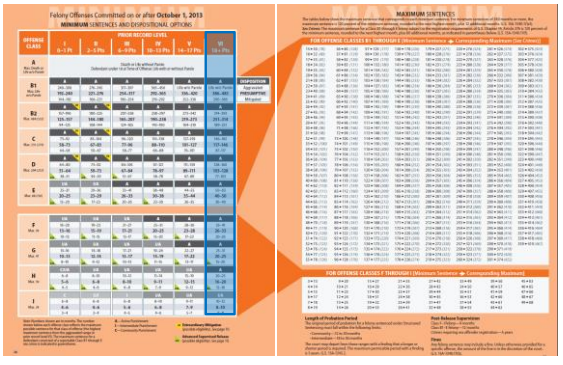

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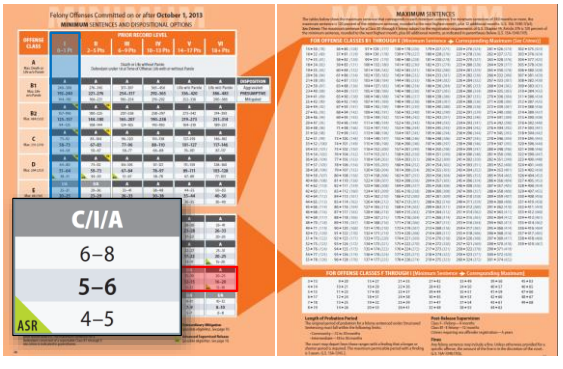

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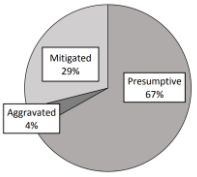
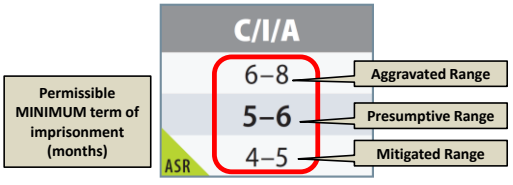
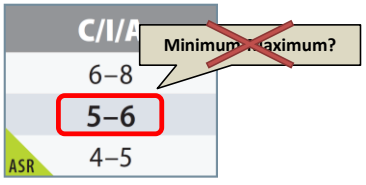
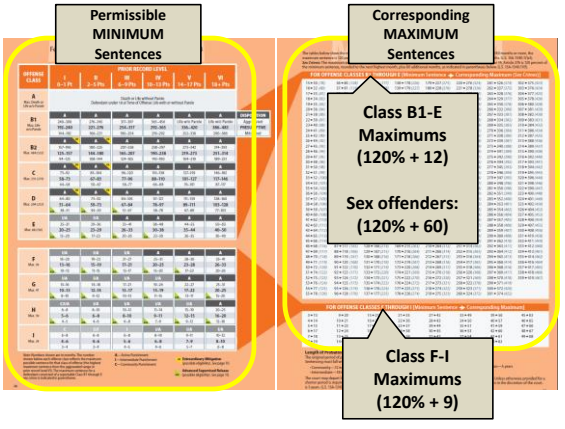

Mitigated
29%
Presumptive
67%
Aggravated
4%


C/I/A
6–8
5–6
4–5
ASR
Permissible MINIMUM term of imprisonment (months)
Aggravated Range
Presumptive Range
Mitigated Range

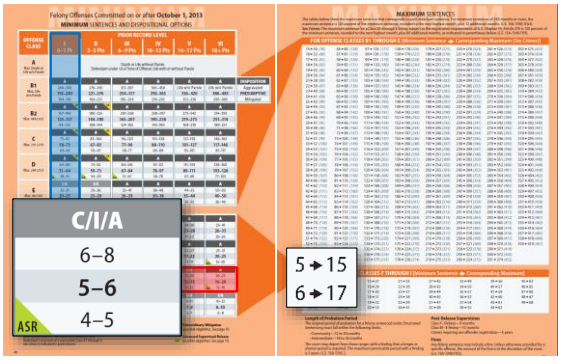
82


C/I/A
6–8
5–6
4–5
ASR
Minimum, Maximum?

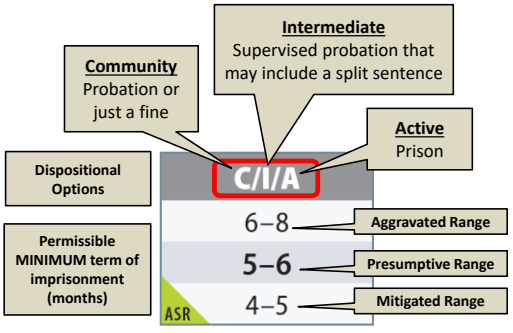
83


Permissible MINIMUM Sentences
Corresponding MAXIMUM Sentences
Class B1-E Maximums (120% + 12)
Sex offenders: (120% + 60)
Class F-I Maximums (120% + 9)

84


C/I/A
6–8
5–6
4–5
ASR
5 → 15
6 → 17

85


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

86

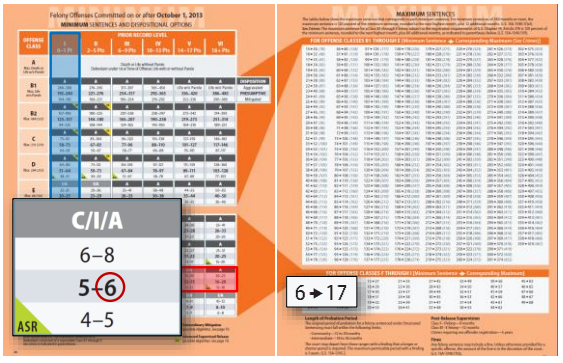

Mandatory Active
Judge's discretion
Mandatory Non-Active

87

Example

- Felony Larceny (Class H)
- Prior Record Level I
- No aggravating or mitigating factors

88

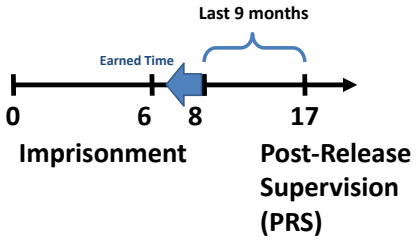


89

What does it mean?

90

- About 7 months in prison
- 9 months of PRS



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Misdemeanor Offenses Committed on or after **December 1, 2013**

OFFENSE CLASS	PRIOR CONVICTION LEVEL			
	I No Prior Convictions	**II** One to Four Prior Convictions		**III** Five or More Prior Convictions
A1	C/I/A 1–60 days	C/I/A 1–75 days		C/I/A 1–150 days
1	C 1–45 days	C/I/A 1–45 days		C/I/A 1–120 days
2	C 1–30 days	C/I 1–45 days		C/I/A 1–60 days
		One to Three Prior Convictions	**Four Prior Convictions**	
3	C Fine Only* 1–10 days	C Fine Only* 1–15 days	C/I 1–15 days	C/I/A 1–20 days

*Unless otherwise provided for a specific offense, the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine.

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

Misdemeanor Offenses Committed before **December 1, 2013**

OFFENSE CLASS	PRIOR CONVICTION LEVEL		
	I No Prior Convictions	**II** One to Four Prior Convictions	**III** Five or More Prior Convictions
A1	C/I/A 1–60 days	C/I/A 1–75 days	C/I/A 1–150 days
1	C 1–45 days	C/I/A 1–45 days	C/I/A 1–120 days
2	C 1–30 days	C/I 1–45 days	C/I/A 1–60 days
3	C 1–10 days	C/I 1–15 days	C/I/A 1–20 days

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

Step 1: Determine the Applicable Law

Choose the appropriate sentencing grid based on the defendant's date of offense.

- Offenses committed on or after December 1, 2013.
- Offenses committed before December 1, 2013.

Step 2: Determine the Offense Class

North Carolina misdemeanors are assigned to one of four offense classes—Class A1, 1, 2, and 3, from most to least serious. Identify the offense class of the crime being sentenced. See APPENDIX B, Offense Class Table for Misdemeanors.

OFFENSE CLASS REDUCTIONS

Unless otherwise provided by law, the following step-down rules apply for attempts, conspiracies, and solicitations to commit a misdemeanor:

Attempt	1 class lower (G.S. 14-2.5)
Conspiracy	1 class lower (G.S. 14-2.4)
Solicitation	Always a Class 3 misdemeanor (G.S. 14-2.6)

OFFENSE CLASS ENHANCEMENTS

With appropriate factual findings, the offense class of certain misdemeanors may be increased under the enhancements set out below. Additional procedural requirements apply.

Criminal street gang activity (G.S. 14-50.22)	One offense class higher (Class A1 misdemeanor enhanced to Class I felony)
Committed because of the victim's race, color, religion, nationality, or country of origin (G.S. 14-3(c))	Class 2 and 3 misdemeanors enhanced to Class 1 misdemeanor Class 1 and A1 misdemeanors enhanced to Class H felony

Step 3: Determine the Prior Conviction Level

The defendant is assigned to one of three prior conviction levels (I through III) based on his or her criminal history.

Level	Prior Convictions
I	No prior convictions
II	1–4 prior convictions
III	5 or more prior convictions

QUALIFYING PRIOR CONVICTIONS

COUNT:

- Only one prior conviction from a single session of district court, or in a single week of superior court or court in another jurisdiction. G.S. 15A-1340.21(d).
- Convictions in superior court, regardless of a pending appeal to the appellate division. G.S. 15A-1340.11(7).
- Qualifying convictions, regardless of when they arose (there is no statute of limitations). State v. Rich, 130 N.C. App. 113 (1998).
- A prayer for judgment continued (PJC). State v. Canellas, 164 N.C. App. 775 (2004).
- A conviction resulting in G.S. 90-96 probation, if it has not yet been dismissed. State v. Hasty, 133 N.C. App. 563 (1999).

DO NOT COUNT:

- Infractions.
- Contempt. State v. Reaves, 142 N.C. App. 629 (2001).
- Juvenile adjudications.
- District court convictions on appeal, or for which the time for appeal to superior court has not yet expired. G.S. 15A-1340.11(7).

NOTES:

- *Proof.* The State must prove a defendant's record by a preponderance of the evidence. Prior convictions are proved by stipulation, court or administrative records, or any other method found by the court to be reliable. G.S. 15A-1340.21(c).
- *Date of determination.* Prior record level is determined on the date a criminal judgment is entered, G.S. 15A-1340.11(7), and may include convictions for offenses that occurred after the offense now being sentenced, State v. Threadgill, 227 N.C. App. 175 (2013).

- *Ethical considerations.* The State and defendant may not agree to intentionally underreport a defendant's record to the court. Council of the N.C. State Bar, 2003 Formal Ethics Op. 5. A defendant may not misrepresent his or her record but may remain silent on the issue, even during the presentation of an inaccurate record, provided he or she was not the source of the inaccuracy. 1998 Formal Ethics Op. 5.
- *Suppression.* The defendant may move to suppress a prior conviction obtained in violation of his or her right to counsel. G.S. 15A-980.

Step 4: Select a Sentence of Imprisonment

The court imposes a sentence of imprisonment as part of every sentence, including probationary sentences. The court then determines (in Step 5) whether the defendant will be incarcerated for that term (Active punishment) or whether the sentence will be suspended and served only upon revocation of probation (Intermediate or Community punishment).

TERM OF IMPRISONMENT

For misdemeanor sentencing, the court selects a single term of imprisonment from the range shown in the applicable grid cell; unlike felony sentencing, there is no minimum and maximum.

For sentences imposed on or after October 1, 2014, misdemeanor sentences of 90 days or less are served in the local jail, except as provided in G.S. 148-32.1. Misdemeanor sentences in excess of 90 days are served through the Statewide Misdemeanant Confinement Program, through which the N.C. Sheriffs' Association will find space for the inmate in a jail that has volunteered beds to the program. *See* APPENDIX G, Place of Confinement Chart, for additional rules.

FINE-ONLY SENTENCES

The only exception to the requirement for the court to select a sentence of imprisonment is a sentence to a fine only, which is permissible as a Community punishment. For Class 3 misdemeanors committed on or after December 1, 2013, unless otherwise provided for a specific offense, the judgment for a defendant with no more than three prior convictions shall consist of a fine only. G.S. 15A-1340.23(d).

Step 5: Choose a Sentence Disposition

The court must choose a disposition for each sentence. There are three possible sentence dispositions under Structured Sentencing: Active, Intermediate, and Community. The letters shown in each grid cell (A, I, and/or C) indicate which dispositions are permissible in that cell.

Active Punishment Exception
An Active sentence to time already served is permissible for any misdemeanant with pretrial jail credit, even if an Active punishment is not ordinarily allowed in his or her grid cell. G.S. 15A-1340.20(c1).

ACTIVE PUNISHMENT (G.S. 15A-1340.11(1))

An Active punishment requires that the defendant serve the imposed sentence of imprisonment in jail or prison.

INTERMEDIATE PUNISHMENT (G.S. 15A-1340.11(6))

Intermediate punishment requires that the court suspend the sentence of imprisonment and impose SUPERVISED probation.

COMMUNITY PUNISHMENT (G.S. 15A-1340.11(2))

Community punishment requires that the court suspend the sentence of imprisonment and impose SUPERVISED or UNSUPERVISED probation. A Community punishment also may consist of a fine only.

See PROBATIONARY SENTENCES, PAGE 16

Step 6: Review Additional Issues, as Appropriate

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

- Fines, costs, and other fees
- Restitution
- Sex Crimes
- Sentencing multiple convictions
- Jail credit
- Sentence reduction credits
- DNA sample
- Deferrals (deferred prosecution, PJC, and conditional discharge)
- Work release
- Purposes of sentencing
- Obtaining additional information for sentencing

See ADDITIONAL ISSUES, PAGE 11

Fines, Costs, and Other Fees

FINES

Any sentence may include a fine. Unless otherwise provided for a specific crime, the amount of the fine is in the discretion of the court. Unless otherwise provided by law, the maximum fine for a Class 3 misdemeanor is $200, and the maximum fine for a Class 2 misdemeanor is $1,000. G.S. 15A-1340.23(b). The fine for a local ordinance violation may not exceed $50 unless the ordinance expressly provides for a larger fine, which in no case may exceed $500. G.S. 14-4. For Class 3 misdemeanors committed on or after December 1, 2013, unless otherwise provided for a specific offense, the judgment for a defendant with no more than three prior convictions shall consist of a fine only. G.S. 15A-1340.23(b).

Unpaid fines may, upon a determination of default, be responded to as provided in G.S. 15A-1364 and docketed as a civil judgment as provided in G.S. 15A-1365.

COSTS

Court costs apply by default in every case in which the defendant is convicted, regardless of sentence disposition. Only upon entry of a written order, supported by findings of fact and conclusions of law, determining that there is just cause may the court waive costs. G.S. 7A-304(a). Unpaid costs may, upon a determination of default, be responded to as provided in G.S. 15A-1364 and docketed as a civil judgment as provided in G.S. 15A-1365.

ATTORNEY FEES

Attorney fees are ordered and docketed as provided in G.S. 7A-455, under rules adopted by the Office of Indigent Defense Services. An additional $60 attorney appointment fee applies under G.S. 7A-455.1.

PROBATION SUPERVISION FEES

Supervised probationers pay a supervision fee of $40 per month. The fee is waivable for good cause and upon motion of the probationer. G.S. 15A-1343(c1).

PROBATIONARY JAIL FEES

Probationers may, in the discretion of the court, be ordered to pay a $40 fee for each day of jail confinement imposed as a condition of probation. This fee is not to be confused with the $10 per day fee for *pretrial* confinement, which is a court cost and applicable by default unless waived for just cause. G.S. 7A-313.

ELECTRONIC HOUSE ARREST (EHA) FEE

Probationers sentenced to electronic house arrest (EHA) pay a one-time fee of $90, plus an additional fee reflecting the actual daily cost ($4.48 per day as of October 2016). This fee is waivable for good cause upon motion of the probationer. G.S. 15A-1343(c2).

COMMUNITY SERVICE FEE

Defendants ordered to complete community service pay a fee of $250 per sentencing transaction. G.S. 143B-708.

Restitution

The court must consider ordering restitution from a criminal defendant to a victim in every case. G.S. 15A-1340.34(a). The court shall order restitution to the victim of any offense covered under the Crime Victims' Rights Act (CVRA). G.S. 15A-1340.34(b).

See APPENDIX E, Crimes Covered under the Crime Victims' Rights Act.

RESTITUTION MAY BE ORDERED FOR THE FOLLOWING:

- Bodily injury. G.S. 15A-1340.35(a)(1).
- Damage, loss, or injury to property. G.S. 15A-1340.35(a)(2).
- To a person other than the victim, or to any organization, corporation, or association, including (as of December 1, 2016) an insurer, that provided assistance to the victim and is subrogated to the rights of the victim. G.S. 15A-1340.37(b).

RESTITUTION MAY NOT BE ORDERED FOR THE FOLLOWING:

- A victim's pain and suffering. State v. Wilson, 158 N.C. App. 235 (2003).
- As punitive damages. State v. Burkhead, 85 N.C. App. 535 (1987).

NOTES:

- *Proof of the restitution amount.* The restitution amount must be supported by evidence adduced at trial or at the sentencing hearing, or by stipulation. A prosecutor's statement or restitution worksheet, standing alone, is insufficient to support an award of restitution.

- *Ability to pay.* The court must consider the defendant's ability to pay restitution. The burden of demonstrating the defendant's inability to pay restitution is on the defendant. State v. Tate, 187 N.C. App. 593 (2007).
- *Active cases.* The court must consider recommending that restitution be paid out of any work-release earnings or as a condition of post-release supervision. G.S. 15A-1340.36(c).
- *Civil judgments.* In CVRA cases, restitution orders exceeding $250 may be enforced as a civil judgment as provided in G.S. 15A-1340.38(b). If initially ordered as a condition of probation, the judgment may be executed upon the defendant's property only when probation is terminated or revoked and the judge has made a finding that a sum certain remains owed. G.S. 15A-1340.38(c). There is no clear authority to order restitution as a civil judgment in non-CVRA cases.

Sex Crimes

See APPENDIX F, Crimes Requiring Sex Offender Registration.

SATELLITE-BASED MONITORING DETERMINATION HEARING

When sentencing a crime that requires sex offender registration, the court must conduct the hearing required by G.S. 14-208.40A, at which it will make findings related to registration and determine whether the defendant is required to enroll in satellite-based monitoring (SBM). (Use form AOC-CR-615.)

NOTICE OF DUTY TO REGISTER

When sentencing a sex offender to probation, the court must give the defendant notice of his or her duty to register. G.S. 14-208.8(b). (Use form AOC-CR-261.)

NO-CONTACT ORDER

At sentencing, the district attorney may ask the court to enter a permanent no-contact order prohibiting the defendant from having any contact with the victim of the offense. A violation of a no-contact order is a Class A1 misdemeanor. G.S. 15A-1340.50. (Use form AOC-CR-620.)

Sentencing Multiple Convictions

CONSOLIDATION

If a defendant is convicted of more than one offense at the same time, the court may consolidate the convictions and impose a single judgment with a sentence appropriate for the most serious offense. G.S. 15A-1340.15(b) (felonies); -1340.22(b) (misdemeanors).

DWI Two or more impaired driving charges may not be consolidated for judgment. Such sentences may, however, run concurrently. An impaired driving conviction sentenced under G.S. 20-179 may be consolidated with a charge carrying greater punishment.

CONCURRENT SENTENCES

Unless otherwise specified by the judge, all sentences of imprisonment run concurrently with one another. G.S. 15A-1340.15(a); -1354(a).

CONSECUTIVE SENTENCES

Generally, the judge may order one sentence of imprisonment to run at the expiration of another sentence. Note the following:

- *Single sentence rule*. When felony sentences are run consecutively, the Division of Adult Correction (DAC) treats them as a single sentence. The aggregate minimum sentence is the sum of all of the individual minimum sentences. The aggregate maximum sentence is the sum of all the individual maximum sentences, less 12 months for each second and subsequent Class B1–E felonies, less 60 months for each second or subsequent Class B1–E reportable sex crime, and less 9 months for each second and subsequent Class F–I felony. The defendant will serve a single term of supervised release upon his or her release from prison, the length of which is dictated by the longest post-release supervision term to which the defendant is subject. G.S. 15A-1354(b).
- *Mandatory consecutive sentences*. Some laws require a sentence to run consecutively to any other sentence being served by the defendant: habitual felon (G.S. 14-7.6); violent habitual felon (G.S. 14-7.12); armed habitual felon (G.S. 14-7.41); habitual breaking and entering (G.S. 14-7.31); habitual impaired driving (G.S. 20-138.5(b)); drug trafficking (G.S. 90-95(h)). These laws allow for concurrent or consolidated sentences for convictions sentenced at the same time. State v. Bozeman, 115 N.C. App. 658 (1994).
- *Limit on consecutive sentences for misdemeanors*. The cumulative term of imprisonment of consecutive misdemeanor sentences may not exceed twice the maximum sentence authorized for the class and prior conviction level of the most serious offense. If all convictions are for Class 3 misdemeanors, consecutive sentences shall not be imposed. G.S. 15A-1340.22(a).

PROBATIONARY SENTENCES

Suspended sentences may (consistent with the limitations described above) be set to run concurrently with or consecutively to one another in the event of revocation. Probation periods themselves, however, must run concurrently with one another. G.S. 15A-1346(a). The court may order a probation period to run consecutively to an Active sentence—an arrangement sometimes referred to as a contingent sentence. G.S. 15A-1346(b).

Jail Credit

A defendant must receive credit for the total amount of time he or she has spent in any State or local correctional, mental, or other institution as a result of the charge that culminated in the sentence or the incident from which the charge arose, including credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole, probation, or post-release supervision revocation hearing. G.S. 15-196.1. The presiding judge must determine jail credit. G.S. 15-196.4.

COUNT FOR CREDIT:

- Pretrial confinement and time spent in confinement awaiting a probation violation hearing. G.S. 15-196.1.
- The active portion of a split sentence. State v. Farris, 336 N.C. 552 (1994).
- Time spent at DART Cherry as a condition of probation. State v. Lutz, 177 N.C. App. 140 (2006).
- Presentence commitment for study. State v. Powell, 11 N.C. App. 194 (1971).
- Hospitalization to determine competency to stand trial. State v. Lewis, 18 N.C. App. 681 (1973).
- Time spent in confinement in another state awaiting extradition when the defendant was held in the other state solely based on North Carolina charges. Childers v. Laws, 558 F. Supp. 1284 (W.D.N.C. 1983).
- Time spent imprisoned for contempt under G.S. 15A-1344(e1). State v. Belcher, 173 N.C. App. 620 (2005).
- Time imprisoned as confinement in response to violation (CRV). G.S. 15A-1344(d2).
- Time imprisoned as a "quick dip" under G.S. 15A-1343(a1)(3) or -1343.2.
- DWI Time spent as an inpatient at a state-operated or state-licensed treatment facility for the treatment of alcoholism or substance abuse, provided such treatment occurred after the commission of the offense for which the defendant is being sentenced. G.S. 20-179(k1).

DO NOT COUNT FOR CREDIT:

- Time in custody on a pending charge while serving a sentence imposed for another offense. G.S. 15-196.1.
- Time spent under electronic house arrest. State v. Jarman, 140 N.C. App. 198 (2000).
- Time spent at a privately run residential treatment program. State v. Stephenson, 213 N.C. App. 621 (2011).
- When two or more consecutive sentences are activated upon revocation of probation, credit for time served on concurrent CRV periods shall be credited to only one sentence. G.S. 15-196.2.
- DWI The first 24 hours spent in jail pending trial. G.S. 20-179(p).

NOTES:

- *Multiple charges.* When a defendant is detained on multiple charges and has shared jail credit applicable to all of them, the following rules apply. If the convictions are sentenced to run *concurrently*, each sentence is credited by as much of the time as was spent in custody on each charge. If the convictions are sentenced to run *consecutively*, shared credit is applied against only one sentence. G.S. 15-196.2.
- *Special probation.* When imposing special probation (a split sentence), the judge has discretion to order credit for any pretrial confinement to either the active portion of the split sentence or to the suspended sentence of imprisonment. G.S. 15A-1351(a).
- DWI *Jail credit.* If a defendant sentenced under G.S. 20-179 is ordered to serve 48 hours or more or has 48 hours or more remaining on a term of imprisonment, he or she must be required to serve 48 continuous hours of imprisonment to be given credit. Credit for jail time may only be awarded hour for hour for time actually served. G.S. 20-179(s).

Sentence Reduction Credits

A defendant serving an active term of imprisonment may reduce his or her maximum sentence by working or participating in educational programming in prison. By Division of Adult Correction (DAC) regulation, *earned time* credit is awarded at 3, 6, or 9 days per month, depending on the nature of the work or program. In no case may the defendant's sentence be reduced below the minimum term of imprisonment. A misdemeanant may reduce his or her sentence by up to 4 days per month through earned time and credit for work or educational programming. G.S. 15A-1340.20(d); 162-60. A term of special probation (a split sentence) may not be reduced by any sentence reduction credit. G.S. 148-13(f).

DWI By DAC regulation, DWI inmates are awarded good time at the rate of one day deducted from their prison or jail term for each day they spend in custody without a conviction through the Disciplinary Process of a violation of inmate conduct rules—which generally results in an inmate's sentence being cut in half. A defendant sentenced under G.S. 20-179 is eligible for good time credit regardless of the place of confinement. Good time may not be used to reduce an inmate's sentence below the mandatory minimum period of imprisonment for his or her level of DWI. G.S. 20-179(r). The prison system does not award good time to Aggravated Level One DWI sentences.

DWI Parole

Defendants sentenced to a term of imprisonment for a conviction sentenced under G.S. 20-179—other than defendants sentenced at Aggravated Level One—are eligible for parole. G.S. 15A-1371.

If the sentence includes a minimum term of imprisonment, the person is eligible for release on parole upon completion of the minimum term or one-fifth the maximum penalty allowed by law, whichever is less, subject to the limitations below. If no minimum sentence is imposed for a prisoner serving an active term of imprisonment for a conviction of impaired driving, the person is eligible for release on parole at any time, subject to the limitations below. Good time credit reduces the term that must expire before a defendant becomes eligible for release on parole. Because good time credit is awarded day for day, the time that must expire before a defendant is parole-eligible effectively is halved. G.S. 15A-1355(c). Limitations on DWI parole:

- A defendant may not be released on parole until he or she has served the mandatory minimum term of imprisonment. G.S. 20-179(p).
- To be released on parole, a defendant must have obtained a substance abuse assessment and have completed any recommended treatment or training program or must be paroled into a residential treatment program. G.S. 20-179(p).

In addition to the rules above, a defendant serving a sentence of imprisonment of not less than 30 days nor as great as 18 months under G.S. 20-179 may be released on parole after serving one-third of the maximum sentence as provided in G.S. 15A-1371(g).

DNA Sample

The court must, under G.S. 15A-266.4, order the defendant to provide a DNA sample as a condition of the sentence for defendants convicted of:

- Any felony.
- Assault on a handicapped person (G.S. 14-32.1).
- Stalking (G.S. 14-277.3A).
- Cyberstalking (G.S. 14-196.3).
- Any offense requiring registration as a sex offender (G.S. 14-208.6).

See APPENDIX F, Crimes Requiring Sex Offender Registration.

Deferrals

DEFERRED PROSECUTION

Prosecution may be deferred for a person charged with a misdemeanor or a Class H or Class I felony, and the defendant may be placed on probation as provided in G.S. 15A-1341(a). The maximum probation period for a deferred prosecution is 2 years. G.S. 15A-1342(a). A district attorney may also have local deferral procedures.

PRAYER FOR JUDGMENT CONTINUED (PJC)

A prayer for judgement continued (PJC) is permissible for any defendant who is found guilty or pleads guilty, except for:

- Impaired driving. State v. Greene, 297 N.C. 305 (1979).
- Solicitation of prostitution. G.S. 14-205.1.
- Speeding in excess of 25 m.p.h. over the posted limit. G.S. 20-141(p).
- Passing a stopped school bus. G.S. 20-217(e).

For Class B1–E felonies committed on or after December 1, 2012, the permissible length of a PJC is limited by G.S. 15A-1331.2.

A PJC is converted into a judgment when it includes conditions that amount to punishment. Conditions not amounting to punishment include payment of costs (G.S. 15A-101(4a)) and a requirement to obey the law. State v. Brown, 110 N.C. App. 658 (1993).

CONDITIONAL DISCHARGE UNDER G.S. 15A-1341(a4)

When a defendant pleads guilty to or is found guilty of any Class H or Class I felony or a misdemeanor other than impaired driving, the court may, on joint motion of the defendant and prosecutor, place the defendant on probation without entering a judgment of guilt, as provided in G.S. 15A-1341(a4). The maximum period of probation for this conditional discharge is 2 years. G.S. 15A-1342(a).

CONDITIONAL DISCHARGE UNDER G.S. 90-96

Certain defendants who plead guilty to or are found guilty of the following drug offenses are eligible for a conditional discharge under G.S. 90-96(a):

- Misdemeanor possession of a controlled substance in Schedules I–VI.
- Felony possession of a controlled substance under G.S. 90-95(a)(3).
- Misdemeanor possession of drug paraphernalia under G.S. 90-113.22.

Eligible defendants are those who:

- Have no prior felony convictions of any type.
- Have no prior convictions under Article 5 of G.S. Chapter 90.
- Have never received a prior discharge and dismissal under G.S. 90-96 or 90-113.14.

The maximum period of probation for this conditional discharge is 2 years. G.S. 15A-1342(a).

G.S. 90-96(a) is mandatory for consenting defendants for offenses committed before December 1, 2013. For offenses committed on or after December 1, 2013, conditional discharge is not required if the court, with the agreement of the district attorney, makes a written finding that the defendant is inappropriate for a conditional discharge for factors related to the offense.

G.S. 90-96(a1) describes a discretionary conditional discharge with slightly broader eligibility than G.S. 90-96(a) and a seven-year look-back limitation on disqualifying prior convictions and conditional discharges. The probation period imposed under G.S. 90-96(a1) shall be for at least 1 year.

Work Release

Work release is the temporary release of a sentenced inmate to work on a job in the free community, outside the jail or prison, for which the inmate is paid by the outside employer.

FELONIES

When a person is given an active sentence for a felony, the court may recommend work release. G.S. 15A-1351(f). The prison system makes the ultimate decision of whether and when to grant work release. G.S. 148-33.1. The court shall consider recommending to the Secretary of Public Safety that any restitution be made out of the defendant's work release earnings. G.S. 15A-1340.36.

MISDEMEANORS

When a person is given an active sentence for a misdemeanor, the judge may recommend work release. With the consent of the defendant, the judge may order work release. G.S. 15A-1351(f). When ordering work release, the judge must indicate the date the work is to begin, the place of confinement, a provision that work release terminates if the offender loses his or her job, and a determination about the disbursement of earnings, including how much should be paid to the assigned custodian for the costs of the prisoner's keep. G.S. 15A-1353(f); 148-33.1(f). The court may commit the defendant to a specific jail or prison facility to facilitate an ordered work release arrangement, as provided in G.S. 15A-1352(d).

PROBATIONARY CASES

The judge should not make any recommendation on work release when placing a defendant on probation; that recommendation should be made, if at all, upon revocation of probation. G.S. 148-33.1(i).

Purposes of Sentencing

Under G.S. 15A-1340.12, the primary purposes of sentencing in North Carolina are to:

PUNISH the defendant, commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the defendant's culpability.

PROTECT the public by restraining the defendant.

REHABILITATE the defendant.

RESTORE the defendant to the community as a lawful citizen.

DETER criminal behavior by others.

Obtaining Additional Information for Sentencing

PRESENTENCE INVESTIGATION

In any case, the court may order a probation officer to make a presentence investigation of the defendant. G.S. 15A-1332(b). To accommodate rotation, a judge who orders a presentence report may direct that the sentencing hearing in the case be held before him or her in another district during or after the session in which the defendant was convicted. G.S. 15A-1334(c).

DWI When a person has been convicted of an offense involving impaired driving, the court may, unless the person objects, request a presentence investigation to determine whether the person would benefit from treatment for habitual use of alcohol or drugs. G.S. 20-179.1.

PRESENTENCE COMMITMENT FOR STUDY

Defendants charged with or convicted of any felony or a Class A1 or Class 1 misdemeanor may, with the defendant's consent, be committed to prison for up to 90 days for diagnostic study. G.S. 15A-1332(c). Contact the Division of Adult Correction (DAC) Diagnostic Services Branch at 919-838-3729 to make arrangements.

PROBATIONARY SENTENCES

Probation is a suspended sentence of imprisonment that requires compliance with conditions set by the court. There are two types of probationary sentences, Intermediate punishment and Community punishment. When the court imposes a probationary sentence, it must indicate the type of probation, the length of the probation period, the conditions of probation, and whether or not delegated authority applies.

Types of Probation

INTERMEDIATE PUNISHMENT (G.S. 15A-1340.11(6))

Intermediate punishment requires that the court suspend the sentence of imprisonment and impose SUPERVISED probation.

FOR OFFENSES COMMITTED ON OR AFTER DECEMBER 1, 2011

An Intermediate punishment is supervised probation that MAY include drug treatment court, a split sentence, or other conditions in the discretion of the court, including any of the "community and intermediate probation conditions" set out in G.S. 15A-1343(a1). Intensive supervision, residential program, and day-reporting center are repealed as Intermediate conditions of probation.

FOR OFFENSES COMMITTED BEFORE DECEMBER 1, 2011

An Intermediate punishment is supervised probation that MUST include at least one of the following six conditions:

- Special probation (split sentence)
- Residential program
- Electronic house arrest
- Intensive supervision
- Day-reporting center
- Drug treatment court

Special Probation (Split Sentence) (G.S. 15A-1351(a))

Special probation, often referred to as a split sentence, is a term of probation that includes a period or periods of incarceration. The total of all periods of special probation confinement may not exceed one-fourth the maximum imposed sentence. Imprisonment may be in prison or a designated jail or treatment facility, as provided in APPENDIX G, Place of Confinement Chart. If confinement is in the jail, the court may order the defendant to pay a $40 per day jail fee. G.S. 7A-313. Imprisonment may be for noncontinuous periods, such as weekends; noncontinuous imprisonment may be served only in a jail or treatment facility, not in prison. No confinement other than an activated sentence may be required beyond two years of conviction.

COMMUNITY PUNISHMENT (G.S. 15A-1340.11(2))

Community punishment requires that the court suspend the sentence of imprisonment and impose SUPERVISED or UNSUPERVISED probation. A Community punishment also may consist of a fine only.

FOR OFFENSES COMMITTED ON OR AFTER DECEMBER 1, 2011

A Community punishment is a non-active punishment that does not include drug treatment court or special probation but that may include any of the "community and intermediate probation conditions" set out in G.S. 15A-1343(a1).

FOR OFFENSES COMMITTED BEFORE DECEMBER 1, 2011

A Community punishment is a non-active punishment that does not include any of the six conditions set out above that formerly made a sentence an Intermediate punishment.

DWI PROBATION

DWI The distinctions between Community and Intermediate punishment do not apply to probationary sentences under G.S. 20-179. However, the following DWI-specific rules apply.

Special Probation (Split Sentence) for DWI (G.S. 15A-1351(a))

The total of all periods of confinement imposed as special probation under G.S. 20-179 may not exceed one-fourth the maximum authorized sentence for the level at which the defendant was punished. G.S. 15A-1351(a). The judge may order that a term of imprisonment imposed as a condition of special probation be served as an inpatient in a facility operated or licensed by the State for the treatment of alcoholism or substance abuse where the defendant has been accepted for admission or commitment as an inpatient. The defendant must bear the expense of any treatment unless the judge orders that the costs be absorbed by the State.

Preference for Unsupervised Probation (G.S. 20-179(r))

Unless the judge makes specific findings in the record about the need for probation supervision, a person sentenced at Levels Three through Five must be placed on unsupervised probation if he or she

- has no impaired driving convictions in the seven years preceding the current offense date and
- has been assessed and completed any recommended treatment.

If a judge places a convicted impaired driver on supervised probation under this subsection based on a finding that supervised probation is necessary, the judge must authorize the probation officer to transfer the defendant to unsupervised probation after he or she completes any ordered community service and pays any fines.

Continuous Alcohol Monitoring (CAM)

In addition to the requirements set out in the DWI sentencing grids, the following rules apply to continuous alcohol monitoring (CAM) ordered as part of a DWI sentence for an offense committed on or after December 1, 2012.

- A judge may order as a condition of probation for any level of punishment under G.S. 20-179 that the defendant abstain from alcohol consumption, as verified by CAM. G.S. 20-179(k2).
- A judge may authorize a probation officer to require a defendant to submit to CAM for assessment purposes if the defendant is required, as a condition of probation, not to consume alcohol and the probation officer believes the defendant is consuming alcohol. If the probation officer orders the defendant to submit to CAM pursuant to this provision, the defendant must bear the costs of CAM. G.S. 20-179(k3).
- A court may not impose CAM pursuant to G.S. 20-179(k2) or (k3) if it finds good cause that the defendant should not be required to pay the costs of CAM, unless the local governmental entity responsible for the incarceration of the defendant in the local confinement facility agrees to pay the costs of the system.

Period of Probation

When a judge suspends a sentence of imprisonment and places a defendant on probation, the judge must decide how long the period of probation will be. The permissible length of the period of probation is governed by statute (it does not flow from the length of the suspended sentence of imprisonment).

Under G.S. 15A-1343.2(d), the original period of probation in a case sentenced under Structured Sentencing must fall within the following limits:

	Community Punishment	Intermediate Punishment
Misdemeanant	6 to 18 months	12 to 24 months
Felon	12 to 30 months	18 to 36 months

The court may depart from these ranges with a finding that a longer or shorter period is required. The maximum permissible period is 5 years.

DWI The permissible length of probation in a DWI case is 5 years, and no special findings are required to impose a probationary sentence of that length.

Conditions of Probation

The sentencing judge has broad discretion to shape the conditions of the defendant's probation. Conditions fall into different categories, some of which apply by default and some which may be added by the court, as indicated in the lists below.

Note: The numbering of the conditions in this handbook mirrors the numbering used in the referenced General Statute sections. Omitted numbers indicate repealed conditions.

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

Regular conditions of probation apply to each defendant placed on supervised probation unless the presiding judge specifically exempts the defendant from one or more of the conditions in open court and in the judgment of the court. Regular conditions are as follows:

1. Commit no criminal offense in any jurisdiction.

***2.** Remain within the jurisdiction of the court unless granted written permission to leave by the court or the defendant's probation officer.

***3.** Report as directed by the court or the defendant's probation officer to the officer at reasonable times and places and in a reasonable manner; permit the officer to visit the probationer 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.

***3a.** Not abscond, by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer. [*Offenses committed on/after 12/1/2011.*]

4. Satisfy child support and other family obligations as required by the court. If the court requires the payment of child support, the amount of the payments shall be determined as provided in G.S. 50-13.4(c).

5. Possess no firearm, explosive device, or other deadly weapon listed in G.S. 14-269 without the written permission of the court.

***6.** Pay a supervision fee.

7. Remain gainfully and suitably employed or faithfully pursue a course of study or of vocational training that will equip the probationer for suitable employment. A defendant pursuing a course of study or of vocational training shall abide by all of the rules of the institution providing the education or training, and the probation officer shall forward a copy of the probation judgment to that institution and request to be notified of any violations of institutional rules by the defendant.

***8.** Notify the probation officer if the probationer fails to obtain or retain satisfactory employment.

9. Pay the costs of court and any fine ordered by the court and make restitution or reparation as provided in G.S. 15A-1343(d).

10. Pay the State of North Carolina for the costs of appointed counsel, public defender, or appellate defender to represent the defendant in the case(s) for which he or she was placed on probation.

12. Attend and complete an abuser treatment program if (i) the court finds that the defendant is responsible for acts of domestic violence and (ii) there is a program, approved by the Domestic Violence Commission, reasonably available to the defendant, unless the court finds that such would not be in the best interests of justice.

***13.** Submit at reasonable times to warrantless searches by a probation officer of the probationer's person and of the probationer's vehicle and premises while the probationer is present, for purposes directly related to the probation supervision, but the probationer may not be required to submit to any other search that would otherwise be unlawful. [*Offenses committed on/after 12/1/2009.*]

***14.** Submit to warrantless searches by a law enforcement officer of the probationer's person and of the probationer's vehicle, upon a reasonable suspicion that the probationer 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. [*Offenses committed on/after 12/1/2009.*]

***15.** Not use, possess, or control any illegal drug or controlled substance unless it has been prescribed for him or her 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. [*Offenses committed on/after 12/1/2009.*]

***16.** 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 (DAC) of the Department of Public Safety for the actual costs of drug or alcohol screening and testing. [*Offenses committed on/after 12/1/2011.*]

***17.** Waive all rights relating to extradition proceedings if taken into custody outside of this state for failing to comply with the conditions imposed by the court upon a felony conviction. [*Offenses committed on/after 12/1/2016.*]

18. Submit to the taking of digitized photographs, including photographs of the probationer's face, scars, marks, and tattoos, to be included in the probationer's records. [*Offenses committed on/after 12/1/2016.*]

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* Does not apply to defendants on unsupervised probation.

If ordered to special probation, the defendant is required to obey the rules and regulations of DAC governing the conduct of inmates while imprisoned and report to a probation officer in the State of North Carolina within seventy-two hours of discharge from the active term of imprisonment.

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

The court may require that the defendant comply with one or more of the following special conditions:

1. Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose. Notwithstanding the provisions of G.S. 15A-1344(e) or any other provision of law, the defendant may be required to participate in such treatment for its duration regardless of the length of the suspended sentence imposed.

2. Attend or reside in a facility providing rehabilitation, counseling, treatment, social skills, or employment training, instruction, recreation, or residence for persons on probation.

2b. Participate in and successfully complete a Drug Treatment Court Program pursuant to Article 62 of Chapter 7A of the General Statutes.

2c. Abstain from alcohol consumption and submit to continuous alcohol monitoring when alcohol dependency or chronic abuse has been identified by a substance abuse assessment.

3. Submit to imprisonment required for special probation under G.S. 15A-1351(a) or -1344(e).

3c. Remain at his or her residence. The court, in the sentencing order, may authorize the offender to leave the offender's residence for employment, counseling, a course of study, vocational training, or other specific purposes and may modify that authorization. The probation officer may authorize the offender to leave the offender's residence for specific purposes not authorized in the court order

upon approval of the probation officer's supervisor. The offender shall be required to wear a device which permits the supervising agency to monitor the offender's compliance with the condition electronically and to pay a fee for the device as specified in G.S. 15A-1343(c2).

4. Surrender his or her driver's license to the clerk of superior court and not operate a motor vehicle for a period specified by the court.

5. Compensate the Department of Environmental Quality or the North Carolina Wildlife Resources Commission, as the case may be, for the replacement costs of any marine and estuarine resources or any wildlife resources which were taken, injured, removed, harmfully altered, damaged, or destroyed as a result of a criminal offense of which the defendant was convicted. If any investigation is required by officers or agents of the Department of Environmental Quality or the Wildlife Resources Commission in determining the extent of the destruction of resources involved, the court may include compensation of the agency for investigative costs as a condition of probation. The court may also include, as a condition of probation, compensation of an agency for any reward paid for information leading to the arrest and conviction of the offender. This subdivision does not apply in any case governed by G.S. 143-215.3(a)(7).

6. Perform community or reparation service under the supervision of the Section of Community Corrections of DAC and pay the fee required by G.S. 143B-708.

8a. Purchase the least expensive annual statewide license or combination of licenses to hunt, trap, or fish listed in G.S. 113-270.2, -270.3, -270.5, -271, -272, and -272.2 that would be required to engage lawfully in the specific activity or activities in which the defendant was engaged and which constitute the basis of the offense or offenses of which he or she was convicted.

9. If the offense is one in which there is evidence of physical, mental, or sexual abuse of a minor, the court should encourage the minor and the minor's parents or custodians to participate in rehabilitative treatment and may order the defendant to pay the cost of such treatment.

9b. Any or all of the following conditions relating to street gangs as defined in G.S. 14-50.16(b): Not knowingly associate with any known street gang members and not knowingly be present at or frequent any place or location where street gangs gather or where street gang activity is known to occur; not wear clothes, jewelry, signs, symbols, or any paraphernalia readily identifiable as associated with or used by a street gang; not initiate or participate in any contact with any individual who was or may be a witness against or victim of the defendant or the defendant's street gang.

9c. Participate in any Project Safe Neighborhood activities as directed by the probation officer.

10. Satisfy any other conditions determined by the court to be reasonably related to his or her rehabilitation.

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

For Structured Sentencing offenses committed on or after December 1, 2011, the court may include any one or more of the following conditions as part of a Community or Intermediate punishment:

1. House arrest with electronic monitoring.

2. Perform community service and pay the fee prescribed by law for this supervision.

3. Submit to a period or periods of confinement in a local confinement facility for a total of no more than 6 days per month during any three separate months during the period of probation. The 6 days per month confinement provided for in this subdivision may only be imposed as 2-day or 3-day consecutive periods. When a defendant is on probation for multiple judgments, confinement periods imposed under this subdivision shall run concurrently and may total no more than 6 days per month.

4. Substance abuse assessment, monitoring, or treatment.

4a. Abstain from alcohol consumption and submit to continuous alcohol monitoring when alcohol dependency or chronic abuse has been identified by a substance abuse assessment. [*Offenses committed on/after 12/1/2012.*]

5. Participation in an educational or vocational skills development program, including an evidence-based program.

6. Submission to satellite-based monitoring, pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes, if the defendant is described by G.S. 14-208.40(a)(2).

INTERMEDIATE CONDITIONS (G.S. 15A-1343(b4))

For offenses committed on or after December 1, 2009, the following conditions of probation apply to each defendant subject to Intermediate punishment, unless the court specifically exempts the defendant from one or more of the conditions in its judgment or order:

1. If required in the discretion of the defendant's probation officer, perform community service under the supervision of the Section of Community Corrections of the Division of Adult Correction (DAC), Department of Public Safety and pay the fee required by G.S. 143B-708.

2. Not use, possess, or control alcohol.

3. Remain within the 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 and abiding by the rules, regulations, and direction of each program.

SEX OFFENDER CONDITIONS (G.S. 15A-1343(b2))

A defendant who has been convicted of a reportable sex crime or an offense that involves the physical, mental, or sexual abuse of a minor must be made subject to the following conditions. These defendants may not be placed on unsupervised probation.

1. Register as required by G.S. 14-208.7 if the offense is a reportable conviction as defined by G.S. 14-208.6(4).
2. 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.
3. Not communicate with, be in the presence of, or found in or on the premises of the victim of the offense.
4. Not reside in a household with any minor child if the offense is one in which there is evidence of sexual abuse of a minor.
5. Not reside in a household with any minor child if the offense is one in which there is evidence of physical or mental abuse of a minor, unless 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 minor child's best interest to allow the probationer to reside in the same household with a minor child.
6. Satisfy any other conditions determined by the court to be reasonably related to his or her rehabilitation.
7. Submit to satellite-based monitoring pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes, if the defendant is described by G.S. 14-208.40(a)(1).
8. Submit to satellite-based monitoring pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes, if the defendant described by G.S. 14-208.40(a)(2) and DAC, based on its risk assessment program, recommends that the defendant submit to the highest possible level of supervision and monitoring.
9. Submit at reasonable times to warrantless searches by a probation officer of the probationer's person and of the probationer's vehicle and premises while the probationer is present, for purposes specified by the court and reasonably related to the probation supervision, but the probationer may not be required to submit to any other search that would otherwise be unlawful. For purposes of this subdivision, warrantless searches of the probationer's computer or other electronic mechanism which may contain electronic data shall be considered reasonably related to the probation supervision. Whenever the warrantless search consists of testing for the presence of illegal drugs, the probationer may also be required to reimburse DAC for the actual cost of drug screening and drug testing, if the results are positive.

Delegated Authority (G.S. 15A-1343.2)

Delegated authority applies only to crimes sentenced under Structured Sentencing. Thus, it does not apply to DWI probationers sentenced under G.S. 20-179. Unless the presiding judge specifically finds in the judgment of the court that delegation is not appropriate, a probation officer may require an offender to do any of the following:

COMMUNITY PUNISHMENT CASES

1. Perform up to 20 hours of community service and pay the fee prescribed by law for this supervision.
2. Report to the offender's probation officer on a frequency to be determined by the officer.
3. Submit to substance abuse assessment, monitoring, or treatment.
4. Submit to house arrest with electronic monitoring. [*Offenses committed on/after 12/1/2011.*]
5. Submit to a period or periods of confinement in a local confinement facility for a total of no more than 6 days per month during any three separate months during the period of probation. The 6 days per month confinement provided for in this subdivision may only be imposed as 2-day or 3-day consecutive periods. [*Offenses committed on/after 12/1/2011.*]
6. Submit to a curfew which requires the offender to remain in a specified place for a specified period each day and wear a device that permits the offender's compliance with the condition to be monitored electronically. [*Offenses committed on/after 12/1/2011.*]
7. Participate in an educational or vocational skills development program, including an evidence-based program. [*Offenses committed on/after 12/1/2011.*]

INTERMEDIATE PUNISHMENT CASES

1. Perform up to 50 hours of community service and pay the fee prescribed by law for this supervision.
2. Submit to a curfew which requires the offender to remain in a specified place for a specified period each day and wear a device that permits the offender's compliance with the condition to be monitored electronically.
3. Submit to substance abuse assessment, monitoring, or treatment, including [*for offenses committed on/after 12/1/2012*] continuous alcohol monitoring when abstinence from alcohol consumption has been specified as a term of probation.
4. Participate in an educational or vocational skills development program, including an evidence-based program.
5. Submit to satellite-based monitoring if the defendant is described by G.S. 14-208.40(a)(2).
6. Submit to a period or periods of confinement in a local confinement facility for a total of no more than 6 days per month during any three separate months during the period of probation. The 6 days per month confinement provided for in this subdivision may only be imposed as 2-day or 3-day consecutive periods. [*Offenses committed on/after 12/1/2011.*]
7. Submit to house arrest with electronic monitoring. [*Offenses committed on/after 12/1/2011.*]
8. Report to the offender's probation officer on a frequency to be determined by the officer. [*Offenses committed on/after 12/1/2011.*]

The officer may impose the conditions listed above upon a determination that the offender has violated a court-imposed probation condition. For offenses on or after December 1, 2011, the officer may also impose any condition except jail confinement for defendants deemed to be high risk based on a risk assessment. Jail confinement may be ordered only in response to a violation, and only when the probationer waives his or her right to a hearing on the violation.

APPENDIX B: OFFENSE CLASS TABLE FOR MISDEMEANORS

Class A1

Assault by Pointing a Gun (G.S. 14-34)	
*Assault in Presence of Minor (G.S. 14-33(d))	
Assault Inflicting Serious Injury (G.S. 14-33(c)(1))	
Assault on Child under 12 Years of Age (G.S. 14-33(c)(3))	
Assault on Female (G.S. 14-33(c)(2))	
Assault on Government Officer or Employee (G.S. 14-33(c)(4))	
Assault on Handicapped Person (G.S. 14-32.1)	
Assault on School Employee or Volunteer (G.S. 14-33(c)(6))	
Assault with Deadly Weapon (G.S. 14-33(c)(1))	
Child Abuse (G.S. 14-318.2)	
First-Degree Trespass, Utility Premises or Agricultural Center (G.S. 14-159.12)	
Food Stamp Fraud, $100–$500 (G.S. 108A-53.1)	
Interfering with Emergency Communication (G.S. 14-286.2)	
Misdemeanor Death by Vehicle (G.S. 20-141.1)	Class 1 for offenses before 12/1/2009
Secretly Peeping, Second Offense or with Photo Device (G.S. 14-202)	
Sexual Battery (G.S. 14-27.33)	Codified as G.S. 14-27.5A for offenses before 12/1/2015
*Stalking, First Offense (G.S. 14-277.3A)	
Violation of a Valid Protective Order (G.S. 50B-4.1(a))	

Class 1

Aggressive Driving (G.S. 20-141.6)	
Breaking into Coin-Operated Machine, First Offense (G.S. 14-56.1)	
Breaking or Entering Buildings (G.S. 14-54(b))	
Communicating Threats (G.S. 14-277.1)	
Contributing to the Delinquency of a Juvenile (G.S. 14-316.1)	
Cruelty to Animals (G.S. 14-360)	
Cyber-Bullying, Defendant 18 or Older (G.S. 14-458.1)	
Disclosure of Private Images, Defendant under 18, First Offense (G.S. 14-190.5A)	New for offenses on/after 12/1/2015
Domestic Criminal Trespass (G.S. 14-134.3)	
Driving While License Revoked (DWI Revocation) (G.S. 20-28(a1))	
Escape from Local Confinement Facility (G.S. 14-256)	
Escape from Prison, by Misdemeanant (G.S. 148-45)	
Failure to Stop for School Bus (G.S. 20-217)	
Failure to Yield to Emergency Vehicle, Damage or Injury (G.S. 20-157(h))	
False Imprisonment (Common Law)	
Forgery (Common Law)	
Going Armed to the Terror of the People (Common Law)	
Hit-and-Run Property Damage (G.S. 20-166)	
Injury to Personal Property, > $200 (G.S. 14-160(b))	
Injury to Real Property (G.S. 14-127)	
Larceny of Property, Worth $1,000 or Less (G.S. 14-72)	
Misrepresentation to Obtain Employment Security Benefits (G.S. 96-18(a))	
Misuse of 911 System (G.S. 14-111.4)	Class 3 for offenses before 12/1/2013
Obstruction of Justice (Common Law)	
Possession of Certain Schedule II–IV Controlled Substances (G.S. 90-95(d)(2))	
Possession of Non-Marijuana Drug Paraphernalia (G.S. 90-113.22)	
Possession of Handgun by Minor (G.S. 14-269.7(a))	Class 2 for offenses before 12/1/2011
Possession of over One-Half Ounce of Marijuana (G.S. 90-95(d)(4))	
Possession of Stolen Goods (G.S. 14-72)	
Possession/Manufacture of Fraudulent ID (G.S. 14-100.1)	
Purchase/Possess/Consume Alcohol by Person under 19 (G.S. 18B-302)	
Secretly Peeping (G.S. 14-202)	
Shoplifting/Concealment of Merchandise, Third Offense in 5 Years (G.S. 14-72.1)	
Solicitation of Prostitution, First Offense (G.S. 14-205.1)	G.S. 14-204 for offenses before 10/1/2013
Speeding to Elude (G.S. 20-141.5)	
Tax Return Violations (G.S. 105-236)	
Unauthorized Use of a Motor Vehicle (G.S. 14-72.2)	
Use of Red or Blue Light (G.S. 20-130.1)	
Weapon (Non-Firearm or Explosive) on School Property (G.S. 14-269.2)	
Worthless Check, Closed Account (G.S. 14-107(d)(4))	
*Worthless Check, Fourth Conviction (G.S. 14-107(d)(1))	

*Special Sentencing rules apply. *See* APPENDIX H, Special Sentencing Rules.

Class 2

Carrying Concealed Weapons, First Offense (G.S. 14-269(a), (a1))	
Cyber-Bullying, Defendant under 18 (G.S. 14-458.1)	
Cyberstalking (G.S. 14-196.3)	
Defrauding Innkeeper (G.S. 14-110)	
Disorderly Conduct (G.S. 14-288.4)	
Driving after Consuming (G.S. 20-138.3)	
Failure to Appear on a Misdemeanor (G.S. 15A-543)	
Failure to Report Accident (G.S. 20-166.1)	
Failure to Work after Being Paid (G.S. 14-104)	
Failure to Yield to Emergency Vehicle (G.S. 20-157)	
False Report to Police (G.S. 14-225)	
Financial Card Fraud (G.S. 14-113.13)	
First-Degree Trespass (G.S. 14-159.12)	
Furnishing False Information to Officer (G.S. 20-29)	
Gambling (G.S. 14-292)	
Harassing Phone Calls (G.S. 14-196)	
Indecent Exposure (G.S. 14-190.9)	
Injury to Personal Property, $200 or Less (G.S. 14-160(a))	
Marine/Wildlife Violations, Second/Subsequent Offense (G.S. 113-135)	
Possession of Schedule V Controlled Substance (G.S. 90-95(d)(3))	
Racing/Speed Competition (G.S. 20-141.3)	
Reckless Driving to Endanger (G.S. 20-140)	
Resisting Officers (G.S. 14-223)	
Shoplifting/Concealment of Merchandise, Second Offense in 3 Years (G.S. 14-72.1)	
Simple Assault/Assault and Battery/Affray (G.S. 14-33(a))	
Standing/Sitting/Lying on Highway (G.S. 20-174.1)	

Class 3

Allowing Unlicensed Person to Drive (G.S. 20-34)	Class 2 for offenses before 12/1/2013
Conversion by Bailee, Lessee, etc. ($400 or less) (G.S. 14-168.1)	Class 1 for offenses before 12/1/2013
Driving a Commercial Vehicle after Consuming Alcohol (G.S. 20-138.2A)	
Driving While License Revoked (Non-DWI Revocation) (G.S. 20-28(a))	Class 1 for offenses before 12/1/2013
Expired, Altered, or Revoked Registration/Tag (G.S. 20-111(2))	Class 2 for offenses before 12/1/2013
Failure to Comply with License Restrictions (G.S. 20-7(e))	Class 2 for offenses before 12/1/2013
Failure to Return Hired Property (G.S. 14-167)	Class 2 for offenses before 12/1/2013
Failure to Return Rented Property (G.S. 14-168.4)	Class 2 for offenses before 12/1/2013
Fictitious/Altered Title/Registration (G.S. 20-111(2))	Class 2 for offenses before 12/1/2013
Intoxicated and Disruptive in Public (G.S. 14-444)	
*Littering, 15 Pounds or Less, Non-Commercial (G.S. 14-399(c))	
Local Ordinance Violation (G.S. 14-4)	
Marine/Wildlife Violations, First Offense (G.S. 113-135)	
No Operator's License (G.S. 20-7(a))	Class 2 for offenses before 12/1/2013
Obtaining Property for Worthless Check (G.S. 14-106)	Class 2 for offenses before 12/1/2013
Open Container, First Offense (G.S. 20-138.7)	
Operating Unregistered Vehicle or Not Displaying Plate (G.S. 20-111(1))	Class 2 for offenses before 12/1/2013
Operating Vehicle without Insurance (G.S. 20-313(a))	Class 1 for offenses before 12/1/2013
*Possession of Marijuana (One-Half Ounce or Less) (G.S. 90-95(a)(3))	
Possession of Marijuana Drug Paraphernalia (G.S. 90-113.22A)	New for offenses on/after 12/1/2014
Purchase/Possess/Consume Alcohol by 19 or 20 Year Old (G.S. 18B-302(i))	
Second-Degree Trespass (G.S. 14-159.13)	
*Shoplifting/Concealment of Merchandise, First Offense (G.S. 14-72.1)	
Speeding, More Than 15 m.p.h. over Limit or over 80 m.p.h. (G.S. 20-141(j1))	Class 2 for offenses before 12/1/2013
Unsealed Wine/Liquor in Passenger Area (G.S. 18B-401)	
Window Tinting Violation (G.S. 20-127)	Class 2 for offenses before 12/1/2013
*Worthless Check (Simple, $2,000 or Less) (G.S. 14-107(d)(1))	Class 2 for offenses before 12/1/2013

Selected Infractions

Failure to Carry/Sign Registration Card (G.S. 20-57(c))	Class 2 for offenses before 12/1/2013
Failure to Carry License (G.S. 20-7(a))	Class 2 for offenses before 12/1/2013
Failure to Notify DMV of Address Change for License (G.S. 20-7.1) or Registration (G.S. 20-67)	Class 2 for offenses before 12/1/2013
Fishing without a License (G.S. 113-174.1(a) and -270.1B(a))	Class 3 for offenses before 12/1/2013
Operating a Motor Vehicle with Expired License (G.S. 20-7(f))	Class 2 for offenses before 12/1/2013
Ramp Meter Violation (G.S. 20-158(c)(6))	New for offenses on/after 12/1/2014
Violations of Boating and Water Safety Provisions of Art. 1, G.S. Ch. 75A, Except as Otherwise Provided	Class 3 for offenses before 12/1/2013

Note: Offense classifications are subject to change, and different classifications may apply to older offenses.

*Special Sentencing rules apply. *See* APPENDIX H, Special Sentencing Rules.

APPENDIX G: PLACE OF CONFINEMENT CHART

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

NOTES:

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

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

APPENDIX H: SPECIAL SENTENCING RULES

The listed crimes are a selection of commonly charged offenses that are sentenced under Structured Sentencing, but with the additional rules or exceptions indicated below. The list is not comprehensive.

Statutory Rape of a Child by an Adult (G.S. 14-27.23), and
Statutory Sexual Offense with a Child by an Adult (G.S. 14-27.28)

Mandatory minimum sentence of no less than 300 months and mandatory lifetime satellite-based monitoring upon release from prison. The statutes also provide for a sentence of up to life without parole with judicial findings of "egregious aggravation," but that provision has been ruled unconstitutional. State v. Singletary, 786 S.E.2d 712 (2016) (N.C. Ct. App. 2016).

Assault in the Presence of a Minor on a Person with Whom the Defendant Has a Personal Relationship (G.S. 14-33(d))

A defendant sentenced to Community punishment must be placed on supervised probation. A defendant sentenced for a second or subsequent offense must be sentenced to an active punishment of no less than 30 days.

Concealment of Merchandise (Shoplifting) (G.S. 14-72.1)

First offense. Any term of imprisonment may be suspended only on condition that the defendant complete at least 24 hours of community service.

Second offense within three years of conviction. Any term of imprisonment may be suspended only on condition that the defendant serve a split sentence of at least 72 hours, complete at least 72 hours of community service, or both.

Third or subsequent offense within five years of conviction of two other offenses. Any term of imprisonment may be suspended only on condition that the defendant serve a split sentence of at least 11 days.

If the sentencing judge finds that the defendant is unable to perform community service, the judge may pronounce a sentence that he or she deems appropriate. If the judge imposes an active sentence, he or she may not give jail credit for the first 24 hours of pretrial confinement.

Worthless Checks (G.S. 14-107)

If the court imposes any sentence other than an active sentence, it may require the payment of restitution to the victim for the amount of the check, any service charges imposed by the bank, and any processing fees imposed by the payee, and it must impose witness fees for each prosecuting witness.

Fourth and subsequent offenses. The court must, as a condition of probation, order the defendant not to maintain a checking account or make or utter a check for three years.

Secretly Peeping (G.S. 14-202)

Any probation for a first-time offender may include a requirement that the defendant obtain a psychological evaluation and comply with any recommended treatment. Probation for a second or subsequent offense must include that requirement.

Falsely Representing Self as Law Enforcement Officer (G.S. 14-277)

Intermediate punishment is always authorized for this crime.

Stalking (G.S. 14-277.3A)

A defendant sentenced to Community punishment must be placed on supervised probation.

Littering (15 Pounds or Less, Non-Commercial) (G.S. 14-399(c))

Punishable by a fine from $250 to $1,000. The court may also require 8 to 24 hours of community service, which shall entail picking up litter, if feasible.

Sell or Give Alcoholic Beverage to Person Under 21 (G.S. 18B-302; -302.1)

If the court imposes a non-active sentence, it must impose a fine of at least $250 and at least 25 hours of community service.

Subsequent offense within four years of conviction. If the court imposes a non-active sentence, it must impose a fine of at least $500 and at least 150 hours of community service.

Aiding or Abetting a Violation of G.S. 18B-302 by a Person Over the Lawful Age (G.S. 18B-302.1)

If the court imposes a non-active sentence, it must impose a fine of at least $500 and at least 25 hours of community service.

Subsequent offense within four years of conviction. If the court imposes a non-active sentence, it must impose a fine of at least $1,000 and at least 150 hours of community service.

Habitual Impaired Driving (G.S. 20-138.5)

Mandatory minimum sentence of no less than 12 months, which shall not be suspended. Sentences shall run consecutively with any sentence being served.

Felony Death by Vehicle (G.S. 20-141.4(a1))

Intermediate punishment is authorized for Prior Record Level I defendants.

Aggravated Felony Death by Vehicle (G.S. 20-141.4(a5))

The court must sentence the defendant from the aggravated range, without the need for any findings of aggravating factors.

Possession of Up to One-Half Ounce of Marijuana, 7 Grams of Synthetic Cannabinoid, or One-Twentieth of an Ounce of Hashish (G.S. 90-95(d)(4))

Any sentence of imprisonment must be suspended, and the judge may not impose a split sentence at sentencing.

Probation Violations

Jamie Markham
UNC School of Government

November 2020

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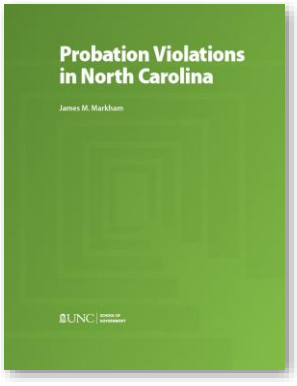

2

General Framework

- Does the court have jurisdiction to act?
- Did the defendant violate a lawful condition?
- Was the violation willful?
- Was the violation revocation-eligible?
- Consider alternatives
- Mitigate

3

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Violation Hearings

4

Initiating a Violation

- Probation Violation Report (DCC-10)
- Probationer is entitled to 24 hours notice of alleged violations
- All violations must be filed before case expires
- No special rules for "addendum" violations

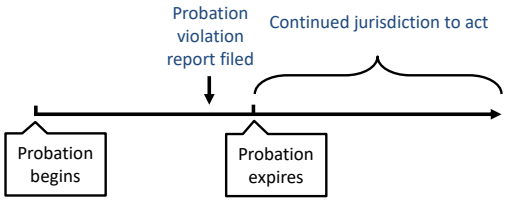
5

Jurisdiction

- The court may act…"[a]t any time prior to the expiration or termination of the probation period." G.S. 15A-1344(d).
- Court may also act after expiration if violation report filed (and file stamped) before probation ends. G.S. 15A-1344(f).

6

UNC SCHOOL OF GOVERNMENT



7

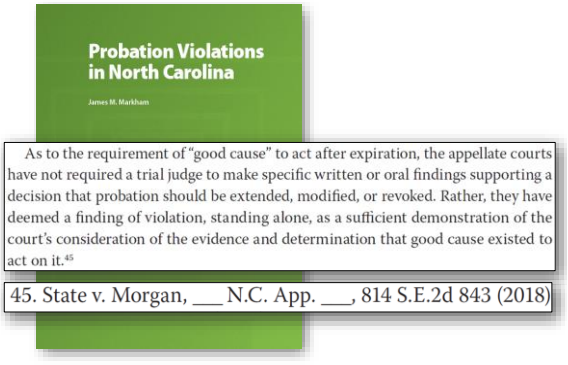
(f) Extension, Modification, or Revocation after Period of Probation. - The court may extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:

(1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.

(2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.

(3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.

8



9

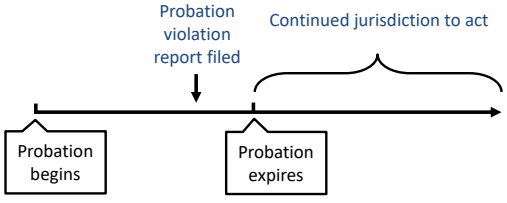
UNC SCHOOL OF GOVERNMENT

State v. Morgan (N.C., 2019)

- To preserve jurisdiction to act on a case after it has expired, the court must make a finding of **"good cause shown and stated"**

10

State v. Morgan



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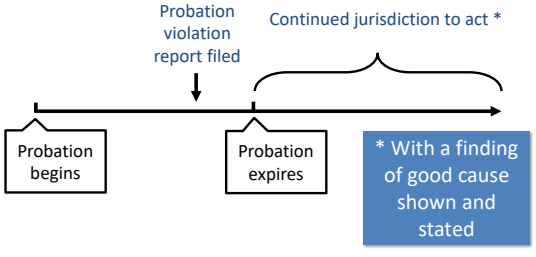
State v. Morgan



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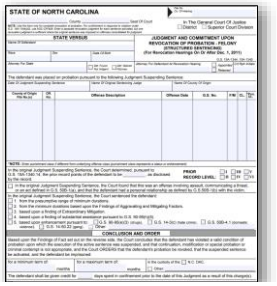
State v. Morgan


STATE OF NORTH CAROLINA

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

STATE VERSUS

JUDGMENT AND COMMITMENT UPON REVOCATION OF SUSPENDED SENTENCE / PRELIMINARY ATTACHMENT UPON REVOCATION
(For Revocation Hearings On Or After Dec. 1, 2011)

G.S. 15A-1344, 15A-1345

Name Of Defendant

Race | Sex | Date Of Birth

Attorney For State | ☐ Def. Waived ☐ Def. Present ☐ Def. Absent | Attorney For Defendant on Revocation Hearing | ☐ Appointed ☐ Retained ☐ Waived

This defendant was placed on probation pursuant to the following Judgment Suspending Sentence:

Date Of Judgment Suspending Sentence | Name Of Issuing Judge | Name Of County Of Origin

County of Origin File No.(s)	CR No.	Offense Description	Offense Date	G.S. No.	F/M	Cl.	Max Term

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

1) The Original Judgment Suspending Sentence, the Court determined, pursuant to G.S. 15A-1340.14, that the defendant was assigned to PRIOR RECORD LEVEL ☐ I ☐ II ☐ III ☐ IV by the record.

2) ☐ In the original Judgment Suspending Sentence, the Court found that this was an offense involving assault, communicating a threat, or an act defined in G.S. 50B-1(a), and that the defendant had a personal relationship as defined by G.S.50B-1(b) with the victim.

3) The Court finds for good cause shown and stated that the defendant has committed the following violation(s):

☐ a. from the presumptive range of minimum durations.
☐ b. from the minimum durations based upon the Findings of Aggravating and Mitigating Factors.
☐ c. based upon a finding of Extraordinary Mitigation.
☐ d. based upon a finding of substantial assistance pursuant to G.S. 90-95(h)(5).
☐ e. ☐ G.S. 90-95(h)(5) (drugs), ☐ G.S. 14-3(c) (hate crime), ☐ G.S. 15A-1340.16(d)(20) (gang), ☐ Other.

CONCLUSION AND ORDER

Based upon the Findings of Fact set out on the reverse side, the Court concludes that the defendant has violated a valid condition of probation and that the defendant should be dealt with for the violation(s). The Court further concludes that the defendant's violation is not a criminal contempt or is not appropriate, and the Court ORDERS that the defendant's probation be revoked, that the suspended sentence be activated, and the defendant be imprisoned.

For a minimum term of ____ months | For a maximum term of ____ months | in the custody of the ☐ N.C. DAC ☐ Other

The defendant shall be given credit for ____ days spent in confinement prior to the date of this Judgment as a result of this charge(s).

"THE COURT FINDS FOR GOOD CAUSE SHOWN AND STATED THAT PROBATION SHOULD BE REVOKED."

13

Arrest and Bail (p. 6-7)

- Probationers can be arrested for a violation
- Generally entitled to bail
- Exceptions for "dangerous" probationers:
  - With felony charges pending, or
  - Ever convicted of a sex crime
- No statutory authorization for anticipatory bonds
  - "Arrest on first positive drug screen. $50,000 bond."
  - "Hold without bond"
  - Court of Appeals has "urged caution" against that practice. State v. Hilbert, 145 N.C. App. 440 (2001)

14

Preliminary Hearings

- Required under G.S. 15A-1345(c)
  - Within 7 working days of arrest
  - Felony preliminary hearings may be held in district court
  - Required only if probationer is detained
- If not held within 7 working days, probationer must be released pending final violation hearing

15

Final Violation Hearings

- Proper venue:
  - Where probation imposed
  - Where violation occurred
  - Where probationer resides
- Court may return the case to district of origin or residence

16

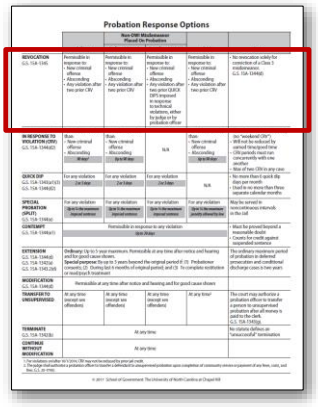
Final Violation Hearings

- Not a formal trial
- Probationer entitled to counsel
- Probationer may confront and cross-examine witnesses, unless the court finds good cause for not allowing confrontation
- Rules of evidence don't apply
  - Hearsay admissible
  - Exclusionary rule inapplicable
- Proof to judge's "reasonable satisfaction"

17

Response Options

18



Probation Response Options

19

Revocation (p. 16)

Serious Violations
- New criminal offense
- Absconding

Eligible for revocation upon first violation

Technical Violations
- Everything else

Three Strikes approach
Eligible for revocation after two prior . . .
Misd: Quick dips
Felony/DWI: CRV

20

Revocation (p. 16)

Serious Violations
- New criminal offense
- Absconding

Eligible for revocation upon first violation

Technical Violations
- Everything else

Three Strikes approach
Eligible for revocation after two prior . . .
Misd: Quick dips
Felony/DWI: CRV

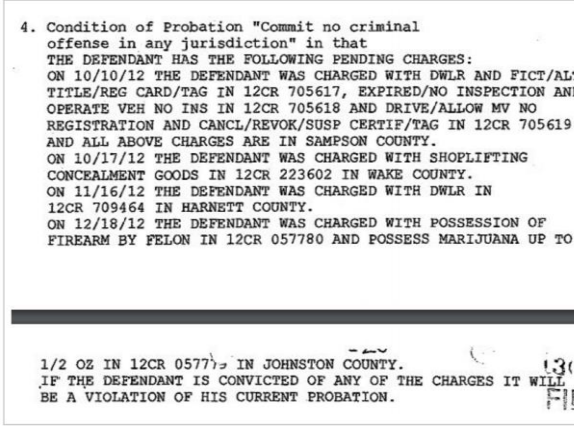
21

Revocation (p. 16)

Serious Violations
- New criminal offense
- Absconding

Eligible for revocation upon first violation

22



4. Condition of Probation "Commit no criminal offense in any jurisdiction" in that THE DEFENDANT HAS THE FOLLOWING PENDING CHARGES: ON 10/10/12 THE DEFENDANT WAS CHARGED WITH DWLR AND FICT/AL TITLE/REG CARD/TAG IN 12CR 705617, EXPIRED/NO INSPECTION AN OPERATE VEH NO INS IN 12CR 705618 AND DRIVE/ALLOW MV NO REGISTRATION AND CANCL/REVOK/SUSP CERTIF/TAG IN 12CR 705619 AND ALL ABOVE CHARGES ARE IN SAMPSON COUNTY. ON 10/17/12 THE DEFENDANT WAS CHARGED WITH SHOPLIFTING CONCEALMENT GOODS IN 12CR 223602 IN WAKE COUNTY. ON 11/16/12 THE DEFENDANT WAS CHARGED WITH DWLR IN 12CR 709464 IN HARNETT COUNTY. ON 12/18/12 THE DEFENDANT WAS CHARGED WITH POSSESSION OF FIREARM BY FELON IN 12CR 057780 AND POSSESS MARIJUANA UP TO

1/2 OZ IN 12CR 0577[illegible] IN JOHNSTON COUNTY. IF THE DEFENDANT IS CONVICTED OF ANY OF THE CHARGES IT WILL BE A VIOLATION OF HIS CURRENT PROBATION.

23

New criminal offense (p. 19)

- "Commit no criminal offense in any jurisdiction"
  - **Conviction** for new offense
  - **Independent findings** of criminal offense at probation violation hearing
- No revocation solely for Class 3 misdemeanor

24

UNC SCHOOL OF GOVERNMENT

Absconding (p. 21)

"Not abscond by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer, if the defendant is placed on supervised probation."

G.S. 15A-1343(b)(3a)

25

Absconding

- More than merely failing to report
- More than merely failing to remain within the jurisdiction
- Facts supporting absconding:
  - Long absence from residence
  - Repeated attempts by officer to contact
  - Probationer knows officer is looking for him or her and still doesn't respond

26

Revocation (p. 16)

Serious Violations
- New criminal offense
- Absconding

Eligible for revocation upon first violation

Technical Violations
- Everything else

Three Strikes approach
Eligible for revocation after two prior . . .
Misd: Quick dips
Felony/DWI: CRV

27

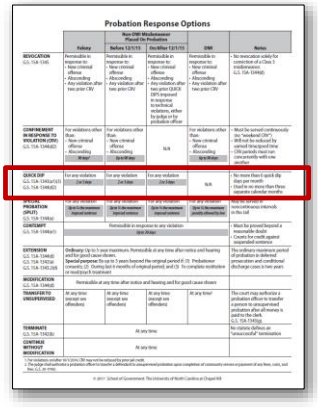
UNC SCHOOL OF GOVERNMENT

Revocation (p. 16)

Technical Violations
- Everything else

Three Strikes approach
Eligible for revocation after two prior . . .
Misd: Quick dips
Felony/DWI: CRV

28


Probation Response Options

29

Quick Dips

- 2-3 days of jail confinement
  - No more than 6 quick dips days per month
  - Used in no more than three separate calendar months of probation
  - Not permissible in DWI cases
- Quick Dips may be imposed by judge or by probation officer through "delegated authority"

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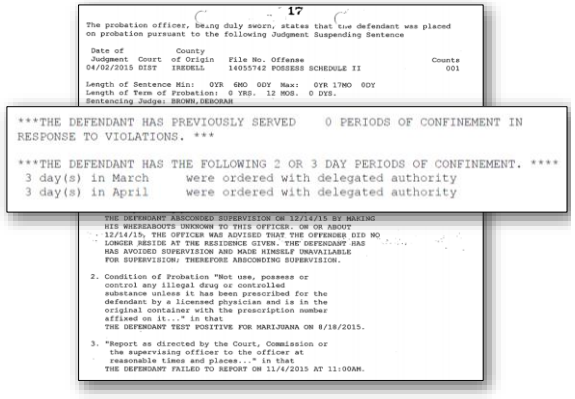


17

The probation officer, being duly sworn, states that the defendant was placed on probation pursuant to the following Judgment Suspending Sentence

Date of Judgment	Court	County of Origin	File No.	Offense	Counts
04/02/2015	DIST	IREDELL	14055742	POSSESS SCHEDULE II	001

Length of Sentence Min: 0YR 6MO 0DY Max: 0YR 17MO 0DY
Length of Term of Probation: 0 YRS. 12 MOS. 0 DYS.
Sentencing Judge: BROWN, DEBORAH

***THE DEFENDANT HAS PREVIOUSLY SERVED 0 PERIODS OF CONFINEMENT IN RESPONSE TO VIOLATIONS. ***

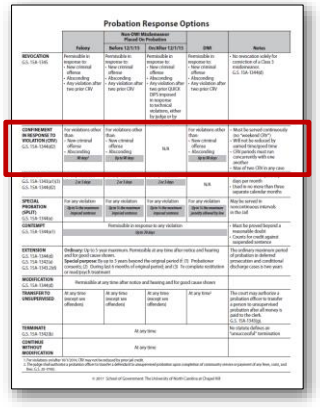
THE DEFENDANT HAS THE FOLLOWING 2 OR 3 DAY PERIODS OF CONFINEMENT. *
3 day(s) in March were ordered with delegated authority
3 day(s) in April were ordered with delegated authority

THE DEFENDANT ABSCONDED SUPERVISION ON 12/14/15 BY MAKING HIS WHEREABOUTS UNKNOWN TO THIS OFFICER, ON OR ABOUT 12/14/15, THE OFFICER WAS ADVISED THAT THE OFFENDER DID NO LONGER RESIDE AT THE RESIDENCE GIVEN. THE DEFENDANT HAS HAS AVOIDED SUPERVISION AND MADE HIMSELF UNAVAILABLE FOR SUPERVISION; THEREFORE ABSCONDING SUPERVISION.

2. Condition of Probation "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..." in that THE DEFENDANT TEST POSITIVE FOR MARIJUANA ON 8/18/2015.

3. "Report as directed by the Court, Commission or the supervising officer to the officer at reasonable times and places..." in that THE DEFENDANT FAILED TO REPORT ON 11/4/2015 AT 11:00AM.

31



Probation Response Options

	Felony	Non-DWI Misdemeanor Placed On Probation: Before 12/1/15	Non-DWI Misdemeanor Placed On Probation: On/After 12/1/15	DWI	Notes
REVOCATION	Permissible in response to: • New criminal offense • Absconding • Any violation after two prior CRV	Permissible in response to: • New criminal offense • Absconding • Any violation after two prior CRV	Permissible in response to: • New criminal offense • Absconding • Any violation after two prior CRV	Permissible in response to: • New criminal offense • Absconding • Any violation after two prior CRV	• No revocation solely for conviction of a Class 3 misdemeanor. G.S. 15A-1344(d)
CONFINEMENT IN RESPONSE TO VIOLATION (CRV) G.S. 15A-1344(d2)	For violations other than: • New criminal offense • Absconding 90 days	For violations other than: • New criminal offense • Absconding Up to 90 days	N/A	For violations other than: • New criminal offense • Absconding Up to 90 days	• Must be served continuously • Credit for pretrial CRV time • CRV may be reduced by earned time/good time • CRV period(s) must run consecutively with new sentence • Max of two CRV in any case
G.S. 15A-1343(a1)(1) G.S. 15A-1344(d1)	2nd 3 days	2nd 3 days	2nd 3 days	N/A	days per month • Could be no more than three separate calendar months
SPECIAL PROBATION (SPLIT) G.S. 15A-1344(a)	For any violation Up to ½ the maximum imposed sentence	For any violation Up to ½ the maximum imposed sentence	For any violation Up to ½ the maximum imposed sentence	For any violation Up to ½ the maximum possibly allowed by law	May be served in non-continuous intervals in the jail
CONTEMPT G.S. 15A-1344(e1)	Permissible in response to any violation Up to 30 days				• Must be proved beyond a reasonable doubt • Counts for credit against suspended sentence
EXTENSION G.S. 15A-1344(d) G.S. 15A-1342(a) G.S. 15A-1341(a)	Ordinary: Up to 5 year maximum. Permissible at any time after notice and hearing and for good cause shown. Special purpose: Up to 5 years beyond the original period if: (1) Probationer willfully avoids supervision (2 months of original period) and (2) To complete restitution or workforce development				The ordinary maximum period of probation is deferred prosecution and conditional discharge cases is two years.
MODIFICATION G.S. 15A-1344(d)	Permissible at any time after notice and hearing and for good cause shown				
TRANSFER TO UNSUPERVISED	At any time (except sex offenders)	At any time (except sex offenders)	At any time (except sex offenders)	At any time*	The court may authorize a probation officer to transfer a person to unsupervised probation if all money is paid to the clerk. G.S. 15A-1343(g)
TERMINATE G.S. 15A-1342(b)	At any time				No statute defines an "unsuccessful" termination
CONTINUE WITHOUT MODIFICATION	At any time				

* For violations on/after 12/1/15, CRV may not be imposed for prior jail credit.

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Confinement in Response to Violation (CRV) (p. 23)

- Permissible in response to violations <u>other than</u> "commit no criminal offense" and "absconding"
- Length:
  - Felony: 90 days
  - DWI: Up to 90 days

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UNC SCHOOL OF GOVERNMENT

Summary of Revocation Eligibility

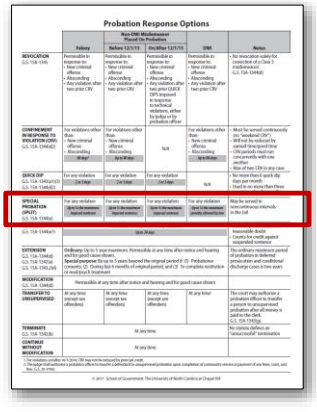
- For **new crimes** & **absconding**
  - Any probationer may be revoked upon first violation
- For **technical violations**, eligible for revocation after:
  - **Felony:** Two prior CRVs (90 days)
  - **DWI:** Two prior CRVs (up to 90 days)
  - **Misdemeanors**: Two prior Quick Dips (2-3 days, imposed by judge or probation officer)

34

Upon Revocation… (p. 18)

- The judge may reduce the sentence within the same range in the same grid cell
- Judge may allow consecutive suspended sentences to run concurrently

35


Probation Response Options

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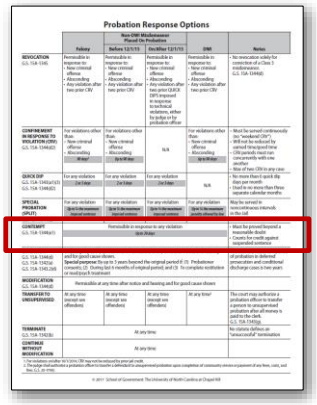

37

Contempt

- Up to 30 days in jail
- Chapter 5A procedures apply
  - Proper notice
  - Proof beyond a reasonable doubt
- Counts for credit against suspended sentence if defendant is later revoked

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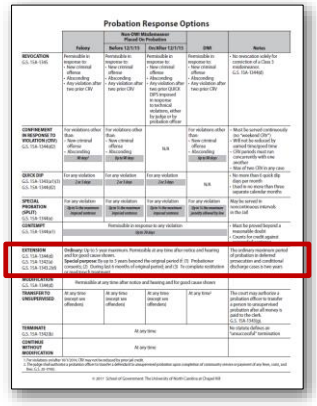


39

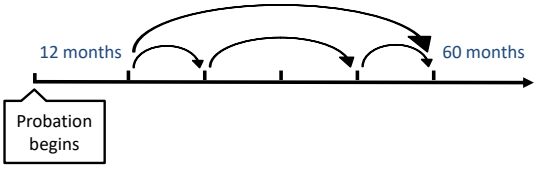
Extending Probation

- Two types: *ordinary* and *special purpose*

40

Ordinary Extensions

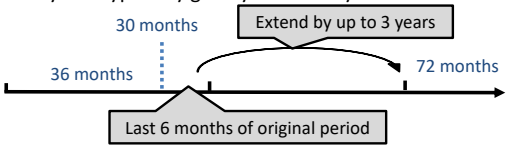
- At any time prior to expiration, for good cause shown, the court may extend probation to the 5-year maximum
  - No violation required
  - Could happen multiple times



41

Special Purpose Extensions

- Extension by up to 3 years beyond the ***original*** period if:
  - Probationer consents
  - During last 6 months of ***original*** period, *and*
  - Extension is for restitution or medical or psychiatric treatment
- Only this type may go beyond the 5-year maximum



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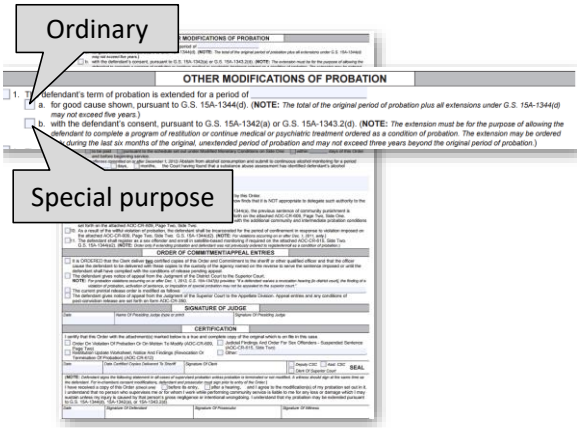
UNC SCHOOL OF GOVERNMENT



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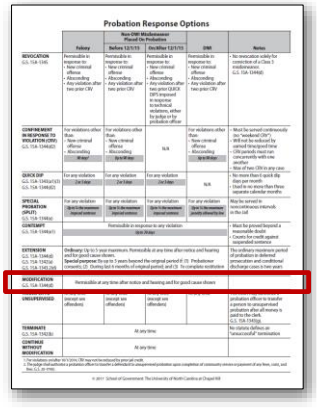


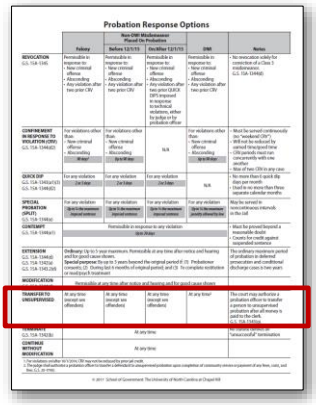
44

Modification

- Court may add/remove conditions at any time for good cause shown
  - No violation need have occurred
- After violation, the judge may add Intermediate conditions to a Community case

45

UNC SCHOOL OF GOVERNMENT

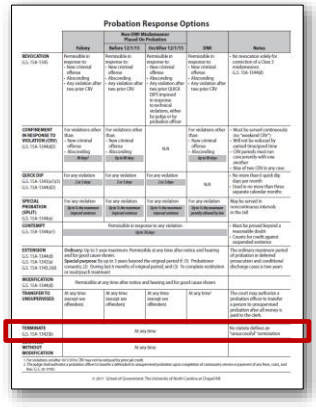


46

Transfer to Unsupervised

- Permissible at any time
- Judge may authorize probation officer to transfer a defendant to unsupervised probation once all money is paid

47

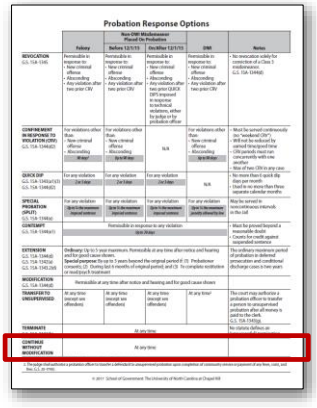


48

Termination

- Ends probation early
- Permissible at any time if warranted by the defendant's conduct and "the ends of justice"
- "Terminate unsuccessfully"

49



50

A defendant was placed on probation for Communicating Threats in 2019. He has a 60-day suspended sentence. The defendant admits to two violations (there are no prior violations):

- Failure to report to the probation officer
- Positive drug screen

Which responses are permissible?

- ✗ Revocation?
- ✗ CRV?
- ✓ Quick dip?
- ✓ Split?

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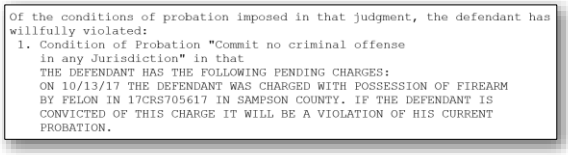
UNC SCHOOL OF GOVERNMENT

A defendant was placed on probation for DWI in 2020. The officer alleges the following violation.


Of the conditions of probation imposed in that judgment, the defendant has willfully violated:
1. Condition of Probation "Commit no criminal offense in any Jurisdiction" in that
THE DEFENDANT HAS THE FOLLOWING PENDING CHARGES:
ON 10/13/17 THE DEFENDANT WAS CHARGED WITH POSSESSION OF FIREARM BY FELON IN 17CRS705617 IN SAMPSON COUNTY. IF THE DEFENDANT IS CONVICTED OF THIS CHARGE IT WILL BE A VIOLATION OF HIS CURRENT PROBATION.

Which responses are permissible?

- ✔ Revocation?
- ✘ CRV?
- ✘ Quick dip?
- ✔ Split?

52

Appeals

- District court defendants have a statutory right to appeal **revocation** or imposition of a **split sentence** to superior court for de novo violation hearing
  - No appeal of CRV
  - No appeal of deferred prosecution revocation
- No de novo appeal to superior court if the defendant "waives" a revocation hearing

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Appeals

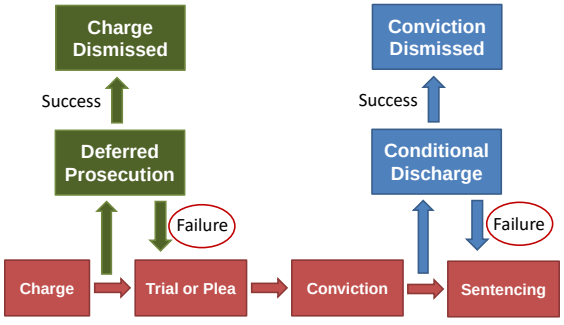
- Class H and I felonies pled in district court
  - By default, violation hearing is in superior court
  - With consent, may be held in district court
  - Appeal is de novo to superior court

54

Violations in Diversion Cases

- Deferred prosecution
- Conditional discharge

55



56

"Elect to Serve"

- No longer an option by statute (since 1997)

57

Jail Credit Upon Revocation

- Pre-trial
- Pre-hearing
- Prior splits
- DART Cherry / Black Mountain
- Contempt
- CRV
- Quick dips

58

General Framework

- Does the court have jurisdiction to act?
- Did the defendant violate a lawful condition?
- Was the violation willful?
- Was the violation revocation-eligible?
- Consider alternatives
- Mitigate

59

Jurisdiction

- Was a violation report filed (and file stamped) before the probation period expired?
  - Watch for "addendum" violations

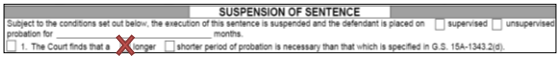
60

Jurisdiction

- Was the initial period of probation lawful to begin with?

Improper Probation Period

- Misdemeanor–Community 6-18 months
- Misdemeanor–Intermediate 12-24 months
- Felony–Community 12-30 months
- Felony–Intermediate 18-36 months


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).

Jurisdiction

- Has there ever been an unlawful extension of the defendant's probation?

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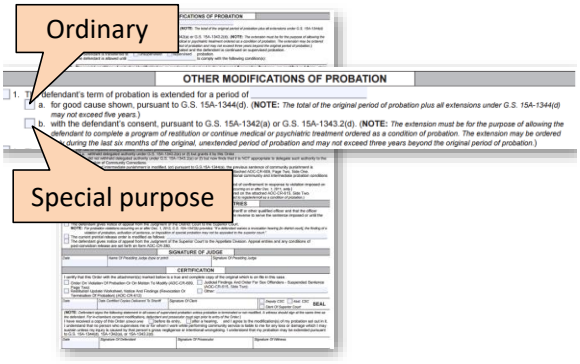

64

General Framework

- Does the court have jurisdiction to act?
- Did the defendant violate a lawful condition?
- Was the violation willful?
- Was the violation revocation-eligible?
- Consider alternatives
- Mitigate

65

Willfulness

- "Good faith inability to pay"
- Be prepared to show defendant's living expenses, employment, etc.

66

General Framework

- Does the court have jurisdiction to act?
- Did the defendant violate a lawful condition?
- Was the violation willful?
- Was the violation revocation-eligible?
- Consider alternatives
- Mitigate

67

If revocation, mitigate

- Reduce sentence
- Run sentences concurrently
- Make sure all jail credit applied
- Relieve financial obligations

68

69

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Probation Violations in North Carolina

James M. Markham

2018

UNC SCHOOL OF GOVERNMENT

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Contents

I. Introduction

A defendant sentenced to probation is subject to conditions that he or she must follow as part of the sentence. A willful failure to comply with those conditions is a violation of probation. The court can respond to a violation in many ways, ranging from doing nothing to—in certain circumstances—revoking probation and activating the defendant's suspended sentence. Before the court can take action, however, a probationer is entitled to notice and a hearing at which the court will determine whether a violation occurred.

This book sets out the law applicable to probation violation hearings in North Carolina. A probation violation hearing is less formal than a criminal trial, but it still requires certain procedures as a matter of state statute and constitutional due process. The traditional view, expressed in many older cases, was that probation was an "act of grace" by the state and that a defendant therefore had little basis upon which to attack any perceived unfairness in the revocation process.[1] Probation was considered a privilege, not a right.

That view was expressly rejected by the Supreme Court of the United States in the early 1970s in *Morrissey v. Brewer*[2] and *Gagnon v. Scarpelli*,[3] which set out a new framework for the process due before a person's probation could be revoked. The rights and procedures described in those cases—written notice of alleged violations, a preliminary hearing, an opportunity to be heard by a neutral and detached officer, and in some cases counsel—were codified into North Carolina law in 1977.[4]

From the late 1970s until 2011, the laws and procedures applicable to probation violations did not change much. Provided the proper procedures were followed, a judge had broad discretion to respond to any single violation by revoking the defendant's probation and activating his or her suspended sentence. In 2011, the General Assembly passed the Justice Reinvestment Act, making major changes to the law of sentencing and probation.[5] The revised law placed substantial limitations on a judge's authority to revoke probation for violations other than a new criminal offense or absconding, as discussed below.

Unless otherwise indicated, the law and procedures described in this book apply to supervised and unsupervised probation alike and to cases sentenced under both Structured Sentencing and the impaired driving law.[6] The procedures do not, however, apply to alleged violations of post-release supervision or parole. Those violations

1. *See, e.g.*, State v. Duncan, 270 N.C. 241 (1967).
2. 408 U.S. 471 (1972).
3. 411 U.S. 778 (1973).
4. *See* N.C. Gen. Stat. (hereinafter G.S.) § 15A-1345 (explicitly described in the Official Commentary as responding primarily to the dictates of *Gagnon* and *Morrissey*).
5. *See generally* James M. Markham, The North Carolina Justice Reinvestment Act (UNC School of Government, 2012).
6. G.S. 15A-1341(a).

are handled under similar but statutorily separate procedures outlined in Article 84A (post-release supervision) and Article 85 (parole) of G.S. Chapter 15A.[7]

II. Initiating a Violation

A. Alleging a Violation

In supervised probation cases, the violation process typically begins when a probation officer files a violation report (Form DCC-10) with the clerk of court. The State must give the probationer notice of the violation hearing and its purpose, including a statement of the violations alleged, at least 24 hours before the hearing, unless such notice is waived by the probationer.[8] The DCC-10 constitutes notice of the alleged violations and controls the scope of the ensuing hearing. The court is empowered to act only on violating behavior alleged in the notice provided to the defendant.[9]

A violation report must include a "statement of the violations alleged."[10] It need not be written with the technical precision of an indictment, but it must give the defendant sufficient information about the allegedly offending behavior to allow him or her to prepare a defense. A failure to identify the precise condition violated does not invalidate a violation report,[11] but the better practice for the officer is surely to expressly state which condition of probation has been violated, and to connect the violating behavior to that condition. Even if not required as a matter of proper notice under G.S. 15A-1345(e), identification of the specific condition violated is required as part of the written statement an officer prepares in conjunction with a probationer's arrest under G.S. 15A-1345(a).

Sometimes a probation officer will allege a violation of the "commit no criminal offense" condition by reference to the fact that the probationer has criminal charges pending for the behavior. Under Department of Public Safety administrative policy, the preferred practice is for the officer to frame the violation around the criminal behavior itself—for example, to allege that "the defendant drove while impaired,"

7. *See* Jamie Markham, *The Post-Release Supervision Violation Hearing Process in a Nutshell*, UNC Sch. of Gov't: N.C. Crim. L. Blog (Feb. 27, 2013), http://nccriminallaw.sog.unc.edu/the-post-release-supervision-violation-hearing-process-in-a-nutshell.

8. G.S. 15A-1345(e).

9. State v. Cunningham, 63 N.C. App. 470 (1983) (reversing a defendant's revocation based on trespass and damage to real property when the violation report alleged only that he had played loud music and removed signs posted by his neighbors).

10. G.S. 15A-1345(e).

11. State v. Moore, 370 N.C. 338 (2017). In *Moore*, the probation officer alleged a new criminal offense violation under the heading "Other Violation," without specifically stating that the defendant violated the "commit no criminal offense" condition. The supreme court concluded that the violation report was valid, in that G.S. 15A-1345(e) requires only allegation of the behavior that violates a condition, not identification of the condition itself.

rather than alleging that the defendant has "pending charges for DWI." Alleging the violation in that way helps avoid any later sense that the probationer is being revoked solely based on the pendency of a criminal charge.[12] However, as far as proper notice goes, a probation officer's reference to a pending charge does not spoil an otherwise proper violation report.[13]

Though no statute expressly says so, a prosecutor probably may allege a violation of probation. If so, the ordinary rules for notice and timing would apply.[14]

B. Alleging a Violation of Unsupervised Probation

In cases of unsupervised probation, violations are generally reported to the court by the clerk's office or by community service staff. Notice of a hearing in response to a violation of unsupervised probation must be given by either personal delivery to the probationer or by U.S. mail to the last known address available to the preparer of the notice and reasonably believed to provide actual notice. If mailed, the notice must be sent at least 10 days prior to any hearing and must state the nature of the violation.[15] Form AOC-CR-220 may be used to provide notice of a hearing on a violation of unsupervised probation. If notice is given by mail and the defendant does not appear, the court may either terminate probation and enter appropriate orders for the enforcement of any outstanding monetary obligations (as otherwise provided by law), or provide for other notice to the defendant as provided in G.S. Chapter 15A.[16]

Community service staff must report significant violations of cases under their purview either in person or by mail as provided in G.S. 143B-708(e). In those cases, the court must conduct a hearing even if the person ordered to perform community service fails to appear. If the court determines that there was a willful failure to comply, it must revoke the person's driver's license until the community service requirement is met. Only when the person is present, however, may the court take other actions generally authorized in response to violations of probation.[17]

12. *See infra* notes 112–123 and accompanying text for a full discussion of the issue of new criminal offense violations based on pending charges that have not yet resulted in a conviction.

13. State v. Lee, 232 N.C. App. 256 (2014) ("The violation report identified the criminal offense on which the trial court relied to revoke defendant's probation—possession of a firearm by a felon—and the specific county and case file number of that alleged offense. Given such notice, defendant was aware that the State was alleging a revocation-eligible violation and he was aware of the exact violation upon which the State relied."), *overruled on other grounds,* State v. Moore, 370 N.C. 338 (2017).

14. *See* G.S. 15A-1344(e) (providing that "the State" must give the probationer notice of the hearing and its purpose).

15. G.S. 15A-1344(b1)(1).

16. G.S. 15A-1344(b1)(2).

17. G.S. 143B-708(e).

C. Notice of Failures to Pay Child Support as a Condition of Probation

A special statutory provision, G.S. 15A-1344.1, sets out a procedure to ensure payments of child support ordered as a condition of probation. When a court requires a defendant to support his or her children—a regular condition of probation under G.S. 15A-1343(b)(4)—the court is also empowered under G.S. 15A-1344.1(a) to order that support payments be made to the State Child Support Collection and Disbursement Unit for remittance to the party entitled to receive the payments. If a court enters such an order, the clerk of court must maintain records related to the payments.[18] The law then sets out procedures, different for IV-D (referencing Title IV-D of the federal Social Security Act, which provides for state child support systems) and non-IV-D cases, through which the clerk of superior court may notify the defendant of any arrearage in the required payments. If the arrearage is not paid in full, the law requires the clerk to notify the district attorney and the defendant's probation officer, who must then initiate revocation proceedings, make a motion for income withholding under G.S. 110-136.5, or both.[19]

For a variety of reasons, the special procedures set out in G.S. 15A-1344.1 are no longer used as a practical matter. Due to the evolution of centralized child support enforcement over the years, judges no longer need to order in the criminal case that payments be made to the State Child Support Collection and Disbursement Unit; centralized collection is now the default. The special notice procedures set out in G.S. 15A-1344.1(d) are also generally unnecessary, as immediate income withholding is effectively automatic under G.S. 110-136.5. Thus, probation officers and court officials are much more likely to give notice of alleged violations related to child support obligations through the same mechanisms applicable to other violations—a violation report by the probation officer or a notice of violation of unsupervised probation, depending on whether the case is one of supervised or unsupervised probation.

D. Dismissing a Violation

No specific statute governs the dismissal of probation violations. Nevertheless, courts routinely dismiss violations after a hearing where the violations are not found, or when a court chooses not to act on a violation. It is also generally understood that a prosecutor may dismiss a probation violation—or at least effectively dismiss it by choosing not to prosecute it. Agreed-upon resolutions of probation matters are often included in plea arrangements between the State and a defendant regarding new criminal charges. As a practical matter, court computer systems will allow a probation violation to be dismissed with leave under G.S. 15A-932, but not voluntarily dismissed under G.S. 15A-931. As a result, local practice in the handling of dismissals of violations varies.

18. G.S. 15A-1344.1(b).
19. G.S. 15A-1344.1(d).

A defendant is not entitled to a continuance under G.S. 15A-1023 on matters related to probation when a trial judge rejects a plea bargain in a new criminal case that includes an agreement to continue the defendant on probation in a prior case.[20]

E. Addenda

There is no special statutory rule for amending a violation report. A probationer is entitled to notice of later-alleged violations in the same manner as any violations alleged in the first instance, including all requirements of timeliness, as discussed below.[21] The filing of an initial violation before a case expires does not preserve the authority to modify that violation or file additional violations once the case has expired.

F. Arrest or Citation

A supervised probationer is subject to arrest for violation of a condition of probation by a law enforcement officer or by a probation officer.[22] One of two documents typically authorizes the arrest. The first is an order for arrest issued by a judicial official.[23] The second is the written request of a probation officer (referred to by probation officers as an "authority to arrest," set out on Form DCC-12).[24] Either document must be accompanied by a written violation report, signed by the probation officer, alleging that the defendant has violated specific conditions of his or her probation. A probation officer may also arrest a probationer without a written order or motion when the officer has probable cause to believe that a violation has occurred,[25] although the policy of the Community Corrections Section of the Division of Adult Correction and Juvenile Justice (DACJJ) expresses a strong preference that officers seek an order for arrest or complete a DCC-12 before arresting a probationer.[26]

In general, a probation officer has the same powers of arrest as a sheriff in the execution of his or her duties,[27] probably including cases supervised pursuant to a deferred prosecution agreement or conditional discharge.[28] Probation officers should

20. State v. Cleary, 213 N.C. App. 198 (2011).

21. *See infra* notes 35–49 and accompanying text.

22. G.S. 15A-1345(a).

23. G.S. 15A-305(b)(4).

24. G.S. 15A-1345(a). By policy, an authority to arrest document is valid for only three days. If the document is not served on the probationer within three days, officers are instructed to seek an order for arrest from a judicial official. N.C. Dep't of Pub. Safety, Div. of Adult Corr. and Juvenile Justice, Section of Comty. Corr., Policy & Procedure Manual (2018) § D.0404 (hereinafter Community Corrections Policy).

25. State v. Waller, 37 N.C. App. 133 (1978).

26. Community Corrections Policy, *supra* note 24, § D.0404.

27. G.S. 15-205.

28. *See* Jamie Markham, *Probation Officers' Arrest Authority in Deferral Cases*, UNC Sch. of Gov't: N.C. Crim. L. Blog (Feb. 14, 2013), http://nccriminallaw.sog.unc.edu/probation-officers-arrest-authority-in-deferral-cases.

be considered state officers within the meaning of G.S. 15A-402(a), meaning that when they have the power to arrest, they may do so anywhere within the state of North Carolina. By policy, an officer may arrest a probationer only when the officer has reasonable suspicion that the probationer violated a condition of probation.[29]

It is not strictly necessary for an officer to arrest a probationer in advance of a violation hearing.[30] If the probation officer does not think it necessary to arrest the probationer, the probationer is given notice of the alleged violations and the time and place of the hearing and cited to court.

A probationer is not subject to arrest for a violation of probation if it is based on an offense for which he or she would be immune from prosecution under the drug-overdose "Good Samaritan" law. That law applies only to certain offenses (misdemeanor drug possession, felony possession of less than one gram of cocaine or heroin, and possession of drug paraphernalia), and only when evidence of the offense was obtained as the result of a person seeking medical assistance for a drug-related overdose.[31]

G. Bail for Alleged Probation Violators

A probationer arrested for an alleged violation of probation must be taken without unnecessary delay before a judicial official to have conditions of release set in the same manner as provided in G.S. 15A-534 for criminal charges.[32]

Some probationers are subject to rules that potentially delay the setting of release conditions. If a probationer either has pending charges for a felony offense or has ever been convicted of an offense that would be a reportable sex crime if committed today, the judicial official setting release conditions must, before imposing conditions of release, determine and record in writing whether the probationer poses a danger to the public. If the judicial official finds the probationer poses a danger to the public, the probationer must be denied release pending a revocation hearing. If the probationer does not pose a danger, release conditions are set as usual. If the judicial official has insufficient information to determine whether the probationer poses a danger, the probationer may be held for up to 7 days from the date of arrest so that the judicial official, or a subsequent reviewing judicial official, may obtain sufficient information to determine whether the probationer poses a threat to the public.[33] The requisite findings can be recorded on side two of Form AOC-CR-272.

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29. Community Corrections Policy, *supra* note 24, § D.0403(a). The policy-based reasonable suspicion standard matches the standard required as a matter of federal constitutional law. *See* Jones v. Chandrasuwan, 820 F.3d 685 (4th Cir. 2016) (holding that probation officers must have reasonable suspicion before seeking a probationer's arrest, and that the officers in this case did not have reasonable suspicion to arrest the probationer for failing to pay his costs and fees).

30. G.S. 15A-1345(a).

31. G.S. 90-96.2.

32. G.S. 15A-1345(b).

33. G.S. 15A-1345(b1).

Sometimes the sentencing judge will order in the judgment suspending sentence or an order for arrest that a particular bond be set for a defendant in the event of his or her arrest for an alleged violation of probation, or that the defendant should be held without bond. The court has no clear authority to set an anticipatory bond in that way, and the court of appeals has urged caution on the part of the trial courts regarding this practice.[34] To the extent that the sentencing court or the judicial official issuing an order for arrest wishes to address the issue of prehearing release for a violation, the better practice is to recommend—not order—a bond in a certain amount.

H. Failures to Appear; Suspension of Public Assistance

When a probationer fails to appear for a probation violation hearing, the court may issue an order for arrest under G.S. 15A-305(4). A hearing extending or modifying probation may be held in the absence of a probationer who fails to appear after a reasonable effort has been made to notify him or her.[35] Probation should not, however, be revoked in the defendant's absence.

If an unsupervised probationer does not appear in response to a mailed notice, the court may either (a) terminate the probation and enter appropriate orders for the enforcement of any outstanding monetary obligations as otherwise provided by law or (b) provide for other notice to the person as authorized by G.S. Chapter 15A for a violation of probation.[36]

The court may order the suspension of any public assistance benefits being received by a probationer for whom the court has issued an order for arrest for violating probation but who is absconding or otherwise willfully avoiding arrest.[37] The suspension continues until the probationer surrenders or is otherwise brought under the court's jurisdiction. The court may use Form AOC-CR-650, *Order of Suspension of Public Benefits for Absconder*, to order the suspension. The suspension does not affect the eligibility for public assistance benefits being received by or for the benefit of a family member of the probationer.

I. Notice to Victims

For crimes covered under the Crime Victims' Rights Act (listed in G.S. 15A-830(a)(7)), a victim may elect to receive notice of certain post-trial proceedings involving the defendant, including probation violation hearings.[38] If a victim has elected to receive

34. *See* State v. Hilbert, 145 N.C. App. 440 (2001) (noting that the sentencing judge's order that the defendant be arrested and placed under a $100,000 cash bond in response to his first positive drug screen was against the better practice; at most, the sentencing judge could recommend, not order, a particular bond).

35. G.S. 15A-1344(d).

36. G.S. 15A-1344(b1).

37. G.S. 15A-1345(a1).

38. G.S. 15A-832.

notifications, Community Corrections must provide him or her with notice of, among other things, the date and location of any hearing to determine whether the defendant's supervision should be revoked, continued, modified, or terminated; the final disposition of any hearing; any modification of restitution; and the addition of any intermediate sanction. The notification must be provided within 30 days of the event requiring notification.[39]

III. Violation Hearings

A. Jurisdiction

A court's jurisdiction to review a probationer's compliance with the terms of his or her probation is limited by statute. The court has power to act "any time prior to the expiration or termination of the probation period."[40] Once a period of probation expires, the court generally loses jurisdiction over the defendant, except as described below.[41]

B. Hearings after Expiration

The main exception to the jurisdictional rule described above is set out in G.S. 15A-1344(f), which grants a court jurisdiction to hear probation matters after a period of probation has expired if a violation report is filed before expiration. This extended jurisdiction becomes important when, for example, an alleged violation occurs near the end of a period of probation and the hearing cannot be held before it expires.

Under G.S. 15A-1344(f), the court may extend, modify, or revoke probation after the expiration of the period of probation if all the following apply:

1. The State files a written violation report before the expiration of the probation period indicating its intent to conduct a hearing on one or more conditions of probation.
2. The court finds that the probationer violated one or more conditions of probation prior to the expiration of the period of probation.
3. The court finds for good cause shown and stated that probation should be extended, modified, or revoked.[42]

39. G.S. 15A-837.
40. G.S. 15A-1344(d).
41. State v. Camp, 229 N.C. 524 (1980).
42. G.S. 15A-1344(f).

To be considered "filed," a violation report should be *file stamped* by the clerk before the probation period expires.[43] In the absence of a file-stamped motion dated before the expiration of probation (or some other evidence proving beyond a reasonable doubt that a violation report was timely filed), the trial court is without jurisdiction to conduct a probation violation hearing after the end of the probationary period. The appellate courts have been demanding in terms of what evidence, aside from a file stamp, suffices to establish beyond a reasonable doubt that a report was timely filed. For example, a report signed and dated by a deputy clerk of superior court was insufficient when the report was not filed stamped.[44]

As to the requirement of "good cause" to act after expiration, the appellate courts have not required a trial judge to make specific written or oral findings supporting a decision that probation should be extended, modified, or revoked. Rather, they have deemed a finding of violation, standing alone, as a sufficient demonstration of the court's consideration of the evidence and determination that good cause existed to act on it.[45]

These jurisdictional provisions apply with equal force to supervised and unsupervised probationers, and to those on probation under G.S. 90-96.[46] The provisions likely also apply in deferred prosecution cases, although no appellate case says so. Generally, upon expiration or early termination of a period of probation imposed as part of a deferred prosecution, the defendant is immune from prosecution on the charges deferred.[47]

The filing of a violation report before a period of probation expires does not itself extend the period of probation beyond the scheduled expiration date. Rather, it merely preserves the court's authority to act on the case at a later hearing. Probation supervision (including the accrual of supervision fees, if any) should cease on the date of expiration unless the court has taken separate action to extend the case.

If a period of probation expires before a probation violation report is filed, the trial court lacks subject matter jurisdiction over the case. Similarly, if an earlier extension of probation was improper and the period of probation would have expired but for the improper extension, the court loses authority to act on the case.[48] The timely filing of one alleged probation violation does not preserve the court's authority to act on additional violations filed after a period of probation has expired. In other words, amendments or addenda to a violation report must themselves comply with the jurisdictional requirements of G.S. 15A-1344(f) (filing before expiration) in order for the court to act on them.

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43. State v. Hicks, 148 N.C. App. 203 (2001); State v. Moore, 148 N.C. App. 568 (2002).

44. State v. High, 230 N.C. App. 330 (2013).

45. State v. Morgan, ___ N.C. App. ___, 814 S.E.2d 843 (2018); State v. Regan, ___ N.C. App. ___, 800 S.E.2d 436 (2017).

46. State v. Burns, 171 N.C. App. 759 (2005).

47. G.S. 15A-1342(i).

48. State v. Gorman, 221 N.C. App. 330 (2012); State v. Satanek, 190 N.C. App. 653 (2008); State v. Reinhardt, 183 N.C. App. 291 (2007).

Though no statute expressly says so, it is clear that conduct may be considered as a violation only if it occurred while the offender was actually on probation. Thus, when a person commits Crime A before being placed on probation for Crime B, but is convicted of Crime A after being placed on probation for Crime B, the conviction is not a violation of the probation for Crime B.[49]

C. Tolling

Tolling in the probation context means that no time runs off the probationer's period of probation while he or she has a criminal charge pending. In 2011, the General Assembly repealed the tolling law for persons placed on probation on or after December 1, 2011.[50] There are still, however, a small number of probationers who were placed on probation before that date and who are thus subject to the law that existed beforehand, described below.

The tolling statute, originally set out in G.S. 15A-1344(d), provided that "[i]f there are pending criminal charges against the probationer in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against the probationer for violation of the terms of this probation, the probation period shall be tolled until all pending criminal charges are resolved." As interpreted by the court of appeals, the tolling provision automatically suspended a defendant's probationary period when new criminal charges were brought.[51] Thus, when a probationer was charged for any offense other than a Class 3 misdemeanor (which cannot result in revocation even upon conviction), time stopped running on his or her period of probation immediately and did not start running again until the charge was resolved by way of acquittal, dismissal, or conviction.

In 2009 the General Assembly made several changes to the tolling law.[52] First, the law was moved from G.S. 15A-1344(d) to G.S. 15A-1344(g). Second, the law was amended to make clear that a probationer remained subject to the conditions of probation, including supervision fees, during the tolled period. Third, the law provided that if a probationer whose case was tolled for a new charge was acquitted or had the charge dismissed, he or she would receive credit against the probation period for the time spent under supervision in tolled status. Those provisions applied to "offenses committed" on or after December 1, 2009, which probably was meant to refer to the date of the offense for which the offender was on probation, not the date of the alleged offense that led to the new criminal charge.[53]

The effective date of the 2009 changes to the tolling law left nothing of G.S.15A-1344(d) for defendants placed on probation before December 1, 2011, for offenses commit-

49. *See, e.g.*, United States v. Drinkall, 749 F.2d 20 (8th Cir. 1984).

50. North Carolina Session Law (hereinafter S.L.) 2011-62.

51. State v. Henderson, 179 N.C. App. 191, 195 (2006); *see also* State v. Patterson, 190 N.C. App. 193 (2008).

52. S.L. 2009-372.

53. *Id.* § 11(b).

ted before December 1, 2009, who are brought to court for a violation hearing on or after December 1, 2009. The legislation removed the original tolling provision in G.S. 15A-1344(d) from the law, effective for "hearings held on or after December 1, 2009."[54] As a result, a trial court lacks jurisdiction to hold a violation hearing on a probationer whose case is tolled under G.S. 15A-1344(d) (assuming the probation period would have expired but for the tolling), because holding the hearing triggers the effective date and negates the effect of the tolling itself.[55] In early 2015, many probationers and inmates affected by the court of appeals decision in *State v. Sitosky* successfully challenged their continued supervision or incarceration.

D. Preliminary Violation Hearings

Under G.S. 15A-1345(c), the court must hold a preliminary hearing on a probation violation within 7 working days of an arrest, unless the probationer waives the preliminary hearing or a final violation hearing is held first. The purpose of the preliminary hearing is to determine whether there is probable cause to believe that the probationer violated a condition of probation. If the hearing is not held, the probationer must be released 7 working days after his or her arrest to continue on probation pending a hearing, unless the probationer is covered under G.S. 15A-1345(b1) and has been determined to be a danger to the public, in which case he or she must be held until the final revocation hearing.[56] The release does not dismiss the violation; rather, it just means that the probationer cannot be detained any longer without a hearing.

The preliminary hearing should be conducted by a judge sitting in the county where the probationer was arrested or the alleged violation occurred.[57] If no judge is sitting in the county where the hearing would otherwise be held, the hearing may be held anywhere in the district.[58] No statutory language limits authority to conduct a preliminary hearing to a judge entitled to sit in the court which imposed probation (as is the case in G.S. 15A-1344(a), limiting the ultimate authority to alter or revoke probation). Thus, apparently any judge—district or superior court—may conduct the preliminary hearing, regardless of which court imposed the probation. That makes sense as a practical matter, as superior court may not be in session within 7 working days of an alleged violation in many districts in North Carolina.

A preliminary hearing must be held only when the probationer is detained for a violation of probation; it is not required when the probationer is released on bail pending the final violation hearing.[59] A failure to hold a preliminary hearing does not deprive the court of jurisdiction to conduct a final violation hearing.[60]

54. *Id.* § 11(a).
55. State v. Sitosky, 238 N.C. App. 558 (2014).
56. *See supra* note 33 and accompanying text.
57. G.S. 15A-1345(d).
58. *Id.*
59. State v. O'Connor, 31 N.C. App. 518 (1976).
60. State v. Seay, 59 N.C. App. 667 (1982).

The State must give the probationer notice of the preliminary hearing and its purpose, including a statement of the violations alleged. At the hearing, the probationer may appear and speak in his or her own behalf, may present relevant information, and may, on request, personally question adverse informants unless the court finds good cause for not allowing confrontation. Formal rules of evidence do not apply.[61]

Regarding the right to counsel, the statutory subsection setting out the procedure applicable at a preliminary hearing, G.S. 15A-1345(d), is silent. By contrast, the statute applicable to final violation hearings (G.S. 15A-1345(e)) expressly notes an entitlement to counsel, including appointed counsel if the defendant is indigent. Nevertheless, G.S. 7A-451(a)(4) states that an indigent person is entitled to counsel at "a hearing for revocation of probation," which arguably refers to both preliminary and final violation hearings. Notwithstanding the ambiguity in the statutes, many probationers have a constitutional right to counsel at the preliminary hearing—including any probationer who denies the alleged violation.[62]

If probable cause is found at the preliminary hearing (or if the hearing is waived), the probationer may be detained for a final violation hearing. If probable cause is not found, the probationer must be released to continue on probation.

E. Final Violation Hearings

1. Proper Court and Venue

Any judge of the same level (district or superior court) as the sentencing judge, located in the district where (a) the probation was imposed, (b) the alleged violation took place, or (c) the probationer currently resides, has authority to reduce, modify, extend, continue, terminate, or revoke probation.[63] When a probation judgment is subsequently modified, the court in which the modification occurred is considered to have "imposed" the modification within the language of G.S. 15A-1344(a), and is thus also a proper venue for a violation hearing.[64]

A judge who sentences a defendant to unsupervised probation may limit jurisdiction to alter or revoke the probation to him- or herself.[65] If the sentencing judge does so, the probation may be reduced, terminated, continued, extended, modified, or revoked only by the sentencing judge or, if the sentencing judge is no longer on the

61. G.S. 15A-1345(d).

62. *See* Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) (holding that an indigent defendant has a right to appointed counsel at both the preliminary and final violation hearing in the following circumstances: when he or she denies the alleged violation, in cases where there are substantial reasons which justified or mitigated the violation and those reasons are complex or otherwise difficult to develop or present, and in cases where the probationer may have difficulty speaking effectively for him- or herself).

63. G.S. 15A-1344(a).

64. State v. Mauck, 204 N.C. App. 583 (2010).

65. G.S. 15A-1342(h).

bench, by a presiding judge in the court where the defendant was sentenced.[66] There is no comparable provision for supervised probation.

Some additional rules apply when probation matters arise in places other than the district in which the probation was initially imposed. First, a court may always on its own motion return a probationer for hearing to the district where probation was imposed or the district where the probationer resides.[67] Second, the district attorney of the prosecutorial district in which probation was imposed must be given reasonable notice of any hearing that will "affect probation substantially."[68] Third, if a judge reduces, terminates, extends, modifies, or revokes probation outside the county where the judgment was entered, the clerk of court must send a copy of that judge's order and any other records to the court where probation was originally imposed. If probation is revoked, the clerk in the county of revocation issues the commitment order.[69]

For defendants on probation as part of a deferred prosecution or conditional discharge, violations are reported to the court and to the district attorney in the district where the case originated.[70] For a variety of reasons, it makes sense for violation hearings in those cases to be handled in the district of origin.[71]

Class H and I felonies pled in district court. Under G.S. 7A-272(c), with the consent of the presiding district court judge, the prosecutor, and the defendant, the district court has jurisdiction to accept a plea of guilty or no contest to a Class H or I felony. If a person enters a felony plea in district court, is placed on probation, and is later alleged to have violated that probation, the violation hearing is, by default, held in superior court. The district court can hold the violation hearing if the State and the defendant consent (consent of the judge is not required under the statute).[72] Appeal of a violation hearing held in district court is to superior court for a de novo hearing, not to the court of appeals.[73]

Supervision of felony drug treatment court or a therapeutic court in district court. With the consent of the chief district court judge and the senior resident superior court judge, the district court has jurisdiction to preside over the supervision of a probation judgment entered in superior court in which the defendant is required to participate in a drug treatment court program or a therapeutic court.[74] In cases where the requisite judges give their consent, a district court judge may modify or extend probation judgments supervised under G.S. 7A-272(e). The superior court has exclusive jurisdiction to revoke probation of cases supervised under G.S. 7A-272(e), except

66. G.S. 15A-1344(b).
67. G.S. 15A-1344(c).
68. G.S. 15A-1344(a).
69. G.S. 15A-1344(c).
70. G.S. 15A-1342(a1).
71. *See infra* notes 189–193 and accompanying text.
72. G.S. 7A-271(e).
73. State v. Hooper, 358 N.C. 122 (2004).
74. A therapeutic court is one that promotes activities designed to address underlying problems of substance abuse and mental illness that contribute to a person's criminal activity. G.S. 7A-272(e).

that the district court has jurisdiction to conduct the revocation proceeding when the chief district court judge and the senior resident superior court judge agree that it is in the interest of justice that the proceedings be conducted by the district court.[75] Unlike non–drug treatment court cases, however, if the district court exercises jurisdiction to revoke probation in a case supervised under G.S. 7A-272(e), appeal of an order revoking probation is to the appellate division, not to superior court.[76]

2. Hearing Procedure

A probation violation hearing is not a criminal prosecution or a formal trial.[77] Nevertheless, certain procedural requirements apply as a matter of statute and constitutional due process. At the hearing, evidence against the probationer must be disclosed to him or her, and the probationer may appear, speak, and present relevant information.[78] The defendant is entitled to a written statement from the court as to the evidence relied on and reasons for revoking probation,[79] but apparently no verbatim transcript is required.[80]

Confrontation. The probationer may confront and cross-examine witnesses unless the court finds good cause for not allowing confrontation.[81] Confrontation in this context is a due process right, not a Sixth Amendment right under the Confrontation Clause.[82] If the court disallows confrontation, it must make findings that there was good cause for doing so. In *State v. Coltrane*, for example, the supreme court reversed a probation revocation when the trial court did not allow the probationer to confront her probation officer (who was not present at the hearing) without making findings of good cause for not allowing confrontation.[83]

Right to counsel. The defendant has a clear statutory right to counsel at the final violation hearing, including appointed counsel if indigent.[84]

The court must comply with G.S. 15A-1242 when accepting a waiver of the right to counsel at a probation violation hearing, just as it must at trial.[85] The court must inquire whether the defendant (1) has been clearly advised of his or her right to counsel, (2) understands the consequences of a decision to proceed without counsel, and (3) comprehends the nature of the charges and the range of permissible punishments. It is unclear whether a waiver of counsel taken at a preliminary hearing is valid for the

75. G.S. 7A-271(f).
76. *Id.*
77. State v. Duncan, 270 N.C. 241 (1967); State v. Pratt, 21 N.C. App. 538 (1974).
78. G.S. 15A-1345(e).
79. Morrissey v. Brewer, 408 U.S. 471 (1972).
80. *See* State v. Quick, 179 N.C. App. 647 (2006) (affirming a probation revocation despite the notes and transcript of the revocation hearing being misplaced; the defendant was unable to demonstrate any prejudice resulting from the missing record).
81. G.S. 15A-1345(e).
82. State v. Braswell, 283 N.C. 332 (1973).
83. 307 N.C. 511 (1983).
84. G.S. 15A-1345(e).
85. State v. Evans, 153 N.C. App. 313 (2002).

final violation hearing as well. There is authority to suggest that it is,[86] but the better practice is to conduct the waiver colloquy again before the final violation hearing.

Evidence. The rules of evidence do not apply at probation violation hearings.[87] There is thus no statutory rule against admitting hearsay at the hearing. Older appellate cases held that hearsay alone was insufficient to support a revocation of probation,[88] but more recent cases appear to have relaxed that rule. In *State v. Murchison*, for example, the defendant was revoked based on hearsay testimony (a statement by the defendant's mother to the probation officer) that he had violated his probation by committing a new criminal offense.[89] The record or recollection of evidence or testimony introduced at the preliminary hearing is inadmissible as evidence at the final violation hearing.[90]

The exclusionary rule also does not apply at probation revocation hearings.[91]

Standard of proof. To activate a suspended sentence for failure to comply with a probation condition, the State must present evidence sufficient to *reasonably satisfy* the judge that the defendant has willfully violated a valid condition of probation or has violated a condition without lawful excuse.[92] Proof to a jury is not required, nor must the proof of the violation be made beyond a reasonable doubt.[93]

When the alleged violation is a failure to satisfy a monetary obligation or a requirement to complete community service, and the probation officer has set the schedule for paying the money or completing the service hours, the State must introduce evidence of those schedules before the judge can make a determination that the defendant has violated them.[94]

Admitted violations. A defendant does not plead "guilty" or "not guilty" to a probation violation. Rather, he or she admits or denies the violation.[95] When a defendant admits to a violation, there is no requirement that the court personally examine him or her pursuant to G.S. 15A-1022 (unlike when a defendant pleads guilty to a criminal charge).[96] A defendant is not entitled to a continuance under G.S. 15A-1023 on matters related to probation when a trial judge rejects a plea bargain in a new criminal case that includes an agreement to continue the defendant on probation in a prior case.[97]

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86. State v. Kinlock, 152 N.C. App. 84, 88–89 (2002).

87. G.S. 15A-1345(e); G.S. 8C-1, Art. 11, R. 1101, § (b)(3).

88. *See* State v. Hewett, 270 N.C. 348, 356 (1967) (noting that some of the trial judge's findings of fact were based on hearsay evidence that "should not have been considered by the judge" but upholding the judge's revocation order based on other evidence); State v. Pratt, 21 N.C. App. 538 (1974).

89. 367 N.C. 461 (2014).

90. G.S. 15A-1345(e).

91. State v. Lombardo, 74 N.C. App. 460 (1985).

92. State v. Duncan, 270 N.C. 241 (1967); State v. White, 129 N.C. App. 52 (1998).

93. State v. Freeman, 47 N.C. App. 171 (1980).

94. State v. Boone, 225 N.C. App. 423, 425 (2013) ("[The probation officer's] conclusory testimony that defendant was in arrears is insufficient to support a finding that defendant had willfully violated the terms of his probation by failing to pay the required fees or perform community service on time.").

95. State v. Sellers, 185 N.C. App. 726 (2007).

96. *Id.*

97. State v. Cleary, 213 N.C. App. 198 (2011).

REVOCATION
CONFINEMENT IN RESPONSE TO VIOLATION (CRV)
QUICK DIP
SPECIAL PROBATION (SPLIT)
CONTEMPT
EXTENSION
MODIFICATION
TRANSFER TO UNSUPERVISED PROBATION
TERMINATION
CONTINUATION WITHOUT MODIFICATION

IV. Probation Response Options

At the conclusion of a proper hearing (or once the defendant has waived his or her right to a hearing), the court may take one or more of the actions described below. The options are arranged roughly from most restrictive to least restrictive, from the standpoint of the defendant. The table on the inside front cover of this booklet summarizes the available options.

In many instances, the response options are not mutually exclusive. For instance, the court may impose a split sentence, extend the period of probation, and otherwise modify the conditions of probation all in response to a single violation. In general, changes to probation short of revocation are ordered using Form AOC-CR-609, *Order on Violation of Probation or on Motion to Modify*. A judgment and commitment upon revocation of probation is entered on Form AOC-CR-607 for a felony, Form AOC-CR-608 for a misdemeanor, and Form AOC-CR-343 for impaired driving.[98] Modifications and dispositions in deferred prosecution cases are entered on Form AOC-CR-634. In conditional discharge cases, use Form AOC-CR-635.

Except as otherwise indicated, the court has broad discretion when crafting the appropriate response to a violation of probation—including the discretion to take no action at all. When a person has committed multiple violations, the court can choose which of them, if any, to respond to. And when a person is on probation for multiple crimes, the court may take the same or different actions in each case. Regardless of the number and type of prior violations, the court is never required to revoke a person's probation.

A. Revocation

Revocation means the probationer's suspended sentence is activated and the probationer is ordered to jail or prison. Prior to the Justice Reinvestment Act of 2011, the longstanding rule in North Carolina was that any single violation of a valid probation condition was a sufficient basis for revocation.[99] For violations occurring on or after December 1, 2011, however, the court's authority to revoke probation is substantially

98. Court officials should be aware that probation officers are guided by an administrative policy that directs how they respond to perceived violations of probation. The policy includes a chart that directs different types of responses depending on the type of violation at issue and the offender's supervision level. For example, nonrecurring violations by low-risk offenders should be responded to with a modest intervention, such as a reprimand or an additional contact by a probation officer, while new crimes or other violations implicating public safety will lead to the issuance of a probation violation report and the arrest of the probationer. *See* Markham, *supra* note 5, at 49–51 (summarizing the policy set out in Community Corrections Policy, *supra* note 24, at § D.0202). That administrative policy is not binding on the courts, but it helps explain which offenders probation officers bring back before the court for a hearing and the types of actions officers recommend to the court.

99. *See, e.g.*, State v. Tozzi, 84 N.C. App. 517 (1987).

limited. For those violations, the court may only revoke probation in the first instance for either of the following:

- violations of the **commit no criminal offense** condition set out in G.S. 15A-1343(b)(1) (hereinafter "new criminal offense" violations), although not solely a conviction for a Class 3 misdemeanor; or
- violations of the statutory **absconding** condition set out in G.S. 15A-1343(b)(3a).

For violations aside from new criminal offenses and absconding (hereinafter "technical violations"), a probationer can be revoked only if he or she has committed two previous technical violations that have been responded to in a specific way, which varies depending on the type of case and when the person was placed on probation:

- **Felony** probationers may be revoked for any violation after receiving two 90-day periods of confinement in response to violation (CRV).
- **Impaired driving (DWI)** probationers may be revoked for any violation after receiving two periods of CRV of up to 90 days each.
- **Misdemeanor probationers placed on probation on or after December 1, 2015**, may be revoked for any violation after previously receiving at least two periods of 2- or 3-day quick-dip confinement, imposed either by a judge or by a probation officer through delegated authority, in response to a technical violation.
- **Misdemeanor probationers placed on probation before December 1, 2015**, are still subject to old law that says they may be revoked for any violation after previously receiving at least two periods of CRV of up to 90 days each.

With these requirements in place, the probation law takes a "three strikes" approach to technical violations: a person may not be revoked until his or her third "strike." As to strikes one and two, only the specific sanctions noted above—CRV or a quick dip, as the case may be—qualify as strikes. Thus, it is the prior *sanction*, not the prior violation itself, that puts the person on a path to revocation, and violations responded to in some other way (by a term of special probation or electronic house arrest, for example) do not count as strikes. Additional details about CRV and quick dips are set out below.[100]

Grounds for Revocation:
New criminal offense or absconding

Revocation Eligibility for a Technical Violation:

Felons—after two prior CRVs (90 days each)

DWI—after two prior CRVs (up to 90 days each)

Misdemeanors—
Placed on probation on or after December 1, 2015: After two prior quick dips (2–3 days each), imposed by a judge or by a probation officer

Placed on probation before December 1, 2015: After two prior CRVs (up to 90 days each)

100. *See infra* notes 135–159 and accompanying text.

In general, an activated sentence commences on the day probation is revoked,[101] although a court may probably delay service of the sentence to some future date in its order revoking probation.[102] A judge also apparently may stay execution of an order revoking probation until some future date, allowing the defendant a final opportunity to comply with his or her conditions in the meantime.[103] For crimes sentenced under Structured Sentencing, an activated sentence must be served in a continuous block; the court may not order it served in noncontinuous intervals.[104] Active sentences for impaired driving may be served on weekends.[105]

1. Changes to a Sentence upon Revocation

Generally a sentence is activated in the same form in which it was entered by the original sentencing judge, with the defendant committed to the custodian identified in the judgment suspending sentence. However, the revoking judge has limited discretion to modify the sentence, as described below.

Reduction of the suspended sentence. A revoking court can, upon revocation, reduce the length of a suspended sentence of imprisonment. For felonies, the reduction must be within the original range (presumptive, mitigated, or aggravated) established for the class of offense and prior record level of the sentence being activated. For misdemeanors, the sentence may be reduced to as little as one day upon revocation, because that is the shortest permissible sentence in every cell on the misdemeanor sentencing grid.[106] The court may reduce a sentence only at the point of revocation.[107]

Consecutive and concurrent sentences upon revocation. Under G.S. 15A-1344(d), a "sentence activated upon revocation of probation commences on the day probation is revoked and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period *unless the revoking judge specifies that it is to run consecutively with the other period.*" The court of appeals has interpreted the last clause of that provision to mean that the revoking judge can change the concurrent or consecutive decision rendered by the original sentencing judge, allowing sentences initially ordered to run consecutively to run

101. *Id*.

102. G.S. 15A-1353(a). *See* Official Commentary to G.S. 15A-1353, providing that subsection (a) of the law "applies both to an initial sentence to imprisonment and to the activation of a sentence following probation revocation." The commentary goes on to say that while the "presumptive beginning date for the term of imprisonment is the date of the commitment order, the judge may specify a delayed beginning dated to permit the defendant to get his affairs in order."

103. State v. Yonce, 207 N.C. App. 658 (2010) (approving a trial judge's order staying a defendant's revocation of probation to allow the probationer additional time to pay restitution).

104. State v. Miller, 205 N.C. App. 291 (2010).

105. G.S. 20-179(s) ("The judge in his discretion may order a term of imprisonment to be served on weekends.").

106. G.S. 15A-1344(d1).

107. State v. Mills, 86 N.C. App. 479 (1987).

concurrently,[108] or vice-versa.[109] The judge may also run an activated sentence consecutive to a later-arising active sentence, even though the later sentence was for an offense that occurred after the original probationary judgment was entered.[110] If the revoking judge does not specifically state on the judgment activating the suspended sentence that it is to run consecutively to another sentence, the Division of Adult Correction and Juvenile Justice will run the activated sentence concurrently with any other sentence the defendant is obligated to serve.

There is no authority to *consolidate* activated sentences with newly imposed judgments, as the statutes governing consolidation apply only to defendants convicted of more than one offense at the same time.[111]

2. Revocation-Eligible Violations

Each type of revocation-eligible violation (a new criminal offense, absconding, or a technical violation after two previous CRV periods or quick dips) raises complicated issues, explored below.

New criminal offense. It is a regular condition of probation that a probationer "[c]ommit no criminal offense in any jurisdiction."[112] The court may revoke probation upon a first violation of the condition.[113]

A common question related to the new criminal offense condition is whether a person must be convicted of the new crime before the court may find it as a violation of probation, or whether a pending charge (or even uncharged or acquitted conduct) could constitute a "criminal offense" within its meaning. The cases make clear that the defendant need not be convicted of the new criminal conduct before the court may respond to it as a probation violation. A finding of violation is proper either if the defendant has been convicted,[114] or if the probation court makes an independent finding that the alleged criminal act occurred.[115] That finding must, however, be based on evidence presented at the violation hearing (or the defendant's admission), not on the mere fact that a charge is pending.

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108. State v. Hanner, 188 N.C. App. 137 (2008); State v. Paige, 90 N.C. App. 142 (1988).

109. The original judgment in *Hanner* was part of a plea arrangement, though it appears that the original sentencing court ran certain sentences concurrently even though the defendant had actually agreed as part of the plea that they would run *consecutively.* Thus, when the revoking judge eventually ran the sentences consecutively, he did not do anything that the defendant had not agreed to in the initial plea arrangement. As a result, *Hanner* probably should not be viewed as strong authority for the idea that a revoking judge can disregard the terms of a plea arrangement calling for concurrent sentences and impose consecutive sentences upon revocation of probation.

110. State v. Campbell, 90 N.C. App. 761 (1988).

111. G.S. 15A-1340.15(b) (consolidation of felonies); -1340.22(b) (consolidation of misdemeanors).

112. G.S. 15A-1343(b)(1).

113. G.S. 15A-1344(a).

114. State v. Guffey, 253 N.C. 43 (1960).

115. State v. Monroe, 83 N.C. App. 143, 145 (1986) ("All that is required in revoking a suspended sentence is evidence which reasonably satisfies the judge in the use of his sound discretion that a condition of probation has been willfully violated.").

Additionally, it is apparently permissible for a probation court to find that a probationer has committed a new criminal offense regardless of the State's decision to drop the new criminal charge[116] or to not bring a charge at all.[117] There is also support for the idea that the probation court may revoke probation based on its own independent findings of a criminal act even if the defendant is acquitted of the new criminal charge,[118] but the appellate courts describe this as against the better practice.[119] Revocation in lieu of, or even in addition to, a new criminal conviction does not constitute double jeopardy; the probation revocation is not new punishment for the same act but is, rather, the activation of a punishment previously imposed for conviction of a prior crime.[120]

Just because a probation court may find a violation based on unconvicted conduct does not mean it must. In many districts in North Carolina, it is common practice to await the resolution of a pending charge before responding to it in probation court, treating it as a new criminal offense violation only if the defendant is convicted. Probation policy directs officers to consult with their chief probation parole officer and the district attorney when a probationer is charged with a new crime, and leaves it to the district attorney to decide whether to proceed with a probation violation hearing before the defendant is convicted on the new charge.[121]

If the violation hearing is held first, and a violation is found, a court later considering the criminal charge probably is not bound by that finding at trial. The defendant is of course entitled to proof beyond a reasonable doubt on the criminal charge, and the finding of a probation violation—with its lower standard of proof, and with fewer procedural protections—would not have preclusive effect.[122] If no violation is found, it is unclear whether that determination would be binding in a subsequent trial.[123]

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116. *See* State v. Debnam, 23 N.C. App. 478 (1974) (upholding the trial court's revocation based on a nolle prossed charge).

117. *Monroe*, 83 N.C. App. at 145–46.

118. *See* State v. Greer, 173 N.C. 759 (1917) (holding that a jury verdict acquitting the defendant of a new criminal charge was not binding on the probation court so long as the court found facts based on the evidence before it).

119. *See Debnam*, 23 N.C. App. at 481 ("It may not be desirable for a judge to activate a suspended sentence upon conduct where a jury has found the defendant not guilty of a charge arising out of that conduct, but it appears to be within the power of the judge to do so.").

120. State v. Sparks, 362 N.C. 181 (2008); State v. Monk, 132 N.C. App. 248 (1999).

121. Community Corrections Policy, *supra* note 24, at § D.0204(a).

122. *See, e.g.*, State v. Byrd, 58 P.3d 50, 58 (Colo. 2002) (holding that, despite an identity of issues and parties, the violation hearing was not a "full and fair opportunity to litigate the issue" sufficient for collateral estoppel to apply at a subsequent trial related to the same criminal behavior).

123. *Cf.* State v. Summers, 315 N.C. 620 (2000) (holding that collateral estoppel barred relitigation at a DWI trial of a prior superior court finding, made at an appeal of a DMV license revocation, that the defendant did not willfully refuse a chemical analysis. Courts in other jurisdictions that have considered the question have generally declined to give probation findings preclusive effect at a subsequent trial. *See, e.g.*, Lucido v. Superior Court, 795 P.2d 1223 (1990) ("Because public policy requires that ultimate determinations of criminal guilt and innocence not be made at probation revocation hearings, barring relitigation of issues at trial will not preserve the integrity of the judicial system.").

Sometimes—either pursuant to a plea agreement or in the judge's own discretion—the court sentencing a new conviction will order that the new conviction not violate the defendant's existing probation. There is no statute approving such orders, and as a technical matter the court sentencing the new conviction has jurisdiction over the probation matter only if a violation report has been filed before the same court. As a practical matter, though, such orders are often honored—either because the defendant's guilty plea in the new case was secured pursuant to an agreement that probation would not be revoked, or simply as a matter of comity between judges.

Class 3 misdemeanors. The court may not revoke a defendant's probation solely for conviction of a Class 3 misdemeanor.[124] That prohibition—which predates the Justice Reinvestment Act—operates as an exception to the general rule that probation may be revoked for a new criminal offense. Interpretations of the law vary. Some argue that revocation is permissible when a probationer is convicted of multiple Class 3 misdemeanors, or of a Class 3 misdemeanor and additional technical violations, on the theory that revocation in those instances would not be "solely" for a single Class 3 misdemeanor. Others take the view that multiple violations ineligible for revocation on their own do not accumulate to allow for revocation. The appellate courts have yet to consider the question in a published case.

Regardless of the answer to that question, courts should bear in mind that a conviction for a Class 3 misdemeanor is still a violation of the "commit no criminal offense" condition and therefore not a "technical violation." That leaves a Class 3 misdemeanor in the unusual position of being ineligible for revocation, but also ineligible for CRV (which, the statute says, is expressly for violations other than a new criminal offense or absconding).

Absconding. For probation violations occurring on or after December 1, 2011, the court may revoke probation for a violation of the statutory absconding condition set out in G.S. 15A-1343(b)(3a). That subsection provides that a probationer may not "abscond, by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer."

The absconding condition was created as part of the Justice Reinvestment Act and applies only to defendants on probation for offenses committed on or after December 1, 2011.[125] By now, most probationers are on probation for offenses committed after that date. Those under supervision for older offenses are not subject to the revocation-eligible absconding condition, and violations of other conditions (such as the "remain within the jurisdiction" condition or the "failure to report to the officer" condition) are ineligible for revocation, even if probation officers refer to them as absconding.[126] If a probationer actually absconded before December 1, 2011, that offending behavior would be eligible for revocation because it predates the effective date of the JRA's limitation on revocation authority. The court of appeals has referred to the gap

124. G.S. 15A-1344(d).
125. S.L. 2011-412, § 2.5.
126. State v. Nolen, 228 N.C. App. 203 (2013).

period affecting probationers on probation for offenses committed before December 1, 2011, who absconded on or after that date as a "donut hole" in the absconding law.[127]

Even for offenders actually subject to the statutory absconding condition, the language of the condition itself does not define "avoiding supervision" or state how long a person's whereabouts must be unknown before he or she becomes an absconder. At one end of the spectrum, a probationer does not become an absconder by missing one office appointment the day after seeing his probation officer.[128] At the other end of the spectrum, a probationer who changed address without permission and made his whereabouts unknown to probation officers for several months was properly deemed an absconder.[129]

In between those extremes, whether a probationer has violated the absconding condition appears to be a fairly fact-specific inquiry. In *State v. Williams*, for example, the court of appeals concluded that a defendant who missed multiple office visits over a three-month period and traveled to New Jersey without permission was not an absconder. The absconding allegations were, the court held, "simply a re-alleging" of the technical violations of failing to report to the probation officer and failing to remain within the jurisdiction.[130] The court also appeared to find it significant that the probationer's whereabouts were not unknown, because he told his probation officer over the phone that he was in New Jersey. In *State v. Melton*, the court of appeals held there was insufficient evidence of absconding when "the probation officer is unable to reach a defendant after merely two days of attempts, only leaving messages with a defendant's relatives."[131] In *State v. Krider*, there was insufficient evidence of absconding when the State failed to establish the identity of a witness who told the supervising officer that the probationer no longer lived at the designated residence.[132]

Probation officers are required as a matter of their own policy to conduct a specialized investigation before declaring that an offender has absconded. That investigation includes attempting to contact the offender by telephone, visiting the offender's residence in the daytime and in the evening, contacting the offender's landlord and neighbors, visiting the offender's workplace or school, contacting the offender's relatives and associates, and contacting local law enforcement, including the jail.[133] Officers alleging absconding violations appear to be on the strongest legal footing when they include the details of this investigation in their violation report, especially those details that exceed the technical violations of failing to report or leaving North Carolina.

Probationers alleged to have absconded are still subject to the jurisdictional provisions of G.S. 15A-1344(f) regarding violation hearings held after the expiration of the

127. State v. Johnson, ___ N.C. App. ___, 803 S.E.2d 827 (2017).
128. State v. Johnson, 246 N.C. App. 139 (2016).
129. State v. Johnson, 246 N.C. App. 132 (2016).
130. 243 N.C. App. 198 (2015).
131. ___ N.C. App. ___, 811 S.E.2d 678 (2018).
132. State v. Krider, ___ N.C. App. ___, 810 S.E.2d 828, *aff'd*, ___ N.C. ___, ___ S.E.2d ___ (Sept. 21, 2018).
133. *See* Community Corrections Policy, *supra* note 24, at § D.0503.

probationary period.[134] Thus, even if a probationer has clearly made him- or herself unavailable for supervision, the probation officer must file a violation report before the case expires to preserve the court's power to act if the probationer is eventually apprehended.

B. Confinement in Response to Violation (CRV)

1. CRV Generally

CRV is a probation sanction permissible in response to technical violations of probation. It is a period of imprisonment, generally shorter than a full revocation of probation, created as part of the Justice Reinvestment Act and designed to help reduce the prison population attributable to probationers who commit relatively minor violations. After an eligible probationer has received two CRV periods, he or she may be revoked for any subsequent violation of probation. Initially, CRV was an option for all probationers (felons, misdemeanants, and impaired drivers), but it was repealed as an option for Structured Sentencing misdemeanants placed on probation on or after December 1, 2015.[135]

CRV may be ordered only in response to technical violations of probation—that is, any violation of probation other than a new criminal offense under G.S. 15A-1343(b)(1) or absconding under G.S. 15A-1343(b)(3a).[136] For a new criminal offense or absconding, the court may not impose CRV. Instead, it may either revoke probation or take one of the other actions described below. Under the effective date language of the Justice Reinvestment Act, the court does not have authority to impose CRV for violations that occurred before December 1, 2011.[137]

CRV is never mandatory. For example, the court could impose special probation or electronic house arrest in response to a technical violation—or it could do nothing at all. However, those responses would not count as "strikes," putting the defendant on a path toward eligibility for revocation for a subsequent technical violation.

When a defendant is on probation for multiple offenses, the law requires CRV periods to run concurrently on "all cases related to the violation," and confinement is to be "immediate unless otherwise specified by the court."[138] Together, these statutory rules indicate that multiple CRV periods should not be "stacked" to create a confinement period of longer than 90 days. The statute is silent, however, on the question of whether a CRV period may be run consecutively to other forms of probationary confinement, like special probation.

The court should use a modification order, Form AOC-CR-609, to impose CRV.

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134. State v. Burns, 171 N.C. App. 759, 762 (2005) ("The mere notation of 'absconder' on the order for arrest did not relieve the State of its duty to make reasonable efforts to notify defendant under [G.S. 15A-1344].").

135. S.L. 2015-191.

136. G.S. 15A-1344(d2).

137. S.L. 2011-192, § 4.(d) ("This section is effective December 1, 2011, and applies to probation violations occurring on or after that date.").

138. G.S. 15A-1344(d2).

Due to a series of legislative revisions between 2011 and today, the technical rules regarding CRV applicability, length, and place of confinement vary depending on the defendant's offense date; date placed on probation; and whether he or she is under supervision for a felony, a misdemeanor sentenced under Structured Sentencing, or impaired driving.

2. Felony CRV

In felony cases, a CRV period is 90 days—no more, no less. The only exception to that rule would be a probationer who has 90 days or less remaining on his or her suspended sentence (unlikely in a felony case), in which case the CRV period is for the remainder of the suspended sentence. The 90 days must be served continuously (the court cannot order them served on weekends, for example), and they must be served in the custody of the Division of Adult Correction and Juvenile Justice.[139] Men ordered to serve CRV are generally housed in one of the state's two CRV centers for men in Robeson County and Burke County, unless the probationer has medical issues or raises security concerns that cannot be addressed in those locations, in which case the time is served in prison. Women generally serve felony CRV at North Piedmont Correctional Institution in Davidson County.

3. CRV for Structured Sentencing Misdemeanors

Whether the court may impose CRV for a misdemeanor sentenced under Structured Sentencing (generally, any crime other than impaired driving and the handful of other offenses sentenced under G.S. 20-179) depends on when the person was placed on probation.

For Structured Sentencing misdemeanants **placed on probation on or after December 1, 2015, CRV is repealed** and therefore unavailable as a response to any probation violation.[140] In those cases, the court may respond to a technical violation with a "quick dip" in the jail (described below) or some other probation response option aside from revocation and CRV.

For misdemeanor defendants placed on probation before December 1, 2015, CRV is still a viable response to a probation violation. For those probationers, CRV is—like felony CRV—permissible for any technical violation, but not in response to a new criminal offense or absconding. The CRV period for any such probationer may be "up to 90 days," meaning the court may impose a period shorter than 90 days in its discretion. Of course, if the defendant's suspended sentence is less than 90 days (as many misdemeanor sentences are), the maximum length of the CRV period is the length of the suspended sentence itself. As with felonies, misdemeanor CRV must be served in a continuous period.

CRV for any misdemeanor probationer is served "where the defendant would have served an active sentence,"[141] which is the place of confinement identified for the

139. *Id.*
140. *Id.*; S.L. 2015-191.
141. G.S. 15A-1344(d2).

suspended term of imprisonment in the judgment suspending sentence. For sentences initially imposed on or after January 1, 2015, the place of confinement for a misdemeanor sentence of greater than 90 days will be the Statewide Misdemeanant Confinement Program, while shorter sentences are generally served in the local jail.[142] Different place-of-confinement rules were in effect for defendants initially sentenced before January 1, 2015; therefore, the place of confinement for CRV for those probationers could differ from that which would apply to a defendant sentenced today.

4. CRV for Impaired Drivers

For DWI, CRV of "up to 90 days" is permissible in response to any technical violation.

CRV for impaired drivers is, like CRV for other misdemeanants, served "where the defendant would have served an active sentence."[143] Thus, for sentences initially imposed on or after January 1, 2015, the place of confinement for any CRV for a DWI, regardless of level, will be the Statewide Misdemeanant Confinement Program.[144]

5. Jail Credit Applied to CRV

The rules for applying jail credit to CRV vary depending on the type of crime for which the person is on probation and the date of the alleged violation.

If the court orders felony CRV for a probation violation committed on or after October 1, 2014, it must *not* reduce the 90-day term of CRV for any time already served in the case. Instead, any credit will be applied to the defendant's suspended sentence in the event of revocation.[145] That rule prohibits the application of prehearing confinement or any other form of jail credit (such as pretrial confinement) to a felony CRV period.

For probation violations that occurred before October 1, 2014, the rule for felony CRV was exactly the opposite: If a defendant was detained in advance of a violation hearing at which CRV was ordered, the judge *must* apply that prehearing credit to the CRV period, with any excess time applied to a later-activated sentence.[146] Today there will be few hearings on violations that old, but if one should arise, the court should use the prior law and apply any prehearing credit to the CRV.

For misdemeanor probationers still eligible for CRV and impaired drivers, the General Statutes are silent on the issue of jail credit applied to CRV. The law neither requires nor forbids the credit, giving the trial judge apparent flexibility to apply credit in his or her discretion.

In all cases, before imposing a CRV period, the court should consider whether, in light of the time the defendant has already served in the case, there is enough time remaining on the suspended sentence to cover the length of the CRV period the court wishes to impose. The jail credit rules should not be applied in a way that exposes a defendant to incarceration in excess of his or her maximum sentence.

142. G.S. 15A-1352.
143. *Id.*
144. G.S. 15A-1352.
145. G.S. 15A-1344(d2).
146. *Id.*; S.L. 2014-100, § 16C.8.(a).

6. Revocation after Two CRV Periods

A defendant may receive only two CRV periods in a particular probation case. After that, the court may respond to subsequent violations by either revoking probation or imposing some sanction other than CRV.

If a person who previously served CRV later has his or her probation revoked, any time spent imprisoned for CRV must be credited to the defendant's activated sentence.[147] The only exception to that rule is for a probationer on probation for multiple offenses who serves concurrent CRVs for sentences that wind up running consecutively upon revocation. In that situation, credit for the concurrent CRV periods is applied to only one of the defendant's consecutive activated sentences.[148]

7. Terminal CRVs

By design, CRV is a temporary intervention in a probation case—a short period of incarceration in response to a technical violation, followed by a return to probation supervision. In reality, CRV often winds up being the last court action in the case, either because the CRV uses up the entirety of the defendant's suspended sentence, or because the probation period expires while the person is serving the CRV. Both situations are referred to as "terminal CRVs."

The first type of terminal CRV (the type that uses up the entirety of a defendant's suspended sentence) is more likely to occur in the case of a misdemeanor or DWI, where the defendant's suspended sentence could be similar in length to a CRV. A felony maximum sentence, by contrast, will typically exceed 90 days by many months, and so the defendant will likely have ample time remaining on his or her maximum sentence even after serving multiple CRV periods.

Some argue that a felony CRV should nonetheless be considered "terminal" if it carries the defendant past the point where he or she would have been released had the sentence been active. For example, a defendant with a 4–14-month suspended sentence who is serving a second CRV period might argue that he or she should be released from the CRV once he or she has accrued five total months of jail credit on the sentence, as that is the point (the maximum sentence less 9 months) at which he or she would be released from prison to post-release supervision on an active term. However, the rule requiring mandatory release to post-release supervision applies only to felons serving an active sentence.[149] A probationer serving CRV has not been revoked, and so is not serving an "active sentence" within the meaning of the PRS law, and therefore probably should serve the full CRV. A judge wanting to avoid that outcome may wish to impose special probation or some sanction aside from CRV.

As to the second type of terminal CRV (the type where the probation period expires while the defendant is in the midst of the CRV), DACJJ will carry out a court-ordered CRV even if the term of probation has expired. No statute clearly says to do otherwise—unlike the special probation statute, which says that no split

147. G.S. 15A-1344(d2); 15-196.1.
148. G.S. 15-196.2.
149. G.S. 15A-1368.1.

sentence may extend beyond the defendant's period of probation.[150] Surprisingly, no appellate case has examined the issue.

A final possibility—officially discouraged by Community Corrections, but nonetheless fairly common—is that the judge will affirmatively terminate the defendant's probation at the conclusion of a CRV period, even when time remains on the suspended sentence and the probation period. This is sometimes referred to as a terminal CRV, but would be better described as a "CRV-and-terminate," to reflect that it is really two orders by the court (a CRV and a termination), and not a single CRV that brings the case to a natural conclusion.

C. "Quick Dip" Confinement

For offenders on probation for Structured Sentencing offenses—felonies or misdemeanors, but not DWI—that occurred on or after December 1, 2011, the court may order jail confinement of 2 or 3 days as a modification of probation. (The choice between 2 or 3 days is in the discretion of the court.) This short term of confinement is sometimes referred to as a "quick dip" in the jail. A defendant may serve no more than 6 days of quick dip confinement per month, and the sanction may be used in no more than 3 separate calendar months of a person's probation.[151] Unlike CRV, which may be imposed only in response to technical violations, the court may impose a quick dip in response to any violation, or even without violation for good cause.[152] Quick dips are always served in a local confinement facility, never in prison. The court may, in its discretion, impose a $40 jail fee for each day of quick dip confinement.[153]

The court should use a modification order, Form AOC-CR-609, to impose a quick dip.

Probation officers may impose a similar form of quick dip confinement through delegated authority.[154] If an officer determines that the probationer has violated a condition imposed by the court, he or she may seek a supervisor's approval to impose a quick dip. Prior to imposing it, the officer must present the probationer with a violation report and advise him or her of the rights (1) to a court hearing on the violation, (2) to a lawyer, (3) to request witnesses who have relevant information concerning the alleged violation, and (4) to examine any witnesses or evidence. If the probationer executes a waiver of those rights—signed by the probationer and two probation officers

150. G.S. 15A-1344(e) ("No confinement other than an activated suspended sentence may be required beyond the period of probation . . . .").

151. G.S. 15A-1343(a1)(3).

152. G.S. 15A-1344(d).

153. G.S. 7A-313. This $40 per day jail fee is not to be confused with the $10 per day jail fee for pretrial confinement. The $10 fee is a cost that may be waived only with findings for just cause, as provided in G.S. 7A-304(a). The $40 fee is discretionary, and a judge may choose not to impose it without any special findings.

154. *See infra* notes 212–221 and accompanying text.

acting as witnesses—the officer may impose the quick dip.[155] No jail fees apply to quick dips imposed by a probation officer.

It is unclear whether judges and probation officers draw from the same statutory allotment of quick dip days per month, but Community Corrections assumes as a matter of policy that they do. A probation officer may exercise delegated authority to impose a quick dip only when the officer determines that the probationer has failed to comply with one or more conditions of probation imposed by the court and the probationer has waived his or her rights to a hearing and counsel on the alleged violation.[156] By statute, a probation officer may impose a quick dip for any violation in a Structured Sentencing case, but not in any DWI case.

1. Revocation after Two Quick Dips

Structured Sentencing misdemeanants placed on probation on or after December 1, 2015—the same cohort of probationers for whom CRV was repealed, as described above—are eligible for revocation in response to any violation after they have received two periods of quick dip confinement in response to prior technical violations, imposed either by a judge as a modification of probation or by a probation officer through delegated authority.[157] In that way, quick dips have replaced CRV as the sanction that serves as a first and second "strike" for technical violations, paving the way for a probationer to later be revoked for a subsequent technical violation.

Not all quick dips qualify as "strikes," however. The quick dips must have been imposed in response to a technical violation (not a new crime or absconding), and the second period of confinement must have been imposed for a violation that occurred after the defendant served the first quick dip.[158] By policy, when a probation officer imposes a quick dip, he or she must file a record of it with the clerk of court. Probation violation reports filed with the court for subsequent violations will indicate how many quick dips the probationer has already served, if any, which gives some indication as to the person's eligibility for revocation for a technical violation. However, the record of quick dips on the violation report does not indicate whether the quick dip was imposed in response to a technical violation, or whether the second period of confinement was imposed for a violation that occurred after the defendant served the first period of confinement. Therefore, a more careful examination of the record may be required in some cases to determine the probationer's status.

If a person who previously served quick dips later has his or her probation revoked, any time spent imprisoned for the quick dips must be credited to the defendant's activated sentence.[159]

155. G.S. 15A-1343.2.
156. *Id.*
157. G.S. 15A-1344(d2).
158. *Id.*
159. *Id.*; G.S. 15-196.1.

D. Special Probation (Split Sentence)

With any finding of violation, the court may modify probation to place the defendant on special probation—often referred to as a split sentence. Special probation confinement may be as little as one day, but no more than one-fourth the maximum sentence imposed (or, in the case of impaired driving, one-fourth the maximum penalty allowed by law). The judge may order the confinement to be served in a local jail or in prison, and in continuous or noncontinuous periods. Noncontinuous periods (like weekends, for example) must be served in a local jail.[160] When a defendant serves a split sentence in the jail, the judge may, in his or her discretion, impose a $40 per day jail fee on the defendant.[161]

For split sentences added as a modification of probation, no confinement other than an activated sentence may be required beyond the period of probation or two years from the time the special probation is imposed, whichever comes first.[162] In other words, the split confinement must end when probation expires.

Special probation is more flexible than CRV in terms of length, manner of service, and place of confinement, and so it may be a useful response option in some cases. It does not, however, count as a technical violation "strike" that puts the defendant on a path to eligibility for revocation for subsequent technical violations.

E. Contempt

If a probationer willfully violates a condition of probation, the court may hold him or her in criminal contempt in lieu of revocation.[163] The probation statute dealing with contempt incorporates by reference the procedures set out in Article 1 of G.S. Chapter 5A. As a result, before a probationer may be punished with contempt, he or she should receive notice as provided in G.S. 5A-15(a) (probation officers use a special violation report, Form DCC-10C, in cases where they will recommend contempt), and violations punished through contempt must be proved beyond a reasonable doubt under G.S. 5A-15(f). Punishment for criminal contempt may not exceed 30 days. Time

160. G.S. 15A-1344(e). When determining the maximum term of special probation confinement permissible in response to a probation violation, the court should take into account any special probation confinement ordered at sentencing under G.S. 15A-1351(a). The total of all special probation confinement ordered under both statutes should not exceed one-fourth the maximum sentence. State v. Younts, 794 S.E.2d 923 (2016) (unpublished).

161. G.S. 7A-313. This $40 per day jail fee is not to be confused with the $10 per day jail fee for pretrial confinement. The $10 fee is a cost that may be waived only with findings for just cause, as provided in G.S. 7A-304(a). The $40 fee is discretionary, and a judge may choose not to impose it without any requirement for special findings.

162. G.S. 15A-1344(e).

163. G.S. 15A-1344(e1).

spent imprisoned for contempt in response to a probation violation counts for credit against the suspended sentence if that sentence is eventually activated.[164]

Contempt does not count as a technical violation "strike" that puts the defendant on a path to eligibility for revocation for subsequent technical violations.

F. Extension

The General Statutes describe two different types of probation extensions: *ordinary extensions* under G.S. 15A-1344(d) and *special-purpose extensions* under G.S. 15A-1343.2. (The terms "ordinary" and "special-purpose" are used here for clarity; they do not appear in the General Statutes.)

1. Ordinary Extensions

Ordinary extensions may, after notice and hearing, be ordered at *any time* prior to the expiration of probation for "good cause shown" (no violation need have occurred).[165] The total maximum probation period, including any ordinary extensions, is 5 years, except in deferred prosecution and conditional discharge cases, in which it is 2 years.[166] A defendant's probation period may be extended multiple times under G.S. 15A-1344(d), provided the total probation period does not exceed 5 years. For instance, a defendant initially placed on probation for 12 months could, under G.S. 15A-1344(d), have that probation extended to 24 months at one hearing, then to 60 months at a later hearing.

For many years, probation officers would routinely coordinate ordinary extensions outside of open court, getting the prosecutor, the defendant, and then the judge to sign a modification order in chambers or elsewhere for a defendant who consented to the extension. However, unpublished appellate decisions have called attention to the fact that no statute clearly authorizes a defendant to waive his or her right to notice and a hearing before an ordinary extension, and that the defendant is entitled to counsel before any hearing at which probation is extended.[167] With those cases in mind, Community Corrections now directs officers to seek ordinary extensions only in a courtroom hearing, after having given notice of the hearing to the probationer.[168]

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164. State v. Belcher, 173 N.C. App. 620 (2005). *See also* Jamie Markham, *Jail Credit for Probation Contempt*, UNC Sch. of Gov't: N.C. Crim. L. Blog (Dec. 13, 2012), nccriminallaw.sog.unc.edu/jail-credit-for-probation-contempt.

165. GS 15A-1344(d).

166. GS 15A-1342(a).

167. *See* State v. Craig, 798 S.E.2d 438 (2017) (unpublished); State v. Lawrence, 197 N.C. App. 630 (2009) (unpublished). *See also* Jamie Markham, *In-Chambers Modifications and Extensions of Probation*, UNC Sch. of Gov't: N.C. Crim. L. Blog (Nov. 17, 2016), nccriminallaw.sog.unc.edu/chambers-modifications-extensions-probation.

168. *See* Jamie Markham, *A Change to Probation's Policy on Ordinary Extensions*, UNC Sch. of Gov't: N.C. Crim. L. Blog (Aug. 8, 2017), nccriminallaw.sog.unc.edu/change-probations-policy-ordinary-extensions/.

2. Special-Purpose Extensions

Special-purpose extensions can be used to extend the probationer's period of probation by up to 3 years beyond the original period of probation if all of the following criteria are met:

1. The probationer consents to the extension.
2. The extension is being ordered during the last 6 months of the *original* period of probation.[169]
3. The extension is necessary to complete a program of *restitution* or to complete *medical or psychiatric treatment*.[170]

Completion of substance abuse treatment is not "medical or psychiatric treatment," and thus not a valid reason for a special purpose extension.[171]

Extensions for these special purposes are generally understood to allow the court to extend a period of probation beyond 5 years, which makes the maximum possible probation period in a single case 8 years. However, only when the *original* period is 5 years can probation be extended to as long as 8 years under this provision, because a special-purpose extension must take place within the last 6 months of the *original* period of probation. If probation has previously been extended, the offender is no longer in his or her *original* period of probation, and is thus ineligible for further extension under G.S. 15A-1343.2 or 15A-1342(a). Thus, a special-purpose extension generally may happen only once in the life of a particular probation case.

A special-purpose extension probably is permissible in a conditional discharge or deferred prosecution case.[172] If so, then probation in those cases—typically capped at 2 years—could be extended to as long 5 years when the original period of probation was 2 years and the three eligibility criteria listed above apply.

G. Modification

After notice and hearing and for good cause shown, the court may modify probation at any time prior to its expiration or termination.[173] There need not be a finding of violation to empower the court to modify probation; modifications may be made without violation for good cause. With or without a violation, a defendant generally

169. *See* State v. Gorman, 221 N.C. App. 330, 727 S.E.2d 731 (2012) (vacating an extension order entered in the third year of a 60-month period of probation because it was ordered too early).

170. G.S. 15A-1343.2; -1342(a).

171. State v. Peed, ___ N.C. App. ___, 810 S.E.2d 777 (2018) ("We conclude that the General Assembly did not intend for a probation condition to complete 'substance abuse treatment' to be synonymous with (or a subset of) a probation condition to complete 'medical or psychiatric treatment.'").

172. One version of the special-purpose extension law appears in G.S. 15A-1342(a)—the same subsection that sets the 2-year maximum probation period for conditional discharge and deferred prosecution cases, making it hard to argue that the provision does not also apply in those cases.

173. G.S. 15A-1344(d).

has a right to be present at any hearing at which probation is modified, even if the modification is minor[174]—although the hearing may be held in the absence of a defendant who fails to appear after a reasonable effort to notify him or her.[175]

Upon a finding that an offender sentenced to community punishment has violated one or more conditions of probation, the court may add conditions of probation that would otherwise make the sentence an intermediate punishment.[176]

If any conditions are modified, the probationer must receive a written statement of the modification.[177] Probation may not later be revoked for violation of a new or modified condition unless the defendant had written notice that the condition applied to him or her; oral notice alone is insufficient.[178]

H. Transfer to Unsupervised Probation

A judge may transfer a supervised probationer to unsupervised probation at any time. The court may also authorize a probation officer to transfer a defendant to unsupervised probation after all money owed by the defendant is paid to the clerk. Additionally, a probation officer has independent authority to transfer a low-risk misdemeanant from supervised to unsupervised probation if the misdemeanant is not subject to any special conditions and was placed on probation solely for the collection of court-ordered payments.[179]

A separate statutory provision in Chapter 20 governs transfers to unsupervised probation for impaired drivers subject to Level Three, Four, or Five punishment. If the defendant is initially placed on supervised probation in those cases, the court must authorize the probation officer to place the defendant on unsupervised probation when he or she has completed community service; paid all fines, court costs, and fees; or both.[180]

A probationer subject to the special conditions of probation applicable to sex offenders may not be placed on unsupervised probation.[181]

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174. *See* State v. Willis, 199 N.C. App. 309 (2009) (vacating a condition that was modified outside the defendant's presence to prohibit him from having more than one animal "in his possession" to prohibiting him from having more than one animal "in his possession *or on his premises*" (emphasis added)).

175. G.S. 15A-1344(d).

176. G.S. 15A-1344(a).

177. G.S. 15A-1343(c).

178. State v. Seek, 152 N.C. App. 237 (2002); State v. Suggs, 92 N.C. App. 112 (1988).

179. G.S. 15A-1343(g).

180. G.S. 20-179(r). *See generally* Shea Riggsbee Denning, The Law of Impaired Driving and Related Implied Consent Offenses in North Carolina (UNC School of Government, 2014), 182.

181. G.S. 15A-1343(b2).

I. Termination

The court may terminate probation at any time if warranted by the conduct of the defendant and "the ends of justice."[182] Although frequently used in practice, the concept of "unsuccessful" or "unsatisfactory" termination does not appear in the General Statutes or appellate case law and carries no defined legal significance.

When a probationer has a probation period greater than 3 years, the probation officer must bring him or her back before the court after 3 years of probation so that the court can review the case to determine whether to terminate probation.[183] Though the statute styles the review as mandatory, a failure to complete it does not deprive the court of later jurisdiction over the case.[184]

Termination of a probation case does not, on its own, extinguish monetary obligations (costs, fines, and other fees) the defendant might owe in relation to the case. If the court wishes to remit or otherwise forgive those obligations, it should affirmatively do so—perhaps especially in Chapter 20 cases, where an unpaid obligation could trigger a driver's license revocation.[185]

J. Continuation without Modification

Whether or not the court finds a violation at a hearing, it may always continue the defendant on probation under the same conditions. This is sometimes referred to as reinstating the defendant's probation.

K. Electing to Serve a Sentence

Some probationers ask to "invoke" their sentence—that is, to have their probation revoked so they may serve their remaining suspended sentence. There is no clear legal authority to do that. Prior law allowing a defendant to elect to serve a sentence was repealed in 1995, effective for offenses occurring on or after January 1, 1997.[186] A defendant may admit to a violation of probation, but for violations occurring on or after December 1, 2011, the admitted-to violation must be a new criminal offense or absconding to allow the court to revoke. For defendants with short suspended sentences, an admission to a technical violation might allow for a CRV period long enough to use up the defendant's entire remaining suspended sentence, which is functionally similar to a revocation.

Defendants on probation for felony offenses committed on or after December 1, 2011, should note that they will be released to post-release supervision upon their

182. G.S. 15A-1342(b).
183. G.S. 15A-1342(d).
184. State v. Benfield, 22 N.C. App. 330 (1974).
185. G.S. 20-24.1.
186. G.S. 15A-1341(c), *repealed by* S.L. 1995-429.

release from imprisonment and that, by statute, PRS cannot be refused.[187] Thus, the incentive to elect to serve active time may be diminished.[188]

V. Violation Hearings in Diversion Cases

A. Deferred Prosecutions

When a person on probation pursuant to a deferred prosecution agreement under G.S. 15A-1341(a1) is alleged to have violated probation, the violation must be reported to the court and to the district attorney in the district in which the agreement was entered.[189] The court, not the district attorney, determines through ordinary probation hearing procedures whether a violation occurred and whether to "order that charges as to which prosecution has been deferred be brought to trial."[190] The North Carolina Attorney General's office has advised that probation matters in deferred prosecution cases should be managed only by the court of the district in which the agreement was entered into, as "[b]ringing the charges to trial would be the responsibility of only the district attorney who brought the charges."[191] Under G.S. 143B-708(e), violation hearings initiated by community service staff may be held in the county in which a deferred prosecution agreement was imposed, the county in which the alleged violation occurred, or the offender's county of residence. In light of the guidance from the Attorney General's office, however, the best practice is probably to hold the hearing where the agreement was imposed, notwithstanding the statute's broader authorization.

B. Conditional Discharge

A conditional discharge is a diversionary option through which a convicted defendant may be placed on probation without entry of judgment. If the defendant succeeds on probation, the court discharges the defendant and dismisses the proceeding without adjudication of guilt. If the defendant violates probation, the court may enter an adjudication of guilt and sentence the defendant. Various statutes give a trial judge authority to impose a conditional discharge in certain circumstances, including G.S. 15A-1341(a4) (misdemeanors and low-level felonies committed by certain defendants), G.S. 15A-1341(a3) (prostitution), and G.S. 90-96 (certain drug crimes).

187. G.S. 15A-1368.2(b).

188. For a lengthier discussion of the issues that arise when a probationer attempts to invoke his or her sentence, see Markham, The North Carolina Justice Reinvestment Act, *supra* note 5, at 77–79.

189. G.S. 15A-1342(a1).

190. G.S. 15A-1344(d).

191. Advisory Letter from Elizabeth F. Parsons, N.C. Assistant Attorney Gen., to LaVee Hamer, Gen. Counsel, N.C. Dep't of Corr. (Nov. 1, 2010).

In general, violation hearings for conditional discharge cases should be treated under the same rules applicable to ordinary probation cases. Violations must be timely filed and heard in the same manner as violations in ordinary post-conviction cases.[192] As in deferred prosecution cases, the district of conviction is probably the best venue for a probation hearing in a conditional discharge case; the defendant must be sentenced if revoked, and there is no clear authority for any court outside of the district of conviction to conduct the sentencing.

When a conditional discharge probationer is found in violation of a term or condition of probation, the court may revoke the probation, enter an adjudication of guilt, and proceed as otherwise provided.[193] Revocation is not required in the event of a violation but is, rather, within the trial court's discretion.

C. Response Options in Diversion Cases

The law is not crystal clear about a judge's authority to respond to violations of probation in deferred prosecution and conditional discharge cases. For both types of cases, the relevant statutes typically say that probation is "as provided in this Article,"[194] referring to Article 82—the statutory article governing ordinary probation. That language could be read to allow the court to take any action in a diversion case that it may take in an ordinary probation case. However, some portions of the ordinary probation framework are not a good fit in diversion cases. For example, any response that includes confinement (CRV, quick dips, and special probation) is probably off limits for diversion defendants who have not yet been sentenced, as they do not yet have a suspended sentence from which to draw creditable confinement days. Even contempt is problematic in that regard, as contempt ordered in response to a probation violation counts for credit against a defendant's suspended sentence.[195]

It is likewise unclear whether the typical limits on a judge's authority to revoke probation (revocation only for a new criminal offense or absconding) apply in diversion cases. On the one hand, in *State v. Burns* the court of appeals held that ordinary probation rules apply in conditional discharge cases in the absence of a provision to the contrary.[196] That rule lends support to the argument that "revocation" of diversion cases should, like ordinary cases, be limited to new criminal offense violations and absconding. (The third pathway to revocation, for probationers with two prior technical violations, would not apply to diversion cases—assuming they are indeed exempt from confinement-based sanctions, as described above.) On the other hand, the statutes governing noncompliance with conditional discharge probation do not generally use the words "revoke" or "revocation" at all. Instead, they refer to entering

192. State v. Burns, 171 N.C. App. 759, 761 (2005) ("In the absence of a provision to the contrary, and except where specifically excluded, the general probation provisions found in Article 82 of [G.S.] Chapter 15A apply to probation imposed under [G.S.] 90-96.").

193. G.S. 15A-1341(a6); 90-96(a).

194. *E.g.*, G.S. 15A-1341(a4).

195. *See* State v. Belcher, 173 N.C. App. 620 (2005).

196. *Burns*, 171 N.C. App. 759.

judgment and proceeding as otherwise provided (for conditional discharges) and ordering charges brought to trial (for deferred prosecutions), perhaps indicating that the conclusion of these cases is something altogether different from an ordinary probation revocation, and thus not subject to the same background rules. For the time being, it appears to be an open question.

One exception to this ambiguity applies to defendants subject to conditional discharge under G.S. 90-96(a1) (the less frequently used conditional discharge found in G.S. 90-96—most defendants will fall under subsection (a)). Subsection (a1) specifically provides that a person's "failure to complete successfully an approved program of instruction at a drug education school" constitutes grounds to revoke. The subsection defines this failure broadly to include failing to attend classes without an excuse, failing to complete the course in a timely fashion, or failing to pay the required fee. If the court receives an instructor's report about a person's failure to complete the drug education school, it must revoke probation.

If probation for a deferred prosecution or conditional discharge expires or the court terminates it early, the defendant is immune from prosecution of the charges deferred or discharged and dismissed.[197] In conditional discharge cases, it is unclear whether that immunity from prosecution requires the court to presume that the defendant has fulfilled the terms and conditions of the conditional discharge probation in a way that obliges the court to dismiss the conviction and discharge the defendant. To avoid that uncertainty, any scheduled review of a defendant's progress in a conditional discharge case should take place long enough before the case expires to allow the court sufficient time to respond to any alleged noncompliance.[198]

VI. Violations in Interstate Compact Cases

Some probationers are supervised in North Carolina on behalf of another state under the Interstate Compact for Adult Offender Supervision (the Compact).[199] These probationers are subject to the conditions of supervision imposed by the sending state, plus any conditions North Carolina has imposed under the Compact rules.[200] In those cases, when the probationer has allegedly violated a condition of probation, he or she may be arrested and detained for up to 15 days pending a preliminary hearing. Probation officers must coordinate the arrest through North Carolina's Interstate Compact Administrator in Raleigh, which issues an *Authority to Detain and Hold* form

197. G.S. 15A-1342(j).

198. *See* Jamie Markham, *G.S. 90-96 Limbo*, UNC Sch. of Gov't: N.C. Crim. L. Blog (Feb. 4, 2014), nccriminallaw.sog.unc.edu/g-s-90-96-limbo.

199. *See* G.S. 148-65.4 through -65.8.

200. Interstate Compact for Adult Offender Supervision, Rule 4.103 (allowing the receiving state to "impose a condition on an offender if that condition would have been imposed on an offender sentenced in the receiving state"), https://www.interstatecompact.org/sites/default/files/pdf/legal/ICAOS-2018-Rules-ENG_0.pdf.

(roughly equivalent to an order for arrest) accompanied by an arrest warrant from the sending state. Probationers arrested under the Compact are not entitled to bail.[201]

Unless the defendant waives it, the preliminary hearing is typically conducted in the local jail by a hearing officer employed by the Division of Adult Correction and Juvenile Justice, although a North Carolina judge is also empowered to hold the hearing. Prior to the hearing, the defendant must be permitted to consult with anyone whose assistance he or she reasonably desires. At the hearing, the defendant has the right to confront and examine anyone who has made allegations against him or her, unless the hearing officer determines that such confrontation would present a danger of harm to the accuser. The defendant can present proof, including affidavits and other evidence, supporting his or her contentions.[202] It is unclear whether North Carolina's blanket statutory entitlement to appointed counsel for probation violations applies to preliminary hearings for indigent Compact probationers. Regardless, some indigent defendants will be entitled to appointed counsel as a constitutional matter—those who make a colorable claim that they did not commit the alleged violation, those with substantial and complex reasons that justify or mitigate the violation, or those who might be incapable of speaking effectively for themselves.[203]

If the hearing officer finds probable cause to believe that a violation occurred, the sending state may retake the defendant for a final violation hearing in that state. The defendant remains in custody in North Carolina as may be necessary to arrange for the retaking.[204]

In cases where another state is supervising a probationer on North Carolina's behalf, the preliminary hearing is held in the receiving state (unless the probationer waives it). If probable cause exists, the defendant is subject to being returned to North Carolina for a final violation hearing held under the ordinary procedures described elsewhere in this book.[205]

201. G.S. 148-65.8(a). The fact that the arrest warrant will originate from the sending state—which retains ultimate jurisdiction over the case—can sometimes lead Compact probationers to be misidentified as fugitives subject to the extradition process.

202. G.S. 148-65.8(c).

203. Gagnon v. Scarpelli, 411 U.S. 778, 790–91 (1973).

204. G.S. 148-65.8(c1).

205. G.S. 148-65.8(d).

VII. Other Issues That May Arise at a Violation Hearing

A. Credit for Time Served

If probation is revoked and a sentence is activated, the probationer must get credit for the following time under G.S. 15-196.1:

- pretrial confinement,[206]
- the active portion of a split sentence,[207]
- time spent at DART Cherry (the state-run residential treatment facility for chemically dependent males) as a condition of probation,[208]
- pre-sentence commitment for study,[209]
- hospitalization to determine competency to stand trial,[210]
- time spent in confinement in another state awaiting extradition when the defendant was held in the other state based solely on North Carolina charges,[211]
- time spent in the now-defunct IMPACT boot camp program,[212]
- time spent imprisoned for contempt under G.S. 15A-1344(e1),[213]
- "quick dip" confinement time imposed by a probation officer or judge,[214] and
- time imprisoned as confinement in response to violation (CRV).[215] However, when a person on probation for multiple felony offenses serves concurrent CRVs for sentences that wind up running consecutively upon revocation, credit is applied to only one of the defendant's consecutive activated sentences.[216]

Credit should not be awarded for the following:

- Time spent under electronic house arrest.[217]
- Time spent at a privately run residential treatment program as a condition of probation (in a non-DWI case).[218]

206. G.S. 15-196.1.
207. State v. Farris, 336 N.C. 553 (1994).
208. State v. Lutz, 177 N.C. App. 140 (2006). Time spent at Black Mountain Substance Abuse Treatment Center for Women, the equivalent to DART Cherry for women, probably also qualifies for credit under *Lutz*.
209. State v. Powell, 11 N.C. App. 194 (1971).
210. State v. Lewis, 18 N.C. App. 681 (1973).
211. Childers v. Laws, 558 F. Supp. 1284 (W.D.N.C. 1983).
212. State v. Hearst, 356 N.C. 132 (2002).
213. State v. Belcher, 173 N.C. App. 620 (2005).
214. G.S. 15A-1344(d2).
215. *Id*.
216. G.S. 15-196.2.
217. State v. Jarman, 140 N.C. App. 198 (2000).
218. State v. Stephenson, 213 N.C. App. 621 (2011).

B. Delegated Authority

For cases sentenced under Structured Sentencing, the law allows a probation officer to impose certain additional probation conditions on an offender without action by the court.[219] Delegated authority applies only to cases sentenced under Structured Sentencing;[220] it does not apply in impaired driving cases or to any case sentenced under older law.

The sentencing court may find in any case that it is not appropriate to delegate authority to a probation officer. Probationary judgment forms include a check-box for the court to withhold delegated authority. The probation modification form (AOC-CR-609) likewise includes check-boxes for the court to delegate authority that was previously withheld or to withhold authority previously delegated. If the court has withheld delegated authority, the probation officer may not impose additional conditions of supervision.

Which conditions a probation officer may add through delegated authority depends on whether the probationer was sentenced to community punishment or intermediate punishment. In community punishment cases, the officer may add the following conditions:

- Perform up to 20 hours of community service and pay the fee prescribed by law.
- Report to the offender's probation officer on a frequency to be determined by the officer.
- Submit to substance abuse assessment, monitoring, or treatment.
- Submit to house arrest with electronic monitoring.
- Submit to "quick-dip" confinement, a period or periods of confinement in a local confinement facility, for a total of no more than 6 days per month in any 3 separate months during the period of probation. This confinement may be imposed only as 2- or 3-day consecutive periods.
- Submit to an electronically monitored curfew.
- Participate in an educational or vocational skills development program, including an evidence-based program.[221]

In intermediate punishment cases, the officer may add any of the conditions permitted in community cases plus the following conditions:

- Perform up to 50 hours of community service and pay the fee prescribed by law.
- Submit to continuous alcohol monitoring when abstinence from alcohol consumption has been specified as a condition of probation.
- Submit to satellite-based monitoring (SBM) if the defendant is an offender of the type described by G.S. 14-208.40(a)(2).[222]

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219. G.S. 15A-1343.2(e) and (f).

220. G.S. 15A-1343.2(a) ("This section applies only to persons sentenced under Article 81B of this Chapter.").

221. G.S. 15A-1343.2(e).

222. G.S. 15A-1343.2(f).

The circumstances in which officers may exercise delegated authority are identical for community cases and intermediate cases. An officer may exercise delegated authority upon a determination that the offender has failed to comply with one or more court-imposed conditions. An officer may not exercise delegated authority in response to violations of officer-imposed conditions.[223]

A probation officer may also add delegated authority conditions other than quick dips without a violation if the offender is determined to be high risk based on the results of a risk assessment. The statute does not define *high risk*, but the Division of Adult Correction and Juvenile Justice (DACJJ) has determined as a matter of policy that it means offenders with risk assessment scores of 50 or higher.[224]

When a probation officer imposes a delegated authority condition other than a quick dip, the probationer may file a motion with the court to review the new condition. The law does not describe the exact nature of the hearing on such a motion or set any timeline for how quickly it must be held. The offender must be given notice (presumably by the probation officer) of the right to seek court review of any officer-imposed conditions.[225]

Whether a specific violation to which a probation officer has responded through delegated authority may later serve as the basis for a violation found by the court is not clear. The statutes say that "nothing in [the delegated authority] section shall be construed to limit the availability of the procedures authorized under G.S. 15A-1345"[226] (the probation violation hearing statute), but this provision is susceptible to multiple interpretations. That may simply mean that a probation officer is not required in any case to exercise delegated authority but, rather, may always bring violations before the court for review in the first instance. Alternatively, the provision could be read to mean that violation proceedings before the court under G.S. 15A-1345 are available without limit, even in cases where the officer has already exercised delegated authority. Regardless, Community Corrections policy instructs probation officers that noncompliance addressed through the delegated authority process cannot be included on any future violation report.[227]

The court may later respond to violations of conditions added by a probation officer through delegated authority in the same way it may respond to violations of any other condition. Before responding, the court should verify that the condition was added through a proper exercise of the officer's delegated authority. A probation officer may

223. *Id.*

224. Community Corrections Policy, *supra* note 24, at § C.0606. For a discussion of the risk-needs assessment used by DACJJ's Community Corrections section, including the supervision levels into which probationers are assigned, see Jamie Markham, *Probation's Risk-Needs Assessment Process in a Nutshell*, UNC Sch. of Gov't: N.C. Crim. L. Blog (Aug. 8, 2012), nccriminallaw.sog.unc.edu/probations-risk-needs-assessment-process-in-a-nutshell.

225. G.S. 15A-1343.2(e) and (f).

226. *Id.*

227. Community Corrections Policy, *supra* note 24, at § D.0205(f) ("Once noncompliance has been addressed through the delegated authority process, it cannot be included on any future violation report.").

not respond to subsequent violations of conditions added through delegated authority with *additional* delegated authority, as the law limits violation-based delegated authority to violations of conditions imposed by the court.[228]

C. Work Release

Under G.S. 15A-1351(f), the sentencing court may recommend or, with the consent of the defendant, order work release for a misdemeanant. When a defendant is sentenced to probation, that recommendation should not be made until probation is revoked and the sentence of imprisonment is activated.[229]

D. Civil Judgments for Monetary Obligations

Certain monetary obligations may be docketed as a civil judgment against the defendant at the end of a probation case. Unpaid fines and costs may, upon default, be docketed as a lien on the defendant's real estate.[230] Attorney fees and the attorney appointment fee are civil judgments against the defendant from the point of imposition, but when they are ordered as a condition of probation, they are not docketed and indexed until the date probation expires, is terminated, or is revoked.[231]

Restitution in cases covered under the Crime Victims' Rights Act (CVRA) may be docketed as a civil judgment if the restitution amount exceeds $250. In cases where such restitution is ordered as a condition of probation, the judgment may not be executed upon the defendant's property until the clerk is notified that the defendant's probation has been terminated or revoked and the judge has made a finding that restitution in a sum certain remains owed.[232] The finding that a restitution balance is due upon revocation or termination of probation should be made on Form AOC-CR-612.

E. License Forfeiture upon Revocation

If a felony probationer either "refuses probation" or has probation revoked for failing, in the revoking court's estimation, "to make reasonable efforts to comply with the conditions of probation," the probationer automatically forfeits all licensing privileges.[233] The court may use side two of Form AOC-CR-317 to order the forfeiture, which covers driver's licenses (regular and commercial), occupational licenses, and hunting and fishing licenses.

228. G.S. 15A-1343.2.
229. G.S. 148-33.1(i).
230. G.S. 15A-1365.
231. G.S. 7A-455(c).
232. G.S. 15A-1340.38.
233. G.S. 15A-1331.1 (formerly G.S. 15A-1331A, *recodified by* S.L. 2012-194, § 45.(a)).

The forfeiture lasts "for the full term of the period the individual is placed on probation by the sentencing court at the time of conviction for the offense."[234] The forfeiture period must end when the probationer's original term of probation would have expired. For instance, a person whose probation is revoked 23 months into a 24-month period of probation can face only a 1-month license forfeiture under G.S. 15A-1331.1 (not a 24-month forfeiture period beginning at the time of revocation).[235] For purposes of filling out the AOC-CR-317, the beginning date of the forfeiture typically will be the date of the revocation hearing, and the end date will be the date the original period of probation ordered by the sentencing court would have expired.

F. Driver's License Forfeiture for Violations Related to Community Service

If a court determines that a defendant has willfully failed to comply with a requirement to complete community service, the court shall revoke any driver's license issued to the person until the community service requirement has been met.[236]

G. Finding of Violation as a Potential Aggravating Factor

If the court finds the defendant to be in willful violation of a condition of his or her supervision, that finding may serve as an aggravating factor in the sentencing of any crime committed during the 10 years following the finding.[237] Only findings of violation by the "court" (or, in the case of post-release supervision, by the Post-Release Supervision and Parole Commission) qualify the defendant for the aggravating factor. A violation found by a probation officer through delegated authority cannot support the aggravating factor.

VIII. Selected Defenses to Probation Violations

A. Improper Period of Probation

G.S. 15A-1343.2(d) sets out the presumptive lengths for periods of probation imposed under Structured Sentencing as follows:

- Misdemeanants sentenced to community punishment: 6–18 months,
- Misdemeanants sentenced to intermediate punishment: 12–24 months,

234. G.S. 15A-1331.1(b).
235. State v. Kerrin, 209 N.C. App. 72 (2011).
236. G.S. 143B-708(e).
237. G.S. 15A-1340.16(d)(12a).

- Felons sentenced to community punishment: 12–30 months, and
- Felons sentenced to intermediate punishment: 18–36 months.

The sentencing court may always deviate from these defaults and order probation of up to 5 years if it "finds at the time of sentencing that a longer period of probation is necessary."[238] The required finding is merely that a longer period of probation is necessary; the statute does not require the court to offer a detailed rationale.[239] There is a check-box on the suspended sentence judgment forms to indicate that the judge has made the requisite finding.

Sometimes a court sentences a defendant to a probation term longer than the defaults set out above without making the requisite findings. When the error is discovered early on and the defendant appeals, the appellate courts remand the case for resentencing with instructions to the trial court to make the requisite finding or order a shorter period of probation.[240] If the error is not discovered until the defendant has already violated probation, the probationer could file a motion for appropriate relief under G.S. 15A-1415(b)(8) on the ground that the sentence was unauthorized at the time imposed. If the case would have expired if the probation term had been within the durational limits set out in the statute, the defendant will have an argument that the court lacks jurisdiction over the violation, especially if the violation occurred after a lawful period would have ended.

Along similar lines, if an earlier extension of probation was improper and the period of probation would have expired but for the improper extension, the court loses authority to act on the case.[241]

B. Willfulness

Probation may not be revoked unless a violation was willful or without a lawful excuse.[242] The rule has also been stated that a defendant's probation should not be revoked because of circumstances beyond his or her control.[243] For instance, a sex offender probationer's failure to find an approved residence was not a willful violation when he was arrested by his probation officer before having a meaningful opportunity to find a place to live upon his release from prison.[244] On the other hand, a defendant's

238. G.S. 15A-1343.2(d).

239. State v. Wilkerson, 223 N.C. App. 195 (2002) (holding that the trial court "went beyond the statutory requirement" by recording factual support for its decision that a 60-month period of probation was necessary).

240. *See, e.g.*, State v. Riley, 202 N.C. App. 299 (2010).

241. State v. Gorman, 221 N.C. App. 330 (2012); State v. Satanek, 190 N.C. App. 653 (2008); State v. Reinhardt, 183 N.C. App. 291 (2007).

242. State v. Hewett, 270 N.C. 348 (1967).

243. State v. Duncan, 270 N.C. 241 (1967).

244. State v. Talbert, 221 N.C. App. 650 (2012); State v. Askew, 221 N.C. App. 659 (2012) (similar facts).

explanation that she was addicted to drugs was not a lawful excuse for violating probation by failing to complete a drug education program.[245]

Procedurally, once the state establishes that a defendant failed to comply with a condition of probation, the burden is on the defendant to produce evidence that the failure to comply was not willful. If the defendant does not offer evidence of his or her inability to comply, the State's evidence of the failure to comply is sufficient to justify revocation of probation.[246] If a defendant presents evidence of his or her inability to comply, the court must consider that evidence and make findings of fact clearly showing that it considered the evidence.[247] For example, in *State v. Floyd*,[248] the trial court erred by failing to make findings of fact that clearly showed it considered the defendant's evidence that he was unable to pay the cost of his sexual abuse treatment program. The defendant presented evidence, corroborated by his probation officer, that he was unable to pay for the program because he had lost his job and that he would have completed the program if he could have afforded it.

When the alleged violation is the nonpayment of a fine or costs, the court must consider the "issues and procedures" specified in G.S. 15A-1364 at the violation hearing.[249] That statute says the defendant must be given an opportunity to show that he or she was unable to pay. The burden is on the probationer to show that he or she could not pay despite an effort made in good faith to do so.[250] If the defendant meets that burden, the court may (1) allow additional time for the defendant to pay, (2) reduce the amount owed, or (3) remit the obligation altogether.[251] As a constitutional matter, a person cannot be incarcerated for failing to pay money if he or she has made a bona fide effort to pay, unless alternative measures are inadequate to meet society's interest in punishment and deterrence.[252]

C. Invalid Condition of Probation

The court may not revoke probation for a violation of an invalid condition of supervision. By statute, the regular conditions of probation imposed pursuant to G.S. 15A-1343(b) are in every case valid.[253] Similarly, the statutory special conditions set out in G.S. 15A-1343(b1) are presumptively valid in any case in which they are

245. State v. Stephenson, 213 N.C. App. 621 (2011). *See also* State v. Tozzi, 84 N.C. App. 517 (1987) (holding that defendant's explanation that he missed required meetings with his probation officer because he was job hunting was not a lawful excuse).
246. State v. Jones, 78 N.C. App. 507 (1985).
247. State v. Hill, 132 N.C. App. 209 (1999).
248. 213 N.C. App. 611 (2011).
249. G.S. 15A-1345(e).
250. *Jones*, 78 N.C. App. 507.
251. G.S. 15A-1345(e); -1364(c).
252. Bearden v. Georgia, 461 U.S. 660 (1983).
253. G.S. 15A-1343; -1342(g).

imposed.[254] If the court adds ad hoc special conditions of probation under authority of G.S. 15A-1343(b1)(10), those conditions must be reasonably related to the offender's rehabilitation. Any ad hoc conditions must also bear a relationship to the defendant's crime, although case law suggests that the nexus between the condition and the crime need not be particularly close.[255] The appellate courts have interpreted the catch-all provision broadly, giving trial judges "substantial discretion" in tailoring a judgment to fit a particular offender and offense.[256]

A probation condition is also considered invalid if the defendant does not receive written notice of it under G.S. 15A-1343(c). Probation may not be revoked for a violation of a condition unless the defendant had written notice that the condition applied to him or her.[257] Oral notice is not a satisfactory substitute for the written statement.[258] There is an exception to the written notice rule for the requirement to report to Community Corrections for initial processing. A verbal order to report to probation officials after sentencing is enforceable even before it is received in writing—largely as a concession to the practical reality that a defendant will not actually receive a written copy of the judgment until he or she begins the probation intake process.[259]

Probation conditions cannot place unconstitutional constraints on a probationer (such as "Go to church every Sunday" or "Get married"). For example, in *State v. Lambert*,[260] the court of appeals struck a special probation condition prohibiting a defendant from filing court documents unless they were signed and filed by a licensed attorney, as it unreasonably infringed on the defendant's fundamental right of access to the courts and his right to conduct his defense pro se. On the other hand, some limitations that would be unconstitutional for ordinary citizens are permissible as applied to probationers. For instance, a probation condition prohibiting a sex offender probationer from residing with his own minor child did not impermissibly infringe on his fundamental liberty interest as a parent to the custody and care of his child.[261]

Under G.S. 15A-1342(g), a defendant's failure to object to a condition of probation imposed under G.S. 15A-1343(b1) at the time the condition is imposed does not constitute a waiver of the right to object at a later time. The "at a later time" language of the statute does not, however, grant a perpetual right to challenge a condition of

254. State v. Lambert, 146 N.C. App. 360, 367 (2001) ("[W]hen the trial judge imposes one of the special conditions of probation enumerated by N.C. Gen. Stat. § 15A-1343(b1), the condition need not be reasonably related to defendant's rehabilitation because the Legislature has deemed all those special conditions appropriate to the rehabilitation of criminals and their assimilation into law-abiding society.").

255. *See, e.g.*, State v. Cooper, 304 N.C. 180 (1981) (upholding a special condition prohibiting a defendant, convicted of possession of stolen credit cards, from operating a vehicle between midnight and 5:30 a.m.).

256. State v. Harrington, 78 N.C. App. 39 (1985).

257. State v. Seek, 152 N.C. App. 237 (2002); State v. Suggs, 92 N.C. App. 112 (1988).

258. *Lambert*, 146 N.C. App. 360.

259. State v. Brown, 222 N.C. App. 738 (2012).

260. *Lambert*, 146 N.C. App. at 364.

261. State v. Strickland, 169 N.C. App. 193 (2005).

probation. Rather, the defendant must object no later than the revocation hearing.[262] Any later challenge is likely to be viewed as an impermissible collateral attack.[263]

Older cases describe a contract theory of probation, in which a probationer lacks the right to object to the appropriateness of the conditions of supervision because he or she consented to them at the outset.[264] That contract theory of probation may have been appropriate in North Carolina when defendants had a right to refuse probation under G.S. 15A-1343(c). But with the repeal of that subsection in 1995,[265] a defendant should not be considered to have consented to the conditions of supervision, and the right to challenge a condition should not be considered waived.

D. Insufficient Evidence of a Violation

A defendant may of course argue that he or she did not commit the alleged offending behavior, or that the alleged offending behavior, even if committed, did not actually violate the language of the condition at issue. For example, a probationer successfully argued in *State v. Sherrod*[266] that having bullets alone did not violate the condition restricting possession of firearms, explosive devices, or other deadly weapons. In another case, the court of appeals held that a minor child's temporary visit to a sex offender probationer's residence did not violate the condition prohibiting the probationer from residing with a minor.[267] In a case where the alleged violations were a failure to complete community service and a failure to pay monetary obligations, and in which the trial judge had left the scheduling for the community service and the repayment of the money to be determined in the discretion of the probation officer, the court of appeals held that there was insufficient evidence of a violation when the State offered no information about the payment plan and community service schedule established by the probation officer.[268]

In cases involving absconding, the appellate courts appear to undertake a more searching review of the evidence considered by the trial court judge. In *State v. Krider*, for example, the court of appeals and supreme court deemed it an abuse of discretion by the trial judge to conclude to his reasonable satisfaction that the defendant absconded based on evidence from an unidentified person that the defendant no longer lived at his designated residence.[269]

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262. State v. Cooper, 304 N.C. 180 (1981).

263. *See infra* notes 281–283 and accompanying text.

264. *See, e.g.*, State v. Mitchell, 22 N.C. App. 663 (1974).

265. S.L. 1995-429.

266. 191 N.C. App. 776 (2008).

267. State v. Crowder, 208 N.C. App. 723 (2010).

268. State v. Boone, 225 N.C. App. 423 (2013) (emphasis in original) ("Absent *any* evidence of a required payment schedule . . . conclusory testimony that defendant was in arrears is insufficient to support a finding that defendant had willfully violated the terms of his probation by failing to pay the required fees or perform community service on time.").

269. State v. Krider, ___ N.C. App. ___, 810 S.E.2d 828, *aff'd*, ___ N.C. ___, ___ S.E.2d ___ (Sept. 21, 2018).

IX. Appeals

When a district court judge activates a probationer's suspended sentence or imposes special probation, the defendant may appeal to the superior court for a de novo revocation hearing. There is no statutory right to appeal other modifications of probation,[270] including CRV.[271]

For violating behavior that occurred on or after December 1, 2013, there is no right to appeal to superior court for a defendant who waives his or her right to a violation hearing in district court.[272] It is not clear, however, what constitutes waiver of a violation hearing. For instance, mere admission to a violation arguably is not a waiver if the probationer asks to be heard on the sanction that will be imposed in response to the violation. A district court probationer wanting to preserve his or her right to appeal to superior court should take that ambiguity into account when admitting to a violation, perhaps qualifying any admission with an express statement that the district court hearing has not been waived.

If, at a de novo hearing, the superior court continues the defendant on probation under the same or modified conditions, the case is considered to be a superior court case from that point forward; all future proceedings in the case are handled in superior court.[273]

When a violation hearing for a Class H or I felony pled in district court is held in district court, the appeal of any revocation order or modification imposing special probation is de novo to superior court, not to the court of appeals.[274] By contrast, if the district court exercises jurisdiction to revoke probation in a case supervised under G.S. 7A-272(e), which governs supervision of certain drug treatment court or therapeutic court cases, appeal of an order revoking probation is to the appellate division.[275]

When a superior court judge revokes probation or imposes special probation, the defendant may appeal to the appellate division under G.S. 15A-1347 and G.S. 7A-27. There is no statutory right to appeal other modifications of probation, including CRV.

No statute explicitly governs the timing of probation appeals or the court's authority to impose conditions of release during their pendency. In the absence of statutes specific to probation violations, the provisions governing appeals of convictions probably apply. Notice of appeal from district court to superior court probably must come

270. State v. Edgerson, 164 N.C. App. 712 (2004).

271. State v. Romero, 228 N.C. App. 348, 366, n.1 (2013). *Romero* involved a non-terminal CRV (that is, a CRV period that did not use up the defendant's entire suspended sentence). The *Romero* court included a footnote noting that the court expressly declined to offer any opinion on whether a defendant would have a right to appeal a terminal CRV, which is functionally similar to revocation from the defendant's point of view.

272. G.S. 15A-1347; S.L. 2013-385.

273. G.S. 15A-1347.

274. State v. Hooper, 358 N.C. 122 (2004).

275. G.S. 7A-271(f).

orally or in writing to the clerk within 10 days of entry of judgment.[276] For appeals from superior court to the appellate division, it appears that Rule 4(a) of the Rules of Appellate Procedure requires oral notice of appeal upon revocation or the filing of a notice of appeal within 14 days after entry of the judgment revoking probation.[277]

Appeal of a district court violation hearing stays any activated sentence or split sentence, but the judge may order appropriate conditions of release pending the de novo hearing in superior court.[278] Appeal of a superior court violation hearing to the appellate division stays the imposition of any split sentence, but stays confinement on an activated sentence only if the judge allows release during the pendency of the appeal, typically (if at all) through an appeal bond.[279] If the court does allow release pending appeal, probation supervision continues under the same conditions until the probation period expires or the appeal is disposed of, whichever comes first.[280]

If a defendant appeals an activation of a sentence as a result of a finding of a violation of probation by the district or superior court and is released pursuant to Article 26 of G.S. Chapter 15A, probation supervision will continue under the same conditions until the expiration of the period of probation or disposition of the appeal, whichever comes first.

When appealing an order activating a suspended sentence, the defendant generally may not challenge the original judgment suspending sentence, as doing so is an impermissible collateral attack.[281] That prohibition extends to jurisdictional challenges to the underlying conviction made for the first time upon appeal of a revocation, such as arguments that the original charging instrument was defective.[282] (This rule against raising jurisdictional arguments for the first time on appeal does not, however, bar consideration of those issues at the revocation hearing itself in the trial division.) A limited exception to the rule against collateral attacks is that the defendant may, upon appeal of a probation revocation, argue for the first time that he or she was unconstitutionally denied counsel at the original trial.[283]

276. G.S. 15A-1431(c).

277. *See* State v. Long, 220 N.C. App. 139 (2012) (granting a defendant's petition for writ of certiorari when defendant counsel failed to file written notice of appeal of a judgment revoking probation within the time set out in Rule 4(a)).

278. G.S. 15A-1431(f1).

279. G.S. 15A-1451(a).

280. G.S. 15A-1347(c).

281. State v. Holmes, 361 N.C. 410 (2007); State v. Noles, 12 N.C. App. 676 (1971).

282. State v. Pennell, 367 N.C. 466 (2014).

283. State v. Neeley, 307 N.C. 247 (1982).

Defending a probation violation—A general framework

Misdemeanor Defender Training

Jamie Markham
November 2020

1. Does the court have jurisdiction to act?

    - Was the probation violation report filed and file stamped before the period of probation expired?
    - If the hearing took place after expiration, did the court make a finding of "good cause shown and stated" that it should act on the case after expiration? State v. Morgan, 372 N.C. 609 (2019).
    - Did the defendant receive proper notice of the alleged violation?
    - Was the original period of probation lawful (was it within statutory defaults? If not, did the court find that a longer period was necessary)?
    - Has there ever been an unlawful extension of probation?

2. Did the defendant violate a lawful condition?

    - Did the defendant have written notice of the condition on his or her judgment?
    - If a condition other than a regular condition, was it reasonably related to the defendant's rehabilitation and the defendant's crime?

3. Was the violation willful?

    - If a monetary condition, can the defendant show a good faith inability to pay?

4. Did the court consider alternatives to revocation?

    - House arrest
    - 2–3 day "Quick Dip"
    - Special probation (split sentence)
    - DART–Cherry/Black Mountain for substance abuse treatment
    - 90-day confinement in response to violation ("dunk") for violations in felony or DWI cases

5. Was the violation revocation-eligible after Justice Reinvestment?

    - New criminal offense (Has the defendant been convicted of that offense? If not, did the court make independent findings that the criminal act occurred?)
    - Absconding under G.S. 15A-1343(b)(3a) (Was the act really absconding as that has been interpreted in recent appellate cases? Did the probation officer follow the Community Corrections investigation policy before declaring the person to be an absconder?)
    - Have two prior Quick Dips (in misdemeanor cases) or two prior CRVs (in DWI and felony cases) already been served?
    - Did the defendant receive notice of a revocation-eligible violation?

6. If revocation, did the court consider mitigating the sentence?

    - Reducing the suspended sentence
    - Making consecutive sentences concurrent
    - Relieving financial obligations as appropriate

Probation Response Options

	Felony	Non-DWI Misdemeanor Placed On Probation		DWI	Notes
		Before 12/1/15	On/After 12/1/15		
REVOCATION G.S. 15A-1345	Permissible in response to: • New criminal offense • Absconding • Any violation after two prior CRV	Permissible in response to: • New criminal offense • Absconding • Any violation after two prior CRV	Permissible in response to: • New criminal offense • Absconding • Any violation after two prior QUICK DIPS imposed in response to technical violations, either by judge or by probation officer	Permissible in response to: • New criminal offense • Absconding • Any violation after two prior CRV	• No revocation solely for conviction of a Class 3 misdemeanor. G.S. 15A-1344(d) • Deferred prosecution and conditional discharge probation may be revoked for any violation
CONFINEMENT IN RESPONSE TO VIOLATION (CRV) G.S. 15A-1344(d2)	For violations other than: • New criminal offense • Absconding ***90 days[1]***	For violations other than: • New criminal offense • Absconding ***Up to 90 days***	N/A	For violations other than: • New criminal offense • Absconding ***Up to 90 days***	• Must be served continuously (no "weekend CRV") • Will not be reduced by earned time/good time • CRV periods must run concurrently with one another • Max of two CRV in any case
QUICK DIP G.S. 15A-1343(a1)(3) G.S. 15A-1344(d2)	For any violation ***2 or 3 days***	For any violation ***2 or 3 days***	For any violation ***2 or 3 days***	N/A	• No more than 6 quick dip days per month • Used in no more than three separate calendar months
SPECIAL PROBATION (SPLIT) G.S. 15A-1344(e)	For any violation ***Up to ¼ the maximum imposed sentence***	For any violation ***Up to ¼ the maximum imposed sentence***	For any violation ***Up to ¼ the maximum imposed sentence***	For any violation ***Up to ¼ the maximum penalty allowed by law***	May be served in noncontinuous intervals in the Jail
CONTEMPT G.S. 15A-1344(e1)	Permissible in response to any violation ***Up to 30 days***				• Must be proved beyond a reasonable doubt • Counts for credit against suspended sentence
EXTENSION G.S. 15A-1344(d) G.S. 15A-1342(a) G.S. 15A-1343.2(d)	**Ordinary:** Up to 5-year maximum. Permissible at any time after notice and hearing and for good cause shown. **Special purpose:** By up to 3 years beyond the original period if: (1) Probationer consents; (2) During last 6 months of original period; and (3) To complete restitution or med/psych treatment				The ordinary maximum period of probation in deferred prosecution and conditional discharge cases is two years
MODIFICATION G.S. 15A-1344(d)	Permissible at any time after notice and hearing and for good cause shown				
TRANSFER TO UNSUPERVISED	At any time (except sex offenders)	At any time (except sex offenders)	At any time (except sex offenders)	At any time[2]	The court may authorize a probation officer to transfer a person to unsupervised probation after all money is paid to the clerk. G.S. 15A-1343(g).
TERMINATE G.S. 15A-1342(b)	At any time				No statute defines an "unsuccessful" termination
CONTINUE WITHOUT MODIFICATION	At any time				

1. For violations on/after 10/1/2014, CRV may not be reduced by prior jail credit.
2. The judge shall authorize a probation officer to transfer a defendant to unsupervised probation upon completion of community service or payment of any fines, costs, and fees. G.S. 20-179(r).

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

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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

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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.

Reading Driving Records & Protecting the Privilege to Drive

2020 MISDEMEANOR DEFENDER TRAINING
November 3-6, 2020

MIKE PADUCHOWSKI – PARTNER
MATTHEW CHARLES LAW

November 2020

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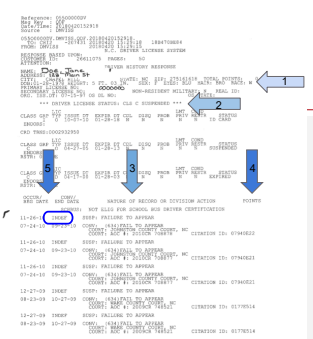
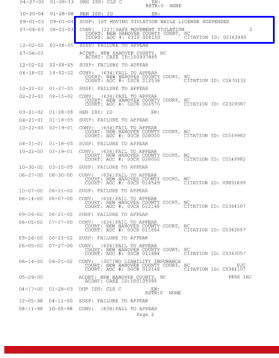
Driving Record



1. Personal Information Section
   a. Defendant's Name; Address; Date of Birth; License Number
2. Driver's License Status
   a. Active; Expired; Suspended; Inactive; Eligible for Reinstatement; Suspended –Pick up License
3. Nature of Record or Division Action
   a. Conviction, County in which case originated, and Original Case Number.
   b. Action DMV took as a result of the Conviction or Inaction of defendant.
4. Points/PJC
   a. Points assessed as a result of conviction or record of PJC
      Note: Zero points is blank
5. Important Dates
   a. Occurrence / Beginning
   b. Conviction / Ending

2

Driving Record



- 1st moving violation while suspended

3

How To Read a NC Driving Record

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

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2 Types of Suspension

N.C. Gen. Stat. § 20-24.1 (Indefinite Suspension)

- Revocation (INDEF) for FTA or FTP/FTC
- Remains in effect until the FTA case is disposed or FTC case is paid

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

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

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Other Possible Causes of a Revocation

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

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

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Moving vs. Non-Moving Violations

Moving Violations

- DWLR (Impaired)
- Speeding
- Stop Sign/Stoplight
- No Insurance
- Unsafe movement
- Reckless Driving (C&R)
- Move Over Law
- DWLR Non-Impaired**
- No Operator's License (NOL)**

**Offense Date Before 12-1-2015

- Driving While Impaired (DWI)
- Open Container
- Following Too Closely
- Left of Center
- Passing a Stopped School Bus
- Failure to Yield to Emergency Vehicle
- Illegal Passing
- Child Seat/Child Seatbelt (<16 years)

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Moving vs. Non-moving

Non-moving Violations

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

*Offense 12/1/15 or later

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Alternatives to a Moving Violation Conviction

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

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Dismissal/Acquittal

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

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Reduce or Amend to Non-moving Violation

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

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Prayer for Judgment Continued (PJC)

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

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

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Extraordinary Relief

- (1) FTA Sent in Error
- (2) Nunc pro Tunc
- (3) Motion for Appropriate Relief (MAR)
- (4) Chapter 14 Criminal Charge of FTA

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FTA Sent In Error

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

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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

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Motion for Appropriate Relief (MAR)

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

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Chapter 14 Criminal Charge of FTA

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

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Limited Driving Privilege

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

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Limited Driving Privilege (cont'd)

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

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Limited Driving Privilege (cont'd)

- Eligible to file petition in district court in the county of the person's residence:
  - 90 days after 1 year revocation period begins
  - 1 year after 2 year revocation period begins
  - 2 years after Permanent revocation period begins
- If Judge issues, clerk of court sends copy of the limited driving privilege to DMV.
- After one year of driving on a limited driving privilege for a Permanent Revocation, the license must be reinstated (but, for some reason, a hearing is still required)

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Misdemeanor Reclassification

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

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NC Drivers License Restoration Act

What Does the NC DL Restoration Act do?

- The Act provides some weapons in the fight against the License Revocation Cycle
- The Act made great strides in ending additional license suspensions from "Driving While Poor"
- The Act has provided traction for programs in some counties to clean up old FTA'd cases

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In a Nutshell…

- The Act makes DWLR (Non-Impaired) a NON-MOVING violation
  - This eliminates any suspensions for DWLR (as they currently stand…like moving violations while suspended)
  - Applies to anyone who is charged with DWLR on or after December 1, 2015
    - NOTE: "Charged" not "Convicted" – Changed in the Technical Corrections phase of the law
    - Practical Tip: DMV is not currently issuing suspensions for convictions after 12/1/2015 regardless of offense date

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What Did This Do?

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

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Potential Pitfalls

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

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Potential Pitfalls

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

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NC DMV Hearings

- Most DMV hearings and interviews cannot be scheduled until a hearing fee has been paid
- DMV will let you pay for a hearing, schedule a hearing, and show up for a hearing…just to tell you that you are not eligible for a hearing
- Things that are perfectly fine for court and limited privilege purposes can be held against you in a DMV hearing and prevent license reinstatement

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Filing Fees for DMV Hearings

DMV HEARING FEES	
Driver improvement clinic eligibility	$40
Commercial driver license disqualification	$200
Violation of Safety & Responsibility law	$200
Compliance with probation or restoration agreement	$220 (billed after hearing)
Pre-interview held before license restoration (situations involving alcohol-related convictions, suspensions or revocations)	$225
License restoration (DWI)	$425
License restoration (driving with revoked license)	$200
License restoration (moving violations while driving with revoked license)	$200
Refusal to submit to chemical analysis	$450
Alcohol concentration restriction violation	$450
Ignition interlock device restriction violation	$450 (billed after hearing)
License suspensions or revocations not otherwise listed to include those found in G.S. 20-13 and G.S 20-16	$100

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Affidavit of Indigence for DMV Hearings

- Available in English and Spanish online
- Income must be verified
  - Recent W-2 or 1099 tax docs
  - Tax Filings or Statement
  - Pay Stubs
  - Proof of government assistance

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Tips For License Restoration

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

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Tips for License Restoration

- Keep money in mind! Your client definitely will.
  - An FTA can cost $200 extra.
  - Just because you can get something dismissed doesn't always mean you should
  - Post-Act, you can save the $200 fee and avoid the additional suspension by entering a plea on the new DWLR charge (non-moving violation)
    - Remember: It is a criminal charge

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Tips for License Restoration

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

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Any Questions?

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

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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).

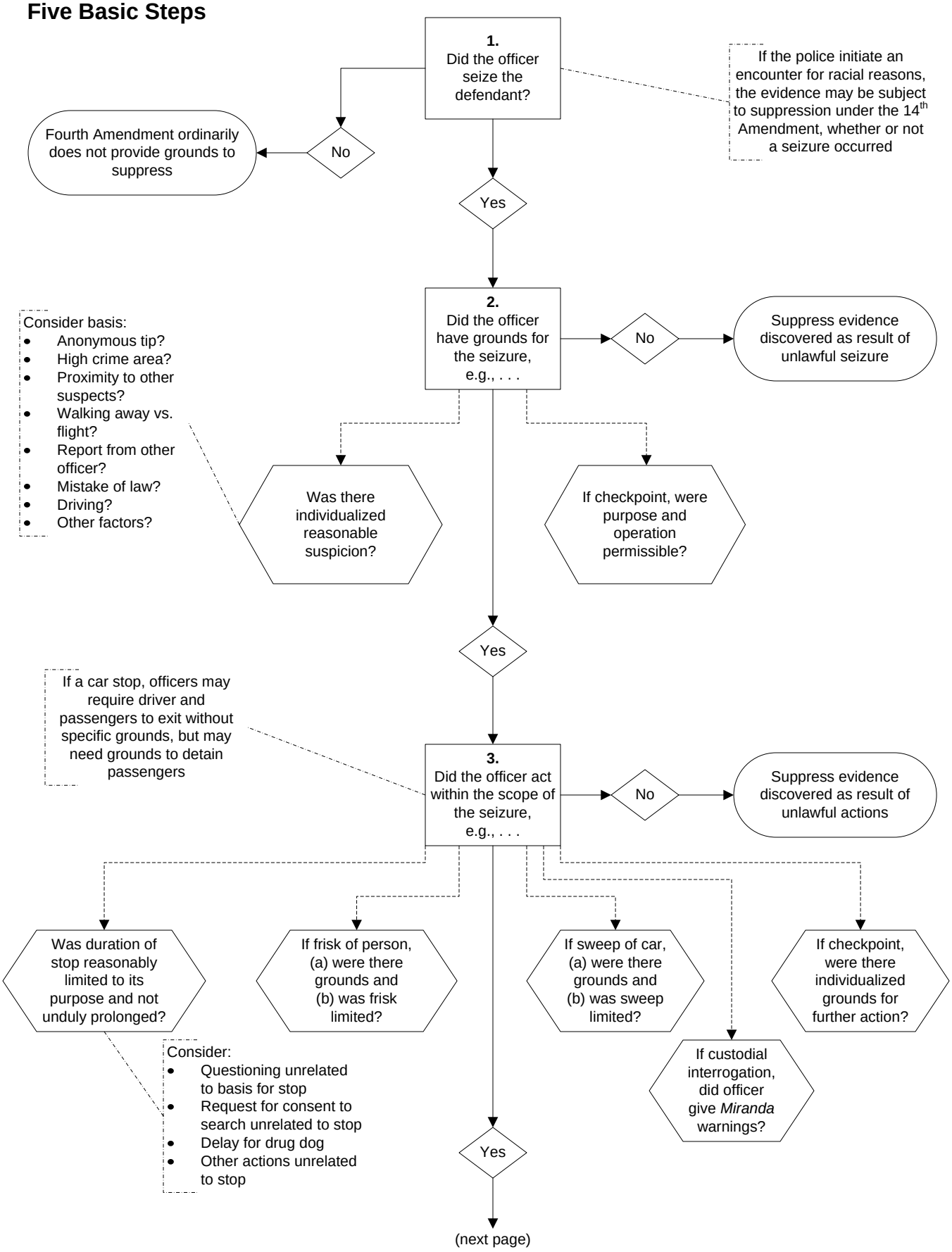
F. Inventory Search

Arrestees. Officers may search and inventory possessions of arrestee. *See* FARB at 229.

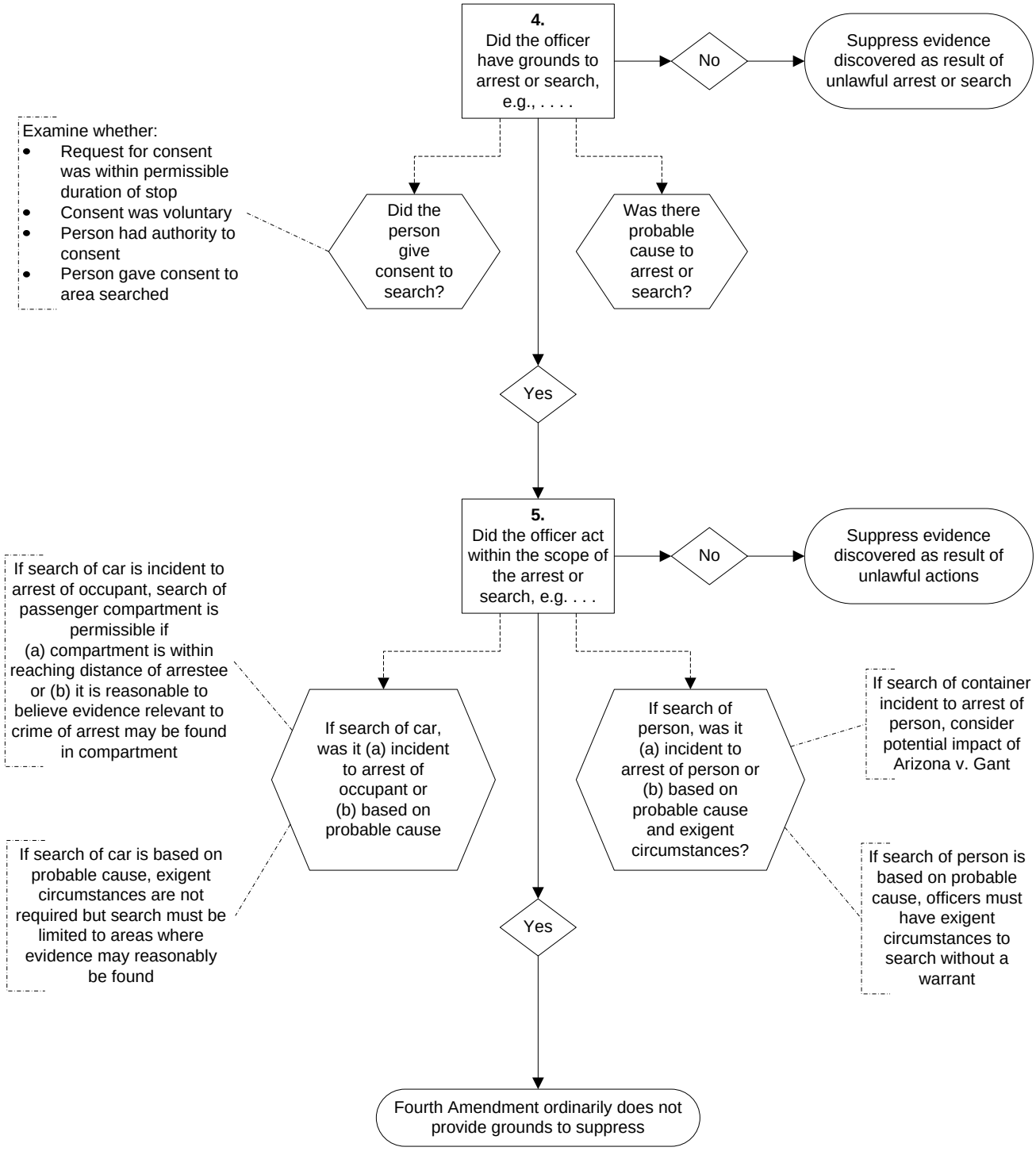
Vehicles. Officers may *impound* a vehicle if pursuant to departmental policy and grounds for impoundment exist, such as the need to safeguard the vehicle and its contents. Officers may *inventory* the vehicle and its contents if pursuant to departmental policy. *See State v. Phifer*, 297 N.C. 216 (1979) (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)



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Warrantless Stops and Searches:
Discussion Problems
September 2019

Did the officer seize the defendant?

1. Law-enforcement officers set up a driver's license checkpoint on a two lane city street (one lane in each direction). The officers were checking licenses at the checkpoint, but there is also evidence that the real purpose of the checkpoint was to look for drugs. One of the officers, Officer Jones, sees a car turn into a side street just before the checkpoint and begins following the car. The driver pulls into an apartment complex and parks. Jones pulls his car into the lot and approaches the defendant. Jones asks the defendant what he's doing, and the defendant replies in a slurred voice that he lives at the complex, which turns out to be true. Jones smells an overpowering odor of alcohol about the defendant and directs him to perform various field sobriety tests. The defendant does poorly, and Jones arrests him for driving while impaired. The defendant later blows a .26.

What is your theory for suppressing the evidence of defendant's impairment?

What evidence or lack of evidence would support your theory?

Did the officer seize the defendant?
Did the officer have grounds for the seizure?

2. An unidentified person calls the police from his cell phone. He describes a car and its license plate and the general appearance of a man with long blond hair as the driver. He says that the car was weaving. The caller says he thinks the driver is drunk. Officer Connor receives a dispatch and pulls the car over. During the course of the stop, Connor discovers evidence that the driver is impaired and arrests him for impaired driving.

What is your theory for suppressing the evidence of defendant's impairment?

What evidence or lack of evidence would support your theory?

Did the officers seize the defendant?
Did the officers have grounds for the stop?
Did the officers act within the scope of the seizure?

3. Drug officer Jones is driving an unmarked car in an area where drug activity is common. He sees an African American man, Harold Bryant, driving a fancy car slowly through the neighborhood and stops him for not wearing a seat belt. The officer asks Bryant whether he can search his car. The officer will swear that Bryant freely gave his consent. A search of the car uncovers marijuana, and the officer arrests Bryant for that offense.

What is your theory for suppressing the marijuana?

What evidence or lack of evidence would support your theory?

Did the officer seize the defendant?
Did the officer have grounds for the seizure?
Did the officer act within the scope of the stop?
Did the officer have grounds to search?

4. Officer Smith clocks a car traveling 58 in a 45-mile per hour zone. Jones turns on his blue light, and the driver pulls over to the side of the road. The officer approaches the car, directs the driver and passengers to step out of the car, inspects the car for weapons, and pats each person down. While patting down the defendant, who was one of the passengers, Smith feels a small bottle in the defendant's right pants pocket and hears a rattling noise. Smith removes and opens the bottle and sees what he believes to be a few rocks of hashish. Laboratory analysis confirms that the substance was 1/10 of an ounce of hashish.

What is your theory for suppressing the hashish?

What evidence or lack of evidence would support your theory?

Traffic Stops

Jeff Welty

August 2015

INTRODUCTION

This paper is intended to serve as a reference regarding the Fourth Amendment issues that arise in connection with traffic stops. It begins by addressing officers' conduct before a stop, proceeds to discuss making the stop itself, then considers investigation during traffic stops, and finally covers the termination of traffic stops.[1]

BEFORE THE STOP

"RUNNING TAGS"

Sometimes, an officer will decide to "run" a vehicle's "tag" – that is, run a computer check to determine whether the license plate on the vehicle is current and matches the vehicle, and perhaps whether the vehicle is registered to a person with outstanding warrants or who is not permitted to drive. When this is done randomly, without individualized suspicion, defendants sometimes argue that the officer has conducted an illegal search by running the tag. Courts have uniformly rejected this argument, finding that license plates are open to public view. See, e.g., State v. Chambers, 203 N.C. App. 373 (2010) (unpublished) ("Defendant's license tag was displayed, as required by North Carolina law, on the back of his vehicle for all of society to view. Therefore, defendant did not have a subjective or objective reasonable expectation of privacy in his license tag. As such, the officer's actions did not constitute a search under the Fourth Amendment."); Jones v. Town of Woodworth, 132 So.3d 422 (La. Ct. App. 2013) ("[A] survey of federal and state cases addressing this issue have concluded that a license plate is an object which is constantly exposed to public view and in which a person, thus, has no reasonable expectation of privacy, and that consequently, conducting a random license plate check is legal."); State v. Setinich, 822 N.W.2d 9 (Minn. Ct. App. 2012) (rejecting a defendant's challenge to an officer's suspicionless license plate check because "[a] driver does not have a reasonable expectation of privacy in a license plate number which is required to be openly displayed"); State v. Davis, 239 P.3d 1002 (Or. Ct. App. 2010) (upholding a random license check and stating that "[t]he state can access a person's driving records by observing a driver's registration plate that is displayed in plain view and looking up that registration plate number in the state's own records"), aff'd by an equally divided court, 295 P.3d 617 (2013); State v. Donis, 723 A.2d 35 (N.J. 1998) (holding that there is no reasonable expectation of privacy in the exterior of a vehicle, including the license plate, so an officer's ability to run a tag "should not be limited only to those instances when [the officer] actually witness[es] a violation of motor vehicle laws"). Cf. New York v. Class, 475 U.S. 106 (1986) (finding no reasonable expectation of privacy in a vehicle's VIN number because "it is unreasonable to have an expectation of privacy in an object required by law to be located in a place ordinarily in plain view from the exterior of the automobile"). See also infra p. 8 (discussion under heading "Driver's Identity" and cases cited therein).

[1] The organization of this paper was inspired in part by Wayne R. LaFave, The "Routine Traffic Stop" From Start to Finish: Too Much "Routine," Not Enough Fourth Amendment, 102 Mich. L. Rev. 1843 (2004).

MAKING THE STOP

LEGAL STANDARD

"Reasonable suspicion [is] the necessary standard for stops based on traffic violations." State v. Styles, 362 N.C. 412 (2008) (rejecting the argument that full probable cause is required for stops based on readily observable traffic violations). That is the same standard that applies to investigative stops in connection with more serious offenses. Terry v. Ohio, 392 U.S. 1 (1968). An officer may have reasonable suspicion of a traffic violation if a law is "genuinely ambiguous," and the officer reasonably interprets it to prohibit conduct that the officer has observed, even if the officer's interpretation of the law turns out to be mistaken.[2]

PRETEXTUAL STOPS

If an officer has reasonable suspicion that a driver has committed a crime or an infraction, the officer may stop the driver's vehicle. This is so even if the officer is not interested in pursuing the crime or infraction for which reasonable suspicion exists, but rather is hoping to observe or gather evidence of another offense. Whren v. United States, 517 U.S. 806 (1996) (emphasizing that the "[s]ubjective intentions" of the officer are irrelevant); State v. McClendon, 350 N.C. 630 (1999) (adopting Whren under the state constitution).[3] However, if an officer makes a pretextual traffic stop and then engages in investigative activity that is directed not at the traffic offense but at another offense for which reasonable suspicion is absent, the officer may exceed the permitted scope of the traffic stop. This issue is addressed below, in the section of this paper entitled Investigation During the Stop.

Because the officer's subjective intentions regarding the purpose of the stop are immaterial, whether "an officer conducting a traffic stop [did or] did not subsequently issue a citation is also irrelevant to the validity of the stop." State v. Parker, 183 N.C. App. 1 (2007).

WHEN REASONABLE SUSPICION MUST EXIST

[2] Heien v. North Carolina, __ U.S. __, ___, 135 S. Ct. 530, 541 (2014) (Kagan, J., concurring). In Heien, an officer stopped a motorist for having one burned-out brake light. The court of appeals ruled that the applicable statute required only one working brake light and that the stop was therefore unreasonable. The Supreme Court reviewed the case and ruled that the brake light statute was sufficiently difficult to parse that the officer's interpretation was reasonable even if mistaken, rendering the stop reasonable also. The majority opinion does not set forth a standard for when an officer's mistaken interpretation of law is reasonable, but Justice Kagan's concurrence argues that such an interpretation is reasonable only when the law itself is "genuinely ambiguous."

[3] Indeed, a stop may be legally justified even where the officer is completely unaware of the offense for which reasonable suspicion exists and makes the stop based entirely on the officer's incorrect belief that reasonable suspicion exists for another offense. See, e.g., Devenpeck v. Alford, 543 U.S. 146 (2004) ("[A]n arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause." (internal citations omitted)); State v. Osterhoudt, 222 N.C. App. 620 (2012) (an officer stopped the defendant based on the officer's mistaken belief that the defendant's driving violated a particular traffic law; the court of appeals concluded that the law in question had no application to the defendant's driving, but upheld the stop because the facts observed by the officer provided reasonable suspicion that the defendant's driving violated a different traffic law, notwithstanding the fact that the officer did not act on that basis).

Normally, a law enforcement officer will attempt to develop reasonable suspicion before instructing a motorist to stop. But what if the officer does not have reasonable suspicion at that point, yet develops reasonable suspicion prior to the person's compliance with the officer's instruction? In California v. Hodari D., 499 U.S. 621 (1991), the United States Supreme Court held that a show of authority is not a seizure until the subject complies. Because the propriety of a seizure depends on the facts known at the time of the seizure, it appears that events after an officer's show of authority, but before a driver's submission to it, may be used to justify the stop. For example, an officer who activates his blue lights after observing a driver traveling 45 m.p.h. in a 55 m.p.h. zone may be without reasonable suspicion. But if the driver initially ignores the blue lights, continues driving, and weaves severely before stopping, the seizure may be upheld based on the driver's weaving in addition to his slow rate of speed. State v. Atwater, __ N.C. App. __, 723 S.E.2d 582 (2012) (unpublished) (adopting the foregoing analysis and concluding that "[r]egardless of whether [the officer] had a reasonable suspicion that defendant was involved in criminal activity prior to turning on his blue lights, defendant's subsequent actions [erratic driving and running two stop signs] gave [the officer] reasonable suspicion to stop defendant for traffic violations"); United States v. Swindle, 407 F.3d 562 (2d Cir. 2005) (reluctantly concluding that a court may "consider[] events that occur[] after [a driver is] ordered to pull over" but before he complies in determining the constitutionality of a seizure); United States v. Smith, 217 F.3d 746 (9th Cir. 2000) (relying on Hodari D. to reject the argument that "only the factors present up to the point when [the officer] turned on the lights of his patrol car can be considered in analyzing the validity of the stop"). Cf. United States v. McCauley, 548 F.3d 440 (6th Cir. 2008) ("We determine whether reasonable suspicion existed at the point of seizure – not . . . at the point of attempted seizure."); United States v. Johnson, 212 F.3d 1313 (D.C. Cir. 2000) (similar). Cf. generally 4 Wayne R. LaFave, Search and Seizure § 9.4(d) n.198 (5th ed. 2012) (collecting cases) (hereinafter, LaFave, Search and Seizure).

COMMON ISSUES

SPEEDING

Many traffic stops based on speeding are supported by radar or other technological means. However, an officer's visual estimate of a vehicle's speed generally is also sufficient to support a traffic stop for speeding. State v. Barnhill, 166 N.C. App. 228 (2004) (upholding a traffic stop based on the estimate of an officer who had no special training that the defendant was speeding 40 m.p.h. in a 25 m.p.h. zone, and stating that "it is well established in this State, that any person of ordinary intelligence, who had a reasonable opportunity to observe a vehicle in motion and judge its speed may testify as to his estimation of the speed of that vehicle"). However, if a vehicle is speeding only slightly, an officer's visual estimate of speed may be insufficiently reliable and accurate to support a traffic stop. Compare United States v. Sowards, 690 F.3d 583 (4th Cir. 2012) (officer's visual estimate that the defendant was speeding 75 m.p.h. in a 70 m.p.h. zone was insufficient to support a traffic stop; the officer also expressed some difficulty with units of measurement), with United States v. Mubdi, 691 F.3d 334 (4th Cir. 2012) (traffic stop was justified when two officers independently estimated that the defendant was speeding between 63 m.p.h. and 65 m.p.h. in a 55 m.p.h. zone), vacated on other grounds, __ U.S. __, 133 S. Ct. 2851 (2013).

DRIVING SLOWLY

Driving substantially under the posted speed limit is not itself necessarily unlawful. In fact, it is sometimes required by G.S. 20-141(a), which states that "[n]o person shall drive a vehicle on a highway or in a public vehicular area at a speed greater than is reasonable and prudent under the conditions then existing." On the other hand, in some circumstances, driving slowly may constitute obstruction of traffic under G.S. 20-141(h) ("No person shall operate

a motor vehicle on the highway at such a slow speed as to impede the normal and reasonable movement of traffic . . . ."), or may violate posted minimum speed limits under G.S. 20-141(c) (unlawful to operate passenger vehicle at less than certain minimum speeds indicated by appropriate signs). Furthermore, the fact that a driver is proceeding unusually slowly may contribute to reasonable suspicion that the driver is impaired. See, e.g., State v. Bonds, 139 N.C. App. 627 (2000) (driver's blank look, slow speed, and the fact that he had his window down in cold weather provided reasonable suspicion; opinion quotes NHTSA publication regarding the connection between slow speeds, blank looks, and DWI); State v. Aubin, 100 N.C. App. 628 (1990) (fact that defendant slowed to 45 m.p.h. on I-95 and weaved within his lane supported reasonable suspicion of DWI); State v. Jones, 96 N.C. App. 389 (1989) (although the defendant did not commit a traffic infraction, "his driving 20 miles per hour below the speed limit and weaving within his lane were actions sufficient to raise a suspicion of an impaired driver in a reasonable and experienced [officer's] mind").

Whether slow speed alone is sufficient to provide reasonable suspicion of impairment is not completely settled in North Carolina. The state supreme court seemed to suggest that it might be in State v. Styles, 362 N.C. 412 (2008) ("For instance, law enforcement may observe certain facts that would, in the totality of the circumstances, lead a reasonable officer to believe a driver is impaired, such as weaving within the lane of travel or driving significantly slower than the speed limit."), but the court of appeals stated that it is not in a subsequent unpublished decision, State v. Brown, 207 N.C. App. 377 (2010) (unpublished) (stating that traveling 10 m.p.h. below the speed limit is not alone enough to create reasonable suspicion, but finding reasonable suspicion based on speed, weaving, and the late hour). The weight of authority in other states is that it is not. See, e.g., State v. Bacher, 867 N.E.2d 864 (Ohio Ct. App. 2007) (holding that "slow travel alone [in that case, 23 m.p.h. below the speed limit on the highway] does not create a reasonable suspicion," and collecting cases from across the country).

It is also unclear just how slowly a driver must be travelling in order to raise suspicions. Of course, driving a few miles per hour under the posted limit is not suspicious. State v. Canty, 224 N.C. App. 514 (2012) (fact that vehicle slowed to 59 m.p.h. in a 65 m.p.h. zone upon seeing officers did not provide reasonable suspicion). Ten miles per hour under the limit, however, may be enough to contribute to suspicion. Brown, 207 N.C. App 377 (finding reasonable suspicion where defendant was driving 10 m.p.h. under the speed limit and weaving within a lane); State v. Bradshaw, 198 N.C. App. 703 (2009) (unpublished) (late hour, driving 10 m.p.h. below the limit, and abrupt turns provided reasonable suspicion). Certainly, the more sustained and the more pronounced the slow driving, the greater the suspicion.

WEAVING

G.S. 20-146 requires that "[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

ACROSS LANES

Absent exceptional circumstances, weaving across lanes of traffic generally violates this provision and supports a traffic stop. See, e.g., State v. Osterhoudt, 222 N.C. App. 620 (2012) (where the "defendant crossed [a] double yellow line . . . he failed to stay in his lane and violated" G.S. 20-146); State v. Hudson, 206 N.C. App. 482 (2010) (where the defendant "crossed the center line of I–95 and pulled back over the fog line twice," an officer was justified in stopping him for a violation of G.S. 20-146). See also State v. Kochuk, 366 N.C. 549 (2013) (per curiam) (adopting the analysis of the dissenting opinion in the court of appeals where it was explained that a driver "momentarily crossed the right dotted line once while in the middle lane" and "later drove on the fog line twice";

the opinion cites Hudson, supra, and appears to suggest that a stop was justified under G.S. 20-146; however, the opinion focuses primarily on the presence of reasonable suspicion of impaired driving as a basis for the stop); State v. Simmons, 205 N.C. App. 509 (2010) (without discussing G.S. 20-146, the court ruled that a stop was supported by reasonable suspicion of DWI where the defendant "was not only weaving within his lane, but was also weaving across and outside the lanes of travel, and at one point actually ran off the road"). But cf. State v. Derbyshire, __ N.C. App. __, 745 S.E.2d 886 (2013) (holding that a stop was not supported by reasonable suspicion of DWI because it was based on only "one instance of weaving," even though "the right side of Defendant's tires crossed into the right-hand lane" during the weaving; the court did not address G.S. 20-146 as a possible basis for the stop).

Driving so that one's tires touch, but do not cross, a lane line should be treated as weaving within a lane, not weaving across lanes. Shea Denning, Keeping It Between the Lines, N.C. Crim. L. Blog (Mar. 11, 2015), http://nccriminallaw.sog.unc.edu/keeping-it-between-the-lines/ (discussing this point and citing State v. Peele, 196 N.C. App. 668 (2009), where the court ruled that there was no reasonable suspicion to stop a defendant whose tires touched the lane lines twice; although the court's discussion focuses on the presence or absence of reasonable suspicion of DWI and does not cite G.S. 20-146, the court does characterize the defendant's driving as weaving "within" a lane).

WITHIN A LANE

Weaving within a single lane does not violate G.S. 20-146 and so is not itself a crime or an infraction. In some circumstances, however, weaving within a single lane may provide, or contribute to, reasonable suspicion that a driver is impaired or is driving carelessly.

- *Moderate Weaving within a Lane: Weaving Plus.* In State v. Fields, 195 N.C. App. 740 (2009), the court of appeals held that an officer did not have reasonable suspicion that a driver was impaired where the driver "swerve[d] to the white line on the right side of the traffic lane" three times over a mile and a half. However, the court stated that weaving, "coupled with additional . . . facts," may provide reasonable suspicion. The court cited cases involving additional facts such as driving "significantly below the speed limit," driving at an unusually late hour, and driving in the proximity of drinking establishments. Thus, Fields stands for the proposition that moderate weaving within a single lane does not provide reasonable suspicion, but that 'weaving plus' may do so. Fields has been applied in cases such as State v. Wainwright, __ N.C. App. __, 770 S.E.2d 99 (2015) (mistakenly analyzing weaving across a lane line as if it were weaving within a lane, then finding reasonable suspicion of impaired driving based in part on the weaving and in part on the late hour and the proximity to bars); State v. Kochuk, 366 N.C. 549 (2013) (ruling that reasonable suspicion supported a stop where the defendant was weaving and it was 1:10 a.m.); State v. Derbyshire, __ N.C. App. __, 745 S.E.2d 886 (2013) (holding that weaving alone did not provide reasonable suspicion to support a stop, that driving at 10:05 p.m. on a Wednesday is "utterly ordinary" and insufficient to render weaving suspicious, and that having "very bright" headlights also was not suspicious); and State v. Peele, 196 N.C. App. 668 (2009) (finding no reasonable suspicion of DWI where an officer received an anonymous tip that defendant was "possibl[y]" driving while impaired, then saw the defendant "weave within his lane once").

- *Severe Weaving within a Lane.* While moderate weaving within a single lane is insufficient by itself to support a traffic stop, severe weaving may suffice. In State v. Fields, 219 N.C. App. 385 (2012), the court of appeals upheld a traffic stop conducted by an officer who followed the defendant for three quarters of a mile and saw him "weaving in his own lane . . . sufficiently frequent[ly] and erratic[ly] to prompt evasive maneuvers from

other drivers." The officer compared the defendant's vehicle to a "ball bouncing in a small room." The extensive weaving enabled the court of appeals to distinguish the precedents discussed in the preceding paragraph. See also State v. Otto, 366 N.C. 134 (2012) (traffic stop justified by the defendant's "constant and continual" weaving at 11:00 p.m. on a Friday night).

SITTING AT A STOPLIGHT

Like weaving within a single lane, remaining at a stoplight after the light turns green is not, in itself, a violation of the law. But also like weaving, it may provide or contribute to reasonable suspicion that the driver is impaired.[4] An important factor in such cases is the length of the delay. Compare State v. Barnard, 362 N.C. 244 (2008) (determining that reasonable suspicion supported an officer's decision to stop the defendant where the defendant was waiting at a traffic light in a high-crime area, near several bars, at 12:15 a.m., and "[w]hen the light turned green, defendant remained stopped for approximately thirty seconds" before proceeding), with State v. Roberson, 163 N.C. App. 129 (2004) (finding no reasonable suspicion where the defendant sat at a green light at 4:30 a.m., near several bars, for 8 to 10 seconds, and stating that "[a] motorist waiting at a traffic light can have her attention diverted for any number of reasons. . . . [so] a time lapse of eight to ten seconds does not appear so unusual as to give rise to suspicion justifying a stop").

UNSAFE MOVEMENT/LACK OF TURN SIGNAL

Under G.S. 20-154(a), "before starting, stopping or turning from a direct line[, a driver] shall first see that such movement can be made in safety . . . and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required." Litigation under this statute has focused on the phrase "the operation of any other vehicle may be affected." Generally, the appellate courts have held that a driver need not signal when making a mandatory turn, but must if the turn is optional and there is another vehicle following closely. Compare State v. Ivey, 360 N.C. 562 (2006) (the defendant was not required to signal at what amounted to a right-turn-only intersection; a right turn was the "only legal movement he could make," and the vehicle behind him was likewise required to stop, then turn right, so the defendant's turn did not affect the trailing vehicle), and State v. Watkins, 220 N.C. App. 384 (2012) (suggesting that there was insufficient evidence of unsafe movement where the defendant changed lanes without signaling while driving three to four car lengths in front of a police vehicle on a road with heavy traffic, because it was not clear that another vehicle was affected), with State v. Styles, 362 N.C. 412 (2008) (where the defendant changed lanes "immediately in front of" an officer, he violated the statute; "changing lanes immediately in front of another vehicle may affect the operation of the trailing vehicle"), and State v. McRae, 203 N.C. App. 319 (2010) (similar).

LATE HOUR, HIGH-CRIME AREA

The United States Supreme Court has held that presence in a high-crime area, "standing alone, is not a basis for concluding that [a person is] engaged in criminal conduct." Brown v. Texas, 443 U.S. 47 (1979). Although the stop in Brown took place at noon, presence in a high-crime area at an unusually late hour is also alone insufficient to provide reasonable suspicion. State v. Murray, 192 N.C. App. 684 (2008) (no reasonable suspicion to stop defendant, who was driving in a commercial area with a high incidence of property crimes at 3:41 a.m.). But the

[4] Under some circumstances, it might also constitute obstructing traffic in violation of G.S. 20-141(h).

incidence of crime in the area and the hour of night are factors that, combined with others such as nervousness or evasive action, may contribute to reasonable suspicion. Cf. In re I.R.T., 184 N.C. App. 579 (2007) (listing factors); State v. Mello, 200 N.C. App. 437 (2009) (holding that the defendant's presence in a high-drug area, coupled with evasive action on the part of individuals seen interacting with defendant, provided reasonable suspicion supporting a stop).

COMMUNITY CARETAKING

The court of appeals recognized the community caretaking doctrine as a basis for a vehicle stop in State v. Smathers, __ N.C. App. __, 753 S.E.2d 380 (2014). In Smathers, an officer stopped the defendant to make sure that she was OK after her car hit a large animal that ran in front of her. The court ruled that the stop was justified, finding an objectively reasonable basis for the caretaking stop that outweighed the intrusion of the stop on the driver's privacy. The court set out a flexible test for community caretaking, yet cautioned that the doctrine should be applied narrowly, so its precise scope remains uncertain.

TIPS

Whether information from a tipster provides reasonable suspicion to stop a vehicle depends on the totality of the circumstances. Whether the tipster is identified is a critical factor, so this paper treats anonymous tips separately from other tips.

ANONYMOUS TIPS

Historically, information from an anonymous tipster has been viewed as insufficient to support a stop, at least without unusual indicia of reliability, such as very detailed information or meaningful corroboration of the tip by the police. State v. Coleman, __ N.C. App. __, 743 S.E.2d 62 (2013) (a tip that the court treated as anonymous did not provide reasonable suspicion, in part because it "did not provide any way for [the investigating officer] to assess [the tipster's] credibility, failed to explain her basis of knowledge, and did not include any information concerning defendant's future actions"); State v. Blankenship, __ N.C. App. __, 748 S.E.2d 616 (2013) (taxi driver's anonymous call to 911, reporting that a specific red Ford Mustang, headed in a specific direction, was "driving erratically [and] running over traffic cones," was insufficient to support a stop of a red Mustang located less than two minutes later headed in the described direction; officers did not corroborate the bad driving and the tip had "limited but insufficient indicia of reliability"); State v. Johnson, 204 N.C. App. 259 (2010) (stating that "[c]ourts have repeatedly recognized, as a general rule, the inherent unreliability of anonymous tips standing on their own" unless such a tip "itself possess[es] sufficient indicia of reliability, or [is] corroborated by [an] officer's investigation or observations"); State v. Peele, 196 N.C. App. 668 (2009) (an anonymous tip that the defendant was driving recklessly, combined with an officer's observation of a single instance of weaving, was insufficient to give rise to reasonable suspicion). This skepticism was rooted in part in Florida v. J.L., 529 U.S. 266 (2000), a non-traffic stop case in which the Court stated that "[u]nlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated . . . an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity," and so rarely provides reasonable suspicion. *Id.* (internal quotation marks and citation omitted.)

However, the Supreme Court recently decided Navarette v. California, 572 U.S. __, 134 S. Ct. 1683 (2014), ruling that a motorist's 911 call, reporting that a specific vehicle had just run the caller off the road, was an

anonymous tip that provided reasonable suspicion to stop the described vehicle 15 minutes later. The Court first ruled that the tip was reliable. It reasoned that the caller effectively claimed first-hand knowledge of the other vehicle's dangerous driving; that the call was "especially reliable" because it was contemporaneous with the dangerous driving; and that the call was made to 911, which "has some features [like recording and caller ID] that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity." Then the Court held that running another vehicle off the road "suggests lane-positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues," and so provided reasonable suspicion of DWI. Because the Court found reasonable suspicion based on a garden-variety anonymous 911 call that the officers did little to corroborate, Navarette almost certainly changes the law in North Carolina regarding anonymous tips and reasonable suspicion.[5] However, it is unclear how far Navarette will extend. Will it apply when the tip is received through a means other than 911? When it concerns a completed traffic offense rather than an ongoing one like DWI? These issues will need to be decided in future cases.

OTHER TIPS

Where an informant "willingly place[s] her anonymity at risk," by identifying herself or by speaking to an officer face to face, courts more readily conclude that the information provides reasonable suspicion. State v. Maready, 362 N.C. 614 (2008) (court gave significant weight to information provided by a driver who approached officers in person, thereby allowing officers to see her, her vehicle, and her license plate, notwithstanding the fact that the officers did not in fact make note of any identifying information about her). See also State v. Hudgins, 195 N.C. App. 430 (2009) (a driver called the police to report that he was being followed, then complied with the dispatcher's instructions to go to a specific location to allow an officer to intercept the trailing vehicle; when the officer stopped the second vehicle, the caller also stopped briefly; the defendant, who was driving the second vehicle, was impaired; the stop was proper, in part because "by calling on a cell phone and remaining at the scene, [the] caller placed his anonymity at risk").[6]

DRIVER'S IDENTITY

[5] North Carolina's appellate courts could adhere to the previous line of authority by ruling that the North Carolina Constitution provides greater protection than the Fourth Amendment, but that is unlikely given the courts' repeated statements that the state and federal constitutions provide coextensive protection from unreasonable searches and seizures. See, e.g., State v. Verkerk, __ N.C. App. __, 747 S.E.2d 658 (2013) (stating that "this Court and the [state] Supreme Court have clearly held that, as far as the substantive protections against unreasonable searches and seizures are concerned, the federal and state constitutions provide the same rights," and citing multiple cases holding that the two constitutions are coextensive in this regard), rev'd on other grounds, 367 N.C. 483 (2014).

[6] The Hudgins court emphasized that the caller remained at the scene of the stop, thereby relinquishing his anonymity. By contrast, in State v. Blankenship, __ N.C. App. __, 748 S.E.2d 616 (2013), a taxi driver called 911 on his cell phone to report an erratic driver. The taxi driver did not give his name, but "when an individual calls 911, the 911 operator can determine the phone number used to make the call. Therefore, the 911 operator was later able to identify the taxicab driver." Nonetheless, the court treated the call as an anonymous tip because "the officers did not meet [the taxi driver] face-to-face," and found that the tip failed to provide reasonable suspicion to support a stop of the other driver. See also State v. Coleman, __ N.C. App. __, 743 S.E.2d 62 (2013) (treating a telephone tip as anonymous even though "the communications center obtained the caller's name . . . and phone number").

"[W]hen a police officer becomes aware that a vehicle being operated is registered to an owner with a suspended or revoked driver's license, and there is no evidence appearing to the officer that the owner is not the individual driving the automobile, reasonable suspicion exists to warrant an investigatory stop." State v. Hess, 185 N.C. App. 530 (2007). See also State v. Johnson, 204 N.C. App. 259 (2010) ("[T]he officers did lawfully stop the vehicle after discovering that the registered owner's driver's license was suspended."). Presumably, an officer would also be justified in stopping a vehicle if he determined that the registered owner was the subject of an outstanding arrest warrant or other criminal process and if the officer could not rule out the possibility that the owner of the vehicle was driving.[7]

INVESTIGATION DURING THE STOP

ORDERING OCCUPANTS OUT OF THE VEHICLE

In the interest of officer safety, an officer may order any or all of a vehicle's occupants out of the vehicle during a traffic stop. Pennsylvania v. Mimms, 434 U.S. 106 (1977) (driver); Maryland v. Wilson, 519 U.S. 408 (1997) (passengers). Likewise, an officer may order the vehicle's occupants to remain in the vehicle. State v. Shearin, 170 N.C. App. 222 (2005); Robert L. Farb, Arrest, Search, and Investigation in North Carolina 45 & n.191 (4th ed. 2011) (collecting cases). Whether, and under what circumstances, an officer can order a driver or passenger into the back seat of the officer's cruiser is an open question in North Carolina and is the subject of a split of authority nationally. Jeff Welty, Traffic Stops, Part II, N.C. Crim. L. Blog (October 28, 2009), http://nccriminallaw.sog.unc.edu/traffic-stops-part-ii/.

FRISKING OCCUPANTS

A frisk does not follow automatically from a valid stop. It is justified only if the officer reasonably suspects that the person or people to be frisked are armed and dangerous. Terry v. Ohio, 392 U.S. 1 (1968). For example, a frisk was justified when a driver "had prior convictions for drug offenses, [an officer] observed [the driver's] nervous behavior inside his vehicle, and [the officer] saw him deliberately conceal his right hand and refuse to open it despite repeated requests." State v. Henry, __ N.C. App. __, 765 S.E.2d 94 (2014). An officer may frisk a passenger based on reasonable suspicion that the passenger is armed and dangerous, even if the officer does not suspect the passenger of criminal activity. Arizona v. Johnson, 555 U.S. 323 (2009).

"CAR FRISKS"

In Michigan v. Long, 463 U.S. 1032 (1983), the Supreme Court held that "the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses [reasonable suspicion] that the suspect is dangerous and the suspect may gain immediate control of weapons." Although Long was decided in the context of what might be described as a Terry stop rather than a traffic stop – because the vehicle in Long had already crashed when officers stopped to investigate – the two types

[7] In State v. Watkins, 220 N.C. App. 384 (2012), the court of appeals upheld a stop based in part on the fact that the registered owner of a vehicle had outstanding warrants even though the officers involved in the case were "pretty sure" that the driver was not the owner. The court noted that the defendant "was driving a car registered to another person," that the registered owner had outstanding warrants, and that there was a passenger in the vehicle who could have been the registered owner.

of stops are similar if not identical,[8] and the concept of a car frisk applies with equal force to traffic stops. State v. Hudson, 103 N.C. App. 708 (1991) (upholding car frisk arising out of a traffic stop).

Whether there is reasonable suspicion that a person is dangerous is similar to the inquiry that must be made in the Terry frisk context. Factors that courts have mentioned in the car frisk context include: furtive movements by the occupants of the vehicle; lack of compliance with police instructions; belligerence; reports that the suspect is armed; and visible indications that a weapon may be present in the car. See, e.g., State v. Edwards, 164 N.C. App. 130 (2004) (finding a car frisk justified where a sexual assault suspect was reported to have a gun; was noncompliant; and appeared to have reached under the seat of his vehicle); State v. Minor, 132 N.C. App. 478 (1999) (holding a car frisk not justified where a suspect appeared to access the center console of the vehicle and later rubbed his hand on his thigh near his pocket; these movements were not "clearly furtive"); State v. Clyburn, 120 N.C. App. 377 (1995) (ruling a car frisk justified where officers suspected that the defendant was involved in the drug trade and the defendant was belligerent during the stop).

Whether an officer's belief that a suspect may gain immediate control of a weapon is reasonable depends on the particular circumstances of a given traffic stop including the suspect's location relative to the vehicle and whether the suspect has been handcuffed. Compare Edwards, 164 N.C. App. 130 (defendant suspected of possessing handgun who was handcuffed and sitting on the curb was in sufficiently "close proximity to the interior of the vehicle" to gain access to a weapon), and State v. Parker, 183 N.C. App. 1 (2007) (defendant was handcuffed in the backseat of his own car when he disclosed that there was a gun in the car; two other passengers were also in the car; "these circumstances were sufficient to create a reasonable belief that defendant was dangerous and had immediate access to a weapon"), with State v. Braxton, 90 N.C. App. 204 (1988) (it was "uncontroverted that defendant [stopped for speeding] could not obtain any weapon . . . from the car" where he was not in the car and detective testified that defendant could not have reached the area searched).

As to the proper scope of a car frisk, there is little North Carolina law on point. In Parker, 183 N.C. App. 1, the court held that an officer properly searched "a drawstring bag located underneath a piece of newspaper that fell to the ground" as he assisted an occupant out of the vehicle. The court noted that the bag was located near a firearm and "was at least large enough to contain methamphetamine and a 'smoking device," perhaps suggesting a willingness to err on the side of officer safety when confronted with ambiguous facts.

LICENSE, WARRANT, AND RECORD CHECKS

Officers frequently check the validity of a driver's license, registration, and insurance during a traffic stop, and may also check for any outstanding arrest warrants against the driver. In Rodriguez v. United States, __ U.S. __, 135 S. Ct. 1609 (2015), the Supreme Court ruled that "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance" are routine and permissible parts of an ordinary traffic stop.

This statement is consistent with prior North Carolina case law allowing these checks, and the associated brief delays. State v. Velazquez-Perez, __ N.C. App. __, 756 S.E.2d 869 (2014) (finding "no . . . authority" for the

[8] Berkemer v. McCarty, 468 U.S. 420 (1984) ("[T]he usual traffic stop is more analogous to a so-called 'Terry stop' than to a formal arrest." (internal citations omitted)); State v. Styles, 362 N.C. 412 (2008) ("Traffic stops have 'been historically reviewed under the investigatory detention framework first articulated in Terry.'" (citation omitted)).

defendant's claim that a document check exceeded the scope of a speeding stop, and noting that "officers routinely check relevant documentation while conducting traffic stops"); State v. Hernandez, 170 N.C. App. 299 (2005) (holding that "running checks on Defendant's license and registration" was "reasonably related to the stop based on the seat belt infraction"); State v. Castellon, 151 N.C. App. 675 (2002) (twenty-five minute "detention for the purpose of determining the validity of defendant's license was not unreasonable" when officer's computer was working slowly). See also, e.g., United States v. Villa, 589 F.3d 1334 (10th Cir. 2009) ("It is well-established that [a] law enforcement officer conducting a routine traffic stop may request a driver's license and vehicle registration, run a computer check, and issue a citation." (citation omitted)); See generally Wayne R. LaFave, The "Routine Traffic Stop" From Start to Finish: Too Much "Routine," Not Enough Fourth Amendment, 102 Mich. L. Rev. 1843, 1874-85 (2004) (noting that most courts have permitted license, warrant, and record checks incident to traffic stops, though criticizing some of these conclusions) [hereinafter LaFave, "Routine"].

Checks that focus on a motorist's criminal history rather than his or her driving status and the existence of outstanding arrest warrants may be permissible also, though the issue is less clearly settled. The Rodriguez Court briefly suggested that criminal record checks may be permissible as an officer safety measure. 135 S. Ct. at 1616 (citing United States v. Holt, 264 F.3d 1215 (10th Cir. 2001) (en banc), for the proposition that running a motorist's criminal record is justified by officer safety). However, the Court did not address the issue in detail and at least one state court has since found one variety of record check to be improperly directed at detecting evidence of ordinary criminal wrongdoing. United States v. Evans, 786 F.3d 779 (9th Cir. 2015) (ruling that an officer improperly extended a traffic stop to conduct an "ex-felon registration check," a procedure that inquired into a subject's criminal history and determined whether he had registered his address with the sheriff as required for certain offenders in the state in which the stop took place).

QUESTIONS ABOUT UNRELATED MATTERS

The United States Supreme Court held in Muehler v. Mena, 544 U.S. 93 (2005), that questioning is not a seizure, so the police may question a person who has been detained about matters unrelated to the justification for the detention, even without any individualized suspicion supporting the questions. Although Muehler involved a person who was detained during the execution of a search warrant, not the subject of a traffic stop, its reasoning applies equally in the traffic stop setting. The Court has recognized as much. Arizona v. Johnson, 555 U.S. 323 (2009) ("An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."). See also e.g., United States v. Olivera-Mendez, 484 F.3d 505 (8th Cir. 2007); United States v. Stewart, 473 F.3d 1265 (10th Cir. 2007).

It should be emphasized that the questioning in Muehler did not extend the subject's detention; whether a traffic stop may be prolonged for additional questioning is discussed below.

USE OF DRUG-SNIFFING DOGS

Having a dog sniff a car is not a search and requires no quantum of suspicion. Illinois v. Caballes, 543 U.S. 405 (2005). Therefore, a dog sniff is permitted during any traffic stop, so long as the sniff does not extend the stop. Whether a traffic stop may be prolonged for a dog sniff is discussed below.

ASKING FOR CONSENT TO SEARCH

Requests to search made during a traffic stop probably should be analyzed just like any other inquiry about matters unrelated to the purpose of the stop: because such a request is not, in itself, a seizure, it does not implicate the Fourth Amendment unless it extends the duration of the stop. 4 LaFave, Search and Seizure § 9.3(e). See also United States v. Turvin, 517 F.3d 1097 (9th Cir. 2008) (because "officers do not need reasonable suspicion to ask questions unrelated to the purpose of an initially lawful stop," a request for consent to search that did not substantially prolong a traffic stop was permissible).

However, at least one North Carolina Court of Appeals case has stated that "[i]f the officer's request for consent to search is unrelated to the initial purpose for the stop, then the request must be supported by reasonable articulable suspicion of additional criminal activity." State v. Parker, 183 N.C. App. 1 (2007). The court's reasoning appears to have been that such a request inherently involves at least a minimal extension of the stop and is therefore unreasonable.[9] But cf. State v. Jacobs, 162 N.C. App. 251 (2004) ("Defendant argues alternatively that the State failed to establish that Officer Smith had sufficient reasonable suspicion to request defendant's consent for the search [during an investigative stop]. No such showing is required.").

PROLONGING THE STOP TO INVESTIGATE UNRELATED MATTERS

In Rodriguez v. United States, __ U.S. __, 135 S. Ct. 1609 (2015), the Supreme Court ruled that an officer could not briefly extend a traffic stop to deploy a drug sniffing dog. The Court reasoned that a stop may not be extended beyond the time necessary to complete the "mission" of the stop, which is "to address the traffic violation that warranted the stop . . . and attend to related safety concerns." That is, "[a]uthority for the seizure ends when tasks tied to the traffic infraction are – or reasonably should have been – completed." Because a dog sniff is not a task "tied to the traffic infraction," but rather is "aimed at 'detect[ing] evidence of ordinary criminal wrongdoing,'" any delay to enable a dog sniff violates the Fourth Amendment. The Court rejected the idea, widely endorsed by the lower courts,[10] that "de minimis" delays of just a few minutes did not rise to the level of Fourth Amendment concern. It therefore effectively overruled State v. Sellars, 222 N.C. App. 245 (2012) (delay of four minutes and thirty-seven seconds to allow a dog sniff to take place was de minimis and did not violate the Fourth

[9] This may not be so in some cases, as when one officer asks for consent to search while another is writing a citation. The issue of delays is addressed later in this manuscript.

[10] See, e.g., United States v. Rodriguez, 741 F.3d 905 (8th Cir. 2014) (a seven- or eight-minute delay to deploy a drug-sniffing dog was "a de minimis intrusion" that did not implicate the Fourth Amendment), vacated, __ U.S. __, 135 S. Ct. 1609 (2015); United States v. Green, 740 F.3d 275 (4th Cir. 2014) (running a "criminal history check added just four minutes to the traffic stop" and "at most, amounted to a de minimis intrusion . . . [that] did not constitute a violation of [the defendant's] Fourth Amendment rights"); United States v. Mason, 628 F.3d 123 (4th Cir. 2010) ("The one to two of the 11 minutes [that the stop took] devoted to questioning on matters not directly related to the traffic stop constituted only a slight delay that raises no Fourth Amendment concern."); United States v. Harrison, 606 F.3d 42 (2d Cir. 2010) (per curiam) (five to six minutes of questioning unrelated to the purpose of the traffic stop "did not prolong the stop so as to render it unconstitutional"); Turvin, 517 F.3d 1097 (asking a "few questions" unrelated to the stop that prolonged the stop by a "few moments" was not unreasonable, and collecting cases). See generally United States v. Everett, 601 F.3d 484 (6th Cir. 2010) (collecting cases and concluding that whether a delay is de minimis depends on all the circumstances, including whether the officer is diligently moving toward a conclusion of the stop, and the ratio of stop-related questions to non-stop-related questions).

Amendment), and State v. Brimmer, 187 N.C. App. 451 (2007) (delay of approximately four minutes to allow a dog sniff to take place was de minimis).[11]

The reasoning of Rodriguez extends beyond dog sniffs. The case clearly implies that an officer may not extend a stop in order to ask questions unrelated to the purpose of the stop, such as questions about drug activity. Lower courts have uniformly understood that implication. See, e.g., United States v. Archuleta, __ F. App'x __, 2015 WL 4296639 (10th Cir. July 16, 2015) (unpublished) (citing Rodriguez while ruling that a bicycle stop was improperly prolonged "in order to ask a few additional questions" unrelated to the bicycle law violations that prompted the stop); Amanuel v. Soares, 2015 WL 3523173 (N.D. Cal. June 3, 2015) (unpublished) (extending a traffic stop by 10 minutes to discuss a passenger's criminal history, ask whether the passenger had been subpoenaed to an upcoming criminal trial, and caution the passenger against perjuring himself, would amount to an improper extension of the stop in violation of Rodriguez); United States v. Kendrick, 2015 WL 2356890 (W.D.N.Y. May 15, 2015) (unpublished) (agreeing that "absent a reasonable suspicion of criminal activity, extending the stop . . . in order to conduct further questioning of the driver and the occupants about matters unrelated to the purpose of the traffic stop would appear to violate the . . . rule announced in Rodriguez," though finding that reasonable suspicion was present in the case under consideration).[12]

Presumably, Rodriguez also makes it improper for an officer to extend a stop in order to seek consent to search. See United States v. Hight, __ F. Supp. 3d __, 2015 WL 4239003 (D. Colo. June 29, 2015) (an officer stopped a truck for a traffic violation, ran standard checks on the driver and spoke briefly with him, and decided that he wanted to ask for consent to search; the officer called for backup and spent at least nine minutes waiting for another officer and working on a consent form; when backup arrived, the officer terminated the stop, then asked for and obtained consent; the court ruled that the nine-minute extension of the stop was improper and that it required suppression even if consent to search was obtained voluntarily after the stop ended). Of course, as noted above, Parker, 183 N.C. App. 1, is also a relevant precedent in this area.

Officers may respond to Rodriguez by multitasking: deploying a drug dog while waiting for a response on a license check, or asking investigative questions of the driver while filling out a citation. Defendants may argue that such multitasking inherently slows an officer down. Whether that is so in a particular case is a factual question. At least in two early cases on point, courts seem to have accepted officers' multitasking. See, e.g., State v. Jackson, __ N.E.3d __, 2015 WL 3824080 (Ohio Ct. App. 2015) (a traffic stop conducted by one Trooper was not impermissibly extended when a different Trooper conducted a dog sniff while the first Trooper investigated the defendant's background and wrote a traffic citation); Lewis v. State, 773 S.E.2d 423 (Ga. Ct. App. 2015) (similar). It may be worth noting that both Jackson and Lewis involved multiple officers, with one handling the dog while the other addressed the traffic violation.

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[11] Even before Rodriguez, the North Carolina Court of Appeals had limited Brimmer and Sellars in State v. Cottrell, __ N.C. App. __, 760 S.E.2d 274 (2014), where the court stated that it did "not believe that the de minimis analysis applied in Brimmer and Sellars should be extended to situations when, as here, a drug dog was not already on the scene."

[12] Even before Rodriguez, it was risky for an officer to measurably extend a stop to ask questions unrelated to the purpose of the stop in light of State v. Jackson, 199 N.C. App. 236 (2009) (finding that an officer unreasonably extended a traffic stop when she asked just a handful of drug-related questions).

One question that arises from Rodriguez is what sorts of conversation relate to the traffic stop. May an officer engage in brief chit-chat with a motorist, or does such interaction constitute an extension of the stop? What about inquiring about a motorist's travel plans, or a passenger's, where such inquiries may bear on the likelihood of driver fatigue but also may be used to seek out inconsistencies that may be evidence of illicit activity? One early case of note is United States v. Iturbe-Gonzalez, __ F. Supp. 3d __, 2015 WL 1843046 (D. Mont. April 23, 2015), where the court indicated that an officer may make "traffic safety-related inquiries of a general nature [including about the driver's] travel plans and travel objectives," and said that "any suggestion to the contrary would ask that officers issuing traffic violations temporarily become traffic ticket automatons while processing a traffic violation, as opposed to human beings." Of course, even if Iturbe-Gonzalez is correct that a question or two about travel plans are sufficiently related to the purpose of a traffic stop, a court might take a different view of an officer's extended discussion of itineraries with multiple vehicle occupants.

TOTAL DURATION

There is no bright-line rule regarding the length of traffic stops. As a rule of thumb, "routine" stops that exceed twenty minutes may deserve closer scrutiny. See Robert L. Farb, Arrest, Search, and Investigation in North Carolina 43 (4th ed. 2011). Stops of various lengths have been upheld by the courts. See, e.g., State v. Heien, __ N.C. App. __, 741 S.E.2d 1 (2013) (thirteen minutes was "not unduly prolonged"), aff'd per curiam, 367 N.C. 163 (2013), and aff'd on other grounds, __U.S. __, 135 S. Ct. 530 (2014); State v. Castellon, 151 N.C. App. 675 (2002) (twenty-five minutes, though some portion of that time may have been after reasonable suspicion developed); United States v. Rivera, 570 F.3d 1009 (8th Cir. 2009) (seventeen minutes); United States v. Eckhart, 569 F.3d 1263 (10th Cir. 2009) (twenty-seven minutes); United States v. Muriel, 418 F.3d 720 (7th Cir. 2005) (thirteen minutes).

TERMINATION OF THE STOP

WHEN TERMINATION TAKES PLACE

As a general rule, "an initial traffic stop concludes . . . after an officer returns the detainee's driver's license and registration." Jackson, 199 N.C. App. 236; State v. Heien, __ N.C. App. __, 741 S.E.2d 1 (2013) ("Generally, the return of the driver's license or other documents to those who have been detained indicates the investigatory detention has ended."), aff'd per curiam, 367 N.C. 163 (2013), and aff'd on other grounds, __ U.S. __, 135 S. Ct. 530 (2014). When an officer takes other documents from the driver, such as registration and insurance documents, these, too must be returned before the stop ends. State v. Velazquez-Perez, __ N.C. App. __, 756 S.E.2d 869 (2014) (even though an officer had returned a driver's license and issued a warning citation, "[t]he purpose of the stop was not completed until [the officer] finished a proper document check [of registration, insurance, and other documents the officer had taken] and returned the documents"). As the Fourth Circuit explains, when an officer returns a driver's documents, it "indicate[s] that all business with [the driver is] completed and that he [is] free to leave." United States v. Lattimore, 87 F.3d 647 (4th Cir. 1996).

This rule is not absolute and specific circumstances may dictate a different result. The North Carolina Court of Appeals has held, in at least one case, that under the totality of the circumstances, the occupants of a vehicle remained seized even after the return of the driver's paperwork, in part because the officer "never told [the driver] he was free to leave." State v. Myles, 188 N.C. App. 42 (2008), aff'd per curiam, 362 N.C. 344 (2008). See also State v. Kincaid, 147 N.C. App. 94 (2001) (suggesting that the return of a driver's license and registration is a necessary, but not invariably a sufficient, condition for the termination of a stop).

Some commentators have argued that many motorists will not feel free to depart until they are expressly permitted to do so. LaFave, "Routine" at 1899-1902. Certainly many officers mark the end of a stop by saying "you're free to go" or "you can be on your way" or something similar. Nonetheless, the United States Supreme Court has rejected the idea that drivers must expressly be told that they are free to go before a stop terminates. Ohio v. Robinette, 519 U.S. 33 (1996) (adopting a totality of the circumstances approach).

EFFECT OF TERMINATION

Once a stop has ended, the driver and any other occupants of the vehicle may depart. Any further interaction between the officer and the occupants of the vehicle is, therefore, consensual. The officer may ask questions about any subject at all, at any length; may request consent to search; and so on. In other words, the "time and scope limitations" that apply to a traffic stop cease to be relevant. LaFave, "Routine" at 1898.

PLEADINGS

Belal Elrahal
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What are they?

- In District Court, the charging instrument becomes the State's pleading.
  - Arrest Warrant
  - Criminal Summons
  - Magistrate's Order
  - Citation
- Or the ADA can supersede with a Statement of Charges
  - Must be signed by the ADA who files it. (N.C.G.S. 15A-922(a), (b))
  - Entitles Defense to 3 days Notice

2

Misd. General Requirements

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

3

Roadmap

- Pleadings Issues
  - Defects
  - Variance
- In Practice
  - Motions
  - Amendments
  - Appeals
- Questions/Resources

4

Defects

- The pleading fails *on its face*
  - Pleading must charge offense properly to give the Court jurisdiction.
- Two sets of Requirements
  - Statute: N.C.G.S. 15- 924(a)
  - Offense Specific: Caselaw
- Examining Common Defects…

5

Find the Defect

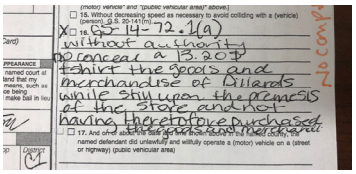

WARRANT FOR ARREST

STATE OF NORTH CAROLINA

Dillard's, an entity capable of owning property.

6

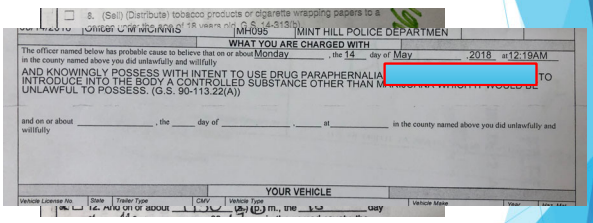
An Example



- U/C can only be committed at a store, not necessary to allege it as capable of owning property.

7

Find the Defect



- The paraphernalia needs to be specifically described.
- Or does it…?

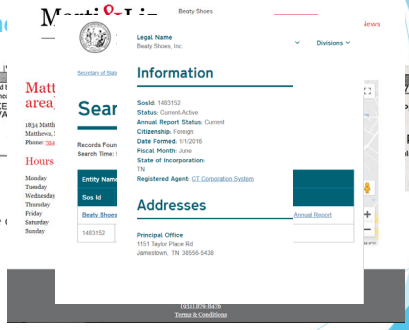
8

Citations

- Requirement of alleging every element relaxed for Citations
  - Needs only allege the crime charged. State v. Allen, 783 S.E.2d 799 (2016).
  - Open question on general requirements vs. charge specific requirements.
  - "Fill In the Blank" Rule?
- Objection
  - May object to trial by citation pursuant to N.C.G.S. 15A-922(c)
  - Doing this requires the State to file a Statement of Charges, which entitles you to a continuance if you need or want it.

9

Find th



- Seems fine

10

Variance

- Variance o
  the allegat
- 2 kinds of
  - Varianc
    fatal.
- Non-Jurisd
- Does not b

11

In Practice

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

12

Motion to Dismiss

- Fatal Variance
  - By nature of the motion, must occur after the State rests.
  - If not made, waived.
- Fatal Defect
  - Jurisdictional – may be made at any time.
  - Arraignment? First Witness? After State's case?

13

Amendments and MSOC

- Amer
  - N
  - c
  - T
- Misd
  - F
  - V
  - f
  - E

STATE OF NORTH CAROLINA
Mecklenburg County
MECKLENBURG COUNTY FILED #118 JUL 30 2019
In The General Court Of Justice
☒ District ☐ Superior Court Division
STATE VERSUS
MISDEMEANOR STATEMENT OF CHARGES
G.S. 154-922

Offense(s)	Date Of Offense	G.S. No.	CL
Count 3: Assault by Pointing a Gun	05/10/2019	14-34	A1

I, the undersigned, upon information and belief allege that on or about the date of offense shown and in the county named above, the defendant named above did unlawfully and willfully

assault [redacted] by pointing a handgun at her.

14

Appeals

- Can the State fix a pleading after you appeal it to Superior Court?
  - No. Superior Court jurisdiction is "derivative of" the charge that is plead and convicted in District Court. N.C.G.S. 7A-271(b)
  - Response – Motion to Dismiss in Superior Court for lack of jurisdiction.

15

Useful Materials

- "The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment" Administration of Justice Bulletin, Jessica Smith (2008). (http://sogpubs.unc.edu/electronicversions/pdfs/aojb0803.pdf)
- Quick Reference Handout
- Case Compendium at SOG Online
- Electronic Materials

QUESTIONS?

16

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).

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.

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

DISTRICT COURT PLEADINGS

IS IT A PLEADING?

The charging instrument (citation, magistrate's order, criminal summons, or arrest warrant) becomes the State's pleading in District Court, unless the prosecutor files a statement of charges, or there is an objection to trial by citation. Objection to trial by citation requires the State to file a Statement of Charges. N.C.G.S. 15A-922

Statement of Charges: a criminal pleading, signed by the prosecutor who files it which supersedes all previous pleadings in that case. If it makes a material change, it can only be filed pre-arraignment, and entitles Defendant to a minimum 3 day continuance. N.C.G.S. 15A-922(a), (b)

DOES IT HAVE WHAT IT NEEDS?

(1) Defendant's name (2) Separate count for each offense (3) County
(4) Date/Time of Offense (5) Plain/concise factual statement for each element
(6) Statute/Ordinance (7) [Applies to felonies only] (N.C.G.S. 15A-924)
Note: State v. Allen relaxed some requirements for citations (see reverse)

WHAT IF IT DOESN'T? (Fatal Defects)

Depending on what is missing (see reverse), the Court lacks jurisdiction to hear the matter. Motion to Dismiss for lack of jurisdiction can be made at any time. Note: if you make the motion after the close of the State's evidence, there is an appearance jeopardy has attached.

WHAT IF IT'S JUST...*DIFFERENT*? (Fatal Variance)

If the evidence does not conform with the pleading during the State's case, depending on the difference (see reverse), the State has failed to prove the charge for which the Court has jurisdiction. Motion to Dismiss for a fatal variance between the pleading and the evidence (aka insufficient evidence of the offense charged) is made at the close of the State's evidence. Note: in granting your motion, the Court's ruling is limited to finding there was insufficient evidence of the charge as pleaded.

WHAT IF THEY CATCH IT?

Pre-Arraignment – The State can supersede its pleading with a Statement of Charges. See above.
Post-Arraignment – Amendments post-arraignment are only authorized "when the amendment does not change the nature of the offense charged." N.C.G.S. 15A-922(f). Practice Note: if the amendment is made to remedy a fatal defect/variance, it changes the nature of the offense charged.

AND WHAT IF THEY DON'T?

If you prevailed, one of two things happened. The Court never had jurisdiction, and jeopardy never attached (fatal defect), or the State failed to prove the charge alleged, and introduced evidence of another offense, not properly before the Court (fatal variance). In either case, the State *may* file a statement of charges, upon which you are entitled to at least three working days continuance. Note: after a fatal defect, the State has three days, unless authorized longer by the Court, to correct the deficiency. N.C.G.A. 15A-922(b)(3)

SAY YOU STILL LOSE, AND APPEAL

On appeal, the State cannot amend charge to either conform to the evidence or fix defect – jurisdiction in superior court is derivative of charge plead and convicted in district court. N.C.G.S. 7A-271(b).

PLEADINGS PARTICULARITIES

If there is a material problem with the pleading on its face, it is a FATAL DEFECT. If a component materially differs at trial, it is a FATAL VARIANCE. The cases below can apply to either depending how the flaw arises.

GENERAL REQUIREMENTS

Factual statement supporting each element: Requirement relaxed only for citations so long as it sufficiently identifies the charge. *State v. Allen*, 783 S.E.2d 799 (2016). But see: *State v. Mcnair*, 797 S.E.2d 712 (2017)(unpublished), citation was defective for not conforming with charge-specific requirement in RDO charge.

Names: Defendant and victim must be named. *State v. Powell*, 10 N.C. App. 443, 448 (1971) If the name is incorrect, courts generally apply the doctrine of *idem sonans*, where the variance is not material if the names sound the same. *State v. Higgs*, 270 N.C. 111, 113 (1967).

Date/Time of Offense: Error in the Date/Time only material if it is "of essence to the offense" or deprives defendant of the ability to present a defense such as an alibi or statute of limitations defense. Generally: *State v. Price*, 310 N.C. 596 (1984); Alibi: *State v. Stewart*, 353 N.C. 516, 518 (2001).

Statute/Ordinance: Failing to allege statute not grounds for dismissal. *State v. Lockhart*, 181 N.C. App. 316 (2007). But, ordinances must be pleaded by caption and also section number where applicable. *State v. Pallet*, 283 N.C. 705, 712 (1973).

SELECTED CHARGE SPECIFIC REQUIREMENTS

Larceny: The item stolen must be charged with particularity. "Meat" insufficient, *State v. Nugent*, 243 N.C. 100 (1955); "Assorted items of clothing having value of $504.99" sufficient, *State v. Monk*, 35 N.C. App. 337 (1978). If the victim is not a natural person, it must be alleged that they are "an entity capable of owning property" or correctly described in a manner that indicates such (inc., corp, llc, church, etc) *State v. Brawley*, 370 N.C. 626 (2018).

PDP: The item alleged to be paraphernalia must be enumerated/described with sufficient detail to put the defense on notice. Pleading alleged "plastic baggies," only evidence at trial was of "bottles." *State v. Satterthwaite*, 234 N.C. App. 440 (2014).

RPO: The officer resisted or delayed must be named. *State v. Smith*, 262 N.C. 472 (1964). The duty the officer was attempting to perform must be described with specificity, as well as how that duty was resisted/delayed/obstructed. *State v. Wells*, 59 N.C. App. 682 (1982).

Assault by Showing Force: The pleading must include allege deviation from normal activities as well as the element of "reasonable apprehension of immediate bodily harm or injury on the part of the person assailed." *State v. Garcia*, 146 N.C. App. 745 (2001).

B/E: The building entered must be described specifically, "a certain building occupied by one Chatham County Board of Education" insufficient. *State v. Smith*, 267 N.C. 755 (1966).

AWDW: pleading must name the weapon and either state it was a "deadly weapon" or include facts that would necessarily demonstrate its deadly nature. "A stick, a deadly weapon" held sufficient. *State v. Palmer*, 293 N.C. 633 (1977).

UNC SCHOOL OF GOVERNMENT

ADMINISTRATION OF JUSTICE BULLETIN NUMBER 2008/03 | JULY 08

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

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Contents

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I. Introduction

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

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

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

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

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

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

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

3. G.S. 15-153.

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

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

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

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

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

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

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

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

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

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

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

II. General Matters

A. Date or Time of Offense

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

1. Homicide

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

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

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

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

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

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

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

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

2. Burglary

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

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

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

3. Sexual Assault

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Failure to Register as a Sex Offender

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

5. Larceny

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

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

6. False Pretenses

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

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

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

7. Possession of a Firearm by a Felon

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

8. Impaired Driving

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

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

9. Conspiracy

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

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

10. Habitual and Violent Habitual Felon

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

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

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

11. Sexual Exploitation of a Minor

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

B. Victim's Name

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Defendant's Name

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

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

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

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

D. Address or County

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Use of the Word "Feloniously"

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

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

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

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

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

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

F. Statutory Citation

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

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

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

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

G. Case Number

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

H. Completion By Grand Jury Foreperson

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

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

I. Prior Convictions

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

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

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

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

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

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

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

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

J. "Sentencing Factors"

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

III. Offense Specific Issues

A. Homicide[58]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Arson

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

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

C. Kidnapping and Related Offenses

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Burglary, Breaking or Entering, and Related Crimes

1. Burglary and Breaking or Entering

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

96. *See id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Breaking into Coin- or Currency-Operated Machine

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

E. Robbery

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. Assaults

1. Generally

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

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

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

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

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

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

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

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

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

2. Injury Assaults

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

3. Deadly Weapon Assaults

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

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

The cases applying this rule are summarized below.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Assault on a Government Official

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

5. Habitual Misdemeanor Assault

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

6. Malicious Conduct by Prisoner

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

G. Stalking

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

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

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

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

H. Resist, Delay, and Obstruct Officer

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

I. Disorderly Conduct

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

J. Child Abuse

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

K. Sexual Assault

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

126. *See id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

L. Indecent Liberties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

142. *See supra* pp. 10–11.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

State v. Ingram, 271 N.C. 538, 541-44 (1967) (larceny indictment that described stolen property as "merchandise, chattels, money, valuable securities and other personal property" was insufficient).

State v. Nugent, 243 N.C. 100, 102-03 (1955) ("meat" was an insufficient description in larceny and receiving indictment of the goods stolen).

State v. Simmons, 57 N.C. App. 548, 551-52 (1982) (fatal variance between larceny indictment and the proof at trial as to what item or items were taken; property was alleged as "eight (8) Imperial, heavy duty freezers, Serial Numbers: 02105, 02119, 01075, 01951, 02024, 02113, 02138, 02079, the personal property of Southern Food Service, Inc., in the custody and possession of Patterson Storage Warehouse Company, Inc., a corporation"; however, the property seized was a 21 cubic foot freezer, serial number "W210TSSC-030-138").

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

State v. Hartley, 39 N.C. App. 70, 71-72 (1978) (larceny indictments alleging property taken as "a quantity of used automobile tires, the personal property of Jerry Phillips and Tom Phillips, and d/b/a the Avery County Recapping Service, Newland, N.C." was sufficient; indictments named property (tires), described them as to type (automobile), condition (used), ownership, and location).

State v. Monk, 36 N.C. App. 337, 340-41 (1978) (indictment alleging "assorted items of clothing, having a value of $504.99 the property of Payne's, Inc." was sufficient).

State v. Boomer, 33 N.C. App. 324, 330 (1977) ("When describing an animal, it is sufficient to refer to it by the name commonly applied to animals of its kind without further description. A specific description of the animal, such as its color, age, weight, sex, markings or brand, is not necessary. The general term 'hogs' in the indictment sufficiently describes the animals taken so as to identify them with reasonable certainty.") (citation omitted).

State v. Coleman, 24 N.C. App. 530, 532 (1975) (no fatal variance between indictment describing property as "a 1970 Plymouth" with a specific serial number, owned by

145. 18 N.C. App. 652 (1973).

146. *See* State v. Woody, 132 N.C. App. 788, 791 (1999).

George Edison Biggs and evidence which showed a taking of a 1970 Plymouth owned by George Edison Biggs but was silent as to the serial number).

State v. Foster, 10 N.C. App. 141, 142-43 (1970) (larceny indictment alleging "automobile parts of the value of $300.00 . . . of one Furches Motor Company" was sufficient).

State v. Mobley, 9 N.C. App. 717, 718 (1970) (indictment alleging "an undetermined amount of beer, food and money of the value of $25.00 . . . of the said Evening Star Grill" was sufficient).

State v. Chandler[147] held that when the charge is attempted larceny, it is not necessary to specify the particular goods and chattels the defendant intended to steal. The court reasoned that the offense of attempted larceny is complete "when there is a general intent to steal and an act in furtherance thereof." Thus, it concluded, an allegation as to the specific articles intended to be taken is not essential to the crime.[148]

A larceny indictment need not describe the manner of the taking, even if the larceny was by trick.[149] Nor is it necessary for a larceny indictment to expressly allege that the defendant intended to convert the property to his or her own use, that the taking was without consent, or that the defendant had an intent to permanently deprive the owner of the property of its use.[150]

In order to properly charge felony larceny, the indictment must specifically allege one of the factors that elevate a misdemeanor larceny to a felony.[151] Thus, if the factor elevating the offense to a felony is that the value of the items taken exceeds $1,000, this fact must be alleged in the indictment. However, a variance as to this figure will not be fatal, provided that the evidence establishes that the value of the items is $1,000 or more.[152] An indictment alleging that the larceny was committed "pursuant to a violation of G.S. 14-51" is sufficient to charge felony larceny committed pursuant to a burglary.[153] Also, a defendant properly may be convicted of felony larceny pursuant

147. 342 N.C. 742, 753 (1996).

148. *See id.*

149. *See* State v. Barbour, 153 N.C. App. 500, 503 (2002) ("It is not necessary for the State to allege the manner in which the stolen property was taken and carried away, and the words 'by trick' need not be found in an indictment charging larceny."); State v. Harris, 35 N.C. App. 401, 402 (1978).

150. *See* State v. Osborne, 149 N.C. App. 235, 244-45 (indictment properly charged larceny even though it did not allege that item was taken without consent or that defendant intended to permanently deprive the owner; charge that defendant "unlawfully, willfully and feloniously did "[s]teal, take, and carry away" was sufficient), *aff'd*, 356 N.C. 424 (2002); State v. Miller, 42 N.C. App. 342, 346 (1979) (rejecting defendant's argument that the indictment was fatally defective because it failed to state a felonious intent to appropriate the goods taken to the defendant's own use; allegation that defendant "unlawfully and willfully did feloniously steal, take, and carry away" the item was sufficient); *see also* State v. Wesson, 16 N.C. App. 683, 685-88 (1972) (warrant's use of the term "steal" in charging larceny sufficiently charged the required felonious intent).

151. *See* G.S. 14-72 (delineating elements that support a felony charge); State v. Wilson, 315 N.C. 157, 164-65 (1985) (agreeing with defendant's contention that the indictment failed to allege felonious larceny because it did not specifically state that the larceny was pursuant to or incidental to a breaking or entering and the amount of money alleged to have been stolen was below the statutory amount necessary to constitute a felony).

152. *See* State v. McCall, 12 N.C. App. 85, 88 (1971) (indictment alleged larceny of $1948 and evidence showed larceny of $1748).

153. *See* State v. Mandina, 91 N.C. App. 686, 690-91 (1988).

to a breaking and entering when the indictment charged felony larceny pursuant to a burglary,[154] because breaking or entering is a lesser included offense of burglary.[155]

N. Receiving or Possession of Stolen Property

Unlike larceny, indictments charging receiving or possession of stolen property need not allege ownership of the property.[156] The explanation for this distinction is that the name of the person from whom the goods were stolen is not an essential element of these offenses.[157]

O. Injury to Personal Property

An indictment for injury to personal property must allege the owner or person in lawful possession of the injured property.[158] If the entity named in the indictment is not a natural person, the indictment must allege that the victim was a legal entity capable of owning property.[159] These rules follow those for larceny, discussed above.[160]

P. False Pretenses and Forgery

1. False Pretenses

One issue in false pretenses cases is how the false representation element should be alleged in the indictment. In *State v. Perkins*,[161] the court of appeals held that an allegation that the defendant used a credit and check card issued in the name of another person, wrongfully obtained and without authorization, sufficiently apprised the defendant that she was accused of falsely representing herself as an authorized user of the cards.[162] In *State v. Parker*,[163] the court of appeals upheld the

154. *See* State v. McCoy, 79 N.C. App. 273, 277 (1986); State v. Eldgridge, 83 N.C. App. 312, 316 (1986).

155. *See McCoy*, 79 N.C. App. at 277.

156. *See* State v. Jones, 151 N.C. App. 317, 327 (2002) (variance between ownership of property alleged in indictment and evidence of ownership introduced at trial is not fatal to charge of felonious possession of stolen goods); State v. Medlin, 86 N.C. App. 114, 123-24 (1987) ("In cases of receiving stolen goods, it has never been necessary to allege the names of persons from whom the goods were stolen, nor has a variance between an allegation of ownership in the receiving indictment and proof of ownership been held to be fatal. We now hold that the name of the person from whom the goods were stolen is not an essential element of an indictment alleging possession of stolen goods, nor is a variance between the indictments' allegations of ownership of property and the proof of ownership fatal.") (citations omitted).

157. *See Jones*, 151 N.C. App at 327.

158. *See* State v. Price, 170 N.C. App. 672, 673-74 (2005).

159. *See id.* at 674 (indictment for injury to personal property was defective when it named the property owner as "City of Asheville Transit and Parking Services," which was not a natural person; the indictment did not allege that it was a legal entity capable of owning property).

160. *See supra* pp. 34–36.

161. 181 N.C. App. 209, 215 (2007).

162. *Id.* (the indictment alleged that the defendant "unlawfully, willfully and feloniously did knowingly and designedly, with the intent to cheat and defraud, attempted to obtain BEER AND CIGARETTES from FOOD LION by means of a false pretense which was calculated to deceive. The false pretense consisted of the following: THIS PROPERTY WAS OBTAINED BY MEANS OF USING THE CREDIT CARD AND CKECK [sic] CARD OF MIRIELLE CLOUGH WHEN IN FACT THE DEFENDANT WRONGFULLY OBTAINED THE CARDS AND WAS NEVER GIVEN PERMISSION TO USE THEM").

163. 146 N.C. App. 715 (2001).

trial court's decision to allow the State to amend a false pretenses indictment by changing the items that the defendant represented as his own from "two (2) cameras and photography equipment" to a "Magnavox VCR."[164] The court held that the amendment was not a substantial alteration because the description of the item or items that the defendant falsely represented as his own was irrelevant to proving the essential elements of the crime charged. Those essential elements were simply that the defendant falsely represented a subsisting fact, which was calculated and intended to deceive, which did in fact deceive, and by which defendant obtained something of value from another.

In false pretenses cases, the thing obtained must be described with reasonable certainty.[165] This standard was satisfied in *State v. Walston*,[166] where the court held that there was no fatal variance between a false pretenses indictment alleging that the defendant obtained $10,000 in U.S. currency and the evidence that showed that the defendant deposited a $10,000 check into a bank account. The court reasoned that "whether defendant received $10,000.00 in cash or deposited $10,000.00 in a bank account, he obtained something of monetary value which is the crux of the offense."[167] Although early cases indicate that a false pretenses indictment should describe money obtained by giving the amount in dollars and cents,[168] more modern cases have been flexible on this rule. Thus, an indictment alleging that the defendant falsely represented to a store clerk that he had purchased a watch band in order to obtain "United States currency" was held to be sufficient, even though a dollar amount was not stated.[169] The court distinguished the earlier cases noting that in the case before it, the indictment alleged the item – the watch band – which the defendant used to obtain the money.[170]

G.S. 15-151 provides that in any case in which an intent to defraud is required for forgery or any other offense, it is sufficient to allege an intent to defraud, without naming the person or entity intended to be defrauded. That provision states that at trial, it is sufficient and not a variance if there is an intent to defraud a government, corporate body, public officer in his or her official capacity, or any particular person. Without citing this provision, at least one case has held that a false pretenses indictment need not specify the alleged victim.[171]

2. Identity Theft

Identity theft[172] is a relatively new crime and few cases have dealt with indictment issues regarding this offense. One case that has is *State v. Dammons,*[173] in which the indictment alleged that the defendant had fraudulently represented himself as William Artis Smith "for the purpose of making financial or credit transactions and for the purpose of avoiding legal consequences in the name of Michael Anthony Dammons." The State's evidence at trial indicated that the defendant assumed Smith's identity without consent in order to avoid legal consequences in the form of

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164. *See id*. at 719.

165. *See* State v. Walston, 140 N.C. App. 327, 334 (2000) (quotation omitted).

166. 140 N.C. App. 327 (2000).

167. *Id.* at 334-36

168. *See* State v. Smith, 219 N.C. 400, 401 (1941); State v. Reese, 83 N.C. 638 (1880).

169. State v. Ledwell, 171 N.C. App. 314, 317-18 (2005).

170. *See id.* at 318.

171. State v. McBride, __ N.C. App. __, 653 S.E.2d 218 (2007) (the court concluded that the statute proscribing the offense, G.S. 14-100, does not require that the State prove an intent to defraud any particular person).

172. G.S. 14-113.20.

173. 159 N.C. App. 284 (2003).

felony charges. The appellate court rejected the defendant's argument of fatal variance, concluding that the charging language about the financial transaction was unnecessary and was properly regarded as surplusage.[174]

3. Forgery

In North Carolina, there are common law and statutory offenses for forgery.[175] For offenses charged under G.S. 14-119 (forgery of notes, checks, and other securities; counterfeiting instruments), the indictment need not state the manner in which the instrument was forged.[176]

Q. Perjury and Related Offenses

G.S. 15-145 provides the form for a bill of perjury. G.S. 15-146 does the same for a bill of subornation of perjury. G.S. 14-217(b) specifies the contents of an indictment for bribery of officials.

R. Habitual and Violent Habitual Felon

In North Carolina, being a habitual felon or a violent habitual felon is not a crime but a status, the attaining of which subjects a defendant thereafter convicted of a crime to an increased punishment.[177] The status itself, standing alone, will not support a criminal conviction.[178] Put another way, an indictment for habitual or violent habitual felon must be "attached" to an indictment charging a substantive offense.[179] Focusing on the distinction between a status and a crime, the

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174. *Id.* at 293.

175. *See* Jessica Smith, North Carolina Crimes: A Guidebook on the Elements of Crime pp. 334-39 (6th ed. 2007).

176. State v. King, 178 N.C. App. 122 (2006) (indictment alleged that "on or about the 19th day of March, 2004, in Wayne County Louretha Mae King unlawfully, willfully, feloniously and with the intent to injure and defraud, did forge, falsely make, and counterfeit a Wachovia withdrawal form, which was apparently capable of effecting a fraud, and which is as appears on the copy attached hereto as Exhibit "A" and which is hereby incorporated by reference in this indictment as if the same were fully set forth"; rejecting the defendant's argument that the indictment was defective because it failed to allege how the defendant committed the forgery; concluding that the indictment clearly set forth all of the elements of the offense and that furthermore a copy of the withdrawal slip was attached to the indictment as an exhibit showing the date and time of day, amount of money withdrawn, account number, and particular bank branch from which the funds were withdrawn).

177. *See, e.g.,* State v. Allen, 292 N.C. 431, 433-35 (1977) ("Properly construed the [habitual felon] act clearly contemplates that when one who has already attained the status of an habitual felon is indicted for the commission of another felony, that person may then be also indicted in a separate bill as being an habitual felon. It is likewise clear that the proceeding by which the state seeks to establish that defendant is an habitual felon is necessarily ancillary to a pending prosecution for the 'principal,' or substantive felony. The act does not authorize a proceeding independent from the prosecution of some substantive felony for the sole purpose of establishing a defendant's status as an habitual felon.").

178. *See, e.g., id.* at 435.

179. *Compare id.* at 436 (holding that habitual felon indictment was invalid because there was no pending felony prosecution to which the habitual felon proceeding could attach) *and* State v. Davis, 123 N.C. App. 240, 243-44 (1996) (trial court erred by sentencing defendant as an habitual felon after arresting judgment in all the underlying felonies for which defendant was convicted) *with* State v. Oakes, 113 N.C. App. 332, 339 (1994) (until judgment was entered upon defendant's conviction of the substantive felony, there remained a pending, uncompleted felony prosecution to which a new habitual felon indictment could

North Carolina Court of Appeals has stated that because being a habitual felon is not a substantive offense, the requirement in G.S. 15A-924(a)(5) that each element of the crime be pleaded does not apply.[180] It went on to indicate that as a status, "the only pleading requirement is that defendant be given notice that he is being prosecuted for some substantive felony as a recidivist."[181]

The relevant statutes provide that the indictment charging habitual felon or violent habitual felon status shall be separate from the indictment charging the substantive felony.[182] Although it has not ruled on the issue, in *State v. Patton*, the North Carolina Supreme Court has indicated that this language requires separate indictments.[183] In *State v. Young*,[184] the North Carolina Court of Appeals upheld an indictment that charged the underlying felony and habitual felon in separate counts of the same indictment. *Young* held that G.S. 14-7.3 does not require that a habitual felon indictment be contained in a separate bill of indictment; rather it held that the statute requires merely that the indictment charging habitual felon status "be distinct, or set apart, from the charge of the underlying felony." However, *Young* was decided before *Patton* and it is not clear that its rationale survives that later case.

The indictment for the substantive felony need not charge or refer to the habitual felon status.[185] Nor must the habitual felon indictment allege the substantive felony.[186] If the substantive felony is alleged in the habitual felon indictment and an error is made with regard to that allegation, the allegation will be treated as surplusage and ignored.[187] Finally a separate habitual felon indictment is not required for each substantive felony indictment.[188]

A number of issues have arisen regarding the timing of habitual and violent habitual felon indictments. The basic rule is that an indictment for habitual felon or violent habitual felon must be obtained before the defendant enters a plea at trial to the substantive offense.[189] The reason for this rule is "so that defendant has notice that he [or she] will be charged as a recidivist before pleading to the substantive felony, thereby eliminating the possibility that he [or she] will enter a

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attach) *and* State v. Mewborn, 131 N.C. App. 495, 501 (1998) (after the original violent habitual felon indictment was quashed, prayer for judgment continued was entered on the substantive felony, a new indictment was issued, and defendant stood trial under that indictment as a violent habitual felon; because defendant had not yet been sentenced for the substantive felony and because the original indictment placed him on notice that he was being tried as a violent habitual felon, the subsequent indictment attached to the ongoing felony proceeding and defendant was properly tried as a violent habitual felon).

180. *See* State v. Roberts, 135 N.C. App. 690, 698 (1999).

181. *Id.* at 698 (quotation omitted and emphasis deleted).

182. *See* G.S. 14-7.3 (habitual felon); 14-7.9 (violent habitual felon).

183. *See* State v. Patton, 342 N.C. 633, 635 (1996); State v. Allen, 292 N.C. 431, 433 (1977).

184. 120 N.C. App. 456, 459-61 (1995).

185. *See* State v. Todd, 313 N.C. 110, 120 (1985); State v. Peoples, 167 N.C. App. 63, 71 (2004); State v. Mason, 126 N.C. App. 318, 322 (1997); State v. Hodge, 112 N.C. App, 462, 466-67 (1993); State v. Sanders, 95 N.C. App. 494, 504 (1989); State v. Keyes, 56 N.C. App. 75, 78 (1982).

186. *See* State v. Cheek, 339 N.C. 725, 727 (1995); State v. Smith, 160 N.C. App. 107, 124 (2003); State v. Bowens, 140 N.C. App. 217, 224 (2000); State v. Roberts, 135 N.C. App. 690, 698 (1999); *Mason,* 126 N.C. App. at 322.

187. *See, e.g., Bowens*, 140 N.C. App. at 224-25.

188. *See* State v. Patton, 342 N.C. 633, 635 (1996) (rejecting the notion that a one-to-one correspondence was required); State v. Taylor, 156 N.C. App. 172, 174 (2003).

189. *See* State v. Allen, 292 N.C. 431, 436 (1977); State v. Little, 126 N.C. App. 262, 269 (1997).

The court of appeals has rejected the argument that the "cut off" is when a defendant enters a plea at an arraignment. State v. Cogdell, 165 N.C. App. 368 (2004). The court concluded that "the critical event . . . is the plea entered before the actual trial." Id. at 373.

guilty plea without a full understanding of the possible consequences of conviction."[190] A habitual or violent habitual indictment may be obtained before an indictment on the substantive charge is obtained, provided there is compliance with the statutes' notice and procedural requirements.[191] Once a guilty plea has been adjudicated on a habitual felon indictment or information, that particular pleading has been "used up" and cannot support sentencing the defendant as a habitual felon on another felony; this rule applies even if the sentencing on the original pleading has been continued.[192]

The most common challenges to habitual felon and violent habitual felon indictments are to the prior felonies alleged. G.S. 14-7.3 (charge of habitual felon), provides that indictments "must set forth the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place." G.S. 14-7.9 (charge of violent habitual felon) contains similar although not identical language. The prior convictions are treated as elements; thus, it is error to allow the State to amend an indictment to replace an alleged prior conviction.[193] Similarly, an indictment will be deemed defective if one of the alleged priors is a misdemeanor, not a felony, even if defense counsel stipulates that the prior convictions were felonies.[194] By contrast, the courts are lenient with regard to the statutory requirement that the indictment identify the state or other sovereign against whom the prior felonies were committed.[195]

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190. State v. Oakes, 113 N.C. App. 332, 338 (1994). The court of appeals has deviated from the basic timing rule in two cases. However, in both cases, (1) the habitual felon indictment was obtained before the defendant entered a plea at trial and was later replaced with either a new or superseding indictment; thus there was some notice as to the charge; and (2) both cases described the defects in the initial indictment as "technical"; thus, both probably could have been corrected by amendment. *See Oakes,* 113 N.C. App. 332; *Mewborn*, 131 N.C. App. 495.

191. *See* State v. Blakney, 156 N.C. App. 671, 675 (2003); *see also* State v. Murray, 154 N.C. App. 631, 638 (2002).

192. State v. Bradley, 175 N.C. App. 234 (2005) (when the defendant pleaded guilty to two crimes and having attained habitual felon status as to each but sentencing was continued, the original habitual felon informations could not be used to support habitual felon sentencing for a subsequent felony charge).

193. *State v. Little*, 126 N.C. App. 262, 269-70 (1997) (the State should not have been allowed to obtain a superseding indictment which changed one of the three felony convictions listed as priors; the court concluded that a change in the prior convictions was substantive and altered an allegation pertaining to an element of the offense).

194. State v. Moncree, __ N.C. App. __, 655 S.E.2d 464 (2008) (habitual felon indictment was defective where one of the prior crimes was classified as a misdemeanor in the state where it was committed; defense counsel's stipulations that all of the priors were felonies did not foreclose relief on appeal).

195. State v. Montford, 137 N.C. App. 495, 500-01 (2000) (trial court did not err in allowing the State to amend the habitual felon indictment; original indictment listed three previous felonies, but did not state that they had been committed against the State of North Carolina, instead listing that they had occurred in Carteret County; State amended the indictment by inserting "in North Carolina" after each listed felony; "we need not even address the amendment issue, as we conclude that the original indictment itself was not flawed"; although the statute requires the indictment to allege the name of the state or sovereign, we have not required rigid adherence to this rule; "the name of the state need not be expressly stated if the indictment sufficiently indicates the state against whom the felonies were committed"; the original indictment sufficiently indicated the state against whom the prior felonies were committed because "State of North Carolina" explicitly appears at the top of the indictment, followed by "Carteret County," thus, Carteret County is clearly linked with the state name); State v. Mason, 126 N.C. App. 318, 323 (1997) (indictment stated the prior assault with a deadly weapon inflicting serious injury occurred in "Wake County, North Carolina" and

Cases dealing with date issues regarding prior convictions in these indictments are summarized above, see *supra* pp. 8–9. The summaries below explore other challenges that have been asserted against the prior felony allegations in habitual felon and violent habitual felon indictments.

> *State v. McIlwaine,* 169 N.C. App. 397, 399-499 (2005) (habitual felon indictment alleged that the defendant had been previously convicted of three felonies, including "the felony of possession with intent to manufacture, sell or deliver [S]chedule I controlled substance, in violation of N.C.G.S. 90-95"; the indictment was sufficient to charge habitual felon even though it did not allege the specific name of the controlled substance).
>
> *State v. Briggs*, 137 N.C. App. 125, 130-31 (2000) (habitual felon indictment listing conviction for "felony of breaking and entering buildings in violation of N.C.G.S. 14-54" and containing the date the felony was committed, the court in which defendant was convicted, the number assigned to the case, and the date of conviction was sufficient).
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> *State v. Hicks*, 125 N.C. App. 158, 160 (1997) (no error by allowing State to amend habitual felon indictment; original indictment alleged that all of the previous felony convictions were committed after the defendant reached the age of eighteen; the State amended to allege that all but one of the previous felony convictions were committed after the defendant reached the age of eighteen; the three underlying felonies remained the same).

S. Drug Offenses

1. Sale or Delivery

Indictments charging sale or delivery of a controlled substance in violation of G.S. 90-95(a)(1) must allege a controlled substance that is included in the schedules of controlled substances.[196] Such indictments also must allege the name of the person to whom the sale or delivery was made, when that person's name is known, or allege that the person's name was unknown.[197] One exception

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that judgment was entered in Wake County Superior Court and listed voluntary manslaughter as occurring in "Wake County" and that judgment was entered in Wake County Superior Court, but did not list a state; indictment was sufficient "because the description of the assault conviction indicates Wake County is within North Carolina, and the indictment states both judgments were entered in Wake County Superior Court, we believe this, along with the dates of the offenses and convictions, is sufficient to give defendant the required notice"); State v. Young, 120 N.C. App. 456, 462 (1995) (rejecting defendant's argument that habitual felon indictment inadequately alleged the name of the state or other sovereign against whom the prior felonies were committed); State v. Hodge, 112 N.C. App. 462, 467 (1993) (upholding indictment that alleged that the felony of common law robbery was committed in "Wake County, North Carolina," and that the other priors were committed in "Wake County," descriptions which were in the same sentence; the use of "Wake County" to describe the sovereignty against which the felonies were committed was clearly a reference to Wake County, North Carolina); State v. Williams, 99 N.C. App. 333, 334-35 (1990) (habitual felon indictment setting forth each of the prior felonies of which defendant was charged and convicted as being in violation of an enumerated "North Carolina General Statutes" contained a sufficient statement of the state or sovereign against whom the felonies were committed).

196. State v. Ahmadi-Turshizi, 175 N.C. App. 783, 785-86 (2006); *see infra* pp. 47-48 (discussing allegations regarding drug name).

197. *See* State v. Bennett, 280 N.C. 167, 168-69 (1971) (an indictment for sale of a controlled substance must state the name of the person to whom the sale was made or that his or her name was unknown) (decided under prior law); State v. Calvino, 179 N.C. App. 219, 221-222 (2006) (the indictment alleged that defendant sold cocaine to "a confidential source of information" and it was undisputed that the State knew the name

to this rule has been recognized by the court of appeals in cases involving middlemen. *State v. Cotton*[198] is illustrative. In *Cotton,* the sale and delivery indictment charged that the defendant sold the controlled substance to Todd, an undercover officer. The evidence at trial showed a direct sale to Morrow, who was acting as a middleman for Todd. Defendant unsuccessfully moved to dismiss on grounds of fatal variance. The court of appeals noted that the State could overcome the motion by producing substantial evidence that the defendant knew the cocaine was being sold to a third party, and that the third party was named in the indictment. Turning to the facts before it, the court noted that the evidence showed that Todd accompanied Morrow to the defendant's house and was allowed to stay in the house while Morrow and defendant had a discussion. Todd was brought upstairs with them and waited in the bedroom when they went into the bathroom. Morrow then came out and told Todd to give him the money because the defendant was paranoid, went back into the bathroom, and came out with the cocaine. The court concluded that there was substantial evidence that the defendant knew that Morrow was acting as a middleman, and that the cocaine was actually being sold to Todd, the person named in the indictment, and thus that there was no fatal variance.[199] When there is insufficient evidence showing that the defendant knew that the intermediary was buying or taking delivery for the purchaser named in the indictment, a fatal variance results.[200]

If the charge is conspiracy to sell or deliver, the person with whom the defendant conspired to sell and deliver need not be named.[201]

2. Possession and Possession With Intent to Manufacture, Sell or Deliver

An indictment for possession of a controlled substance must identify the controlled substance allegedly possessed.[202] However, time and place are not essential elements of the offense of

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of the individual to whom defendant allegedly sold the cocaine in question; the indictment was fatally defective); State v. Smith, 155 N.C. App. 500, 512-13 (2002) (fatal variance in indictment alleging that defendant sold marijuana to Berger; facts were that Berger and Chadwell went to defendant's bar to purchase marijuana; Berger waited in the car while Chadwell went into the building and purchased marijuana on their behalf; there was no substantial evidence that defendant knew he was selling marijuana to Berger); State v. Wall, 96 N.C. App. 45, 49-50 (1989); (fatal variance between indictment charging sale and delivery of cocaine to McPhatter, an undercover officer, and evidence showing that McPhatter gave Riley money to purchase cocaine, which she did; there was no substantial evidence that defendant knew Riley was acting on McPhatter's behalf); State v. Pulliman, 78 N.C. App. 129, 131-33 (1985) (no fatal variance between indictment charging sale and delivery to Walker, an undercover officer, and evidence; evidence showed that although the sale was made to Cobb, defendant knew Cobb was buying the drugs for Walker); State v. Sealey, 41 N.C. App. 175, 176 (1979) (fatal variance between indictment charging defendant with selling dilaudid to Mills and evidence showing that defendant made the sale to Atkins); State v. Ingram, 20 N.C. App. 464, 465-66 (1974) (fatal variance between indictment charging that defendant sold to Gooche and evidence showing that the purchaser was Hairston); State v. Martindate, 15 N.C. App. 216, 217-18 (1972) (indictment that did not name the person to whom a sale was allegedly made and did not allege that the purchaser's name was unknown was fatally defective); State v. Long, 14 N.C. App. 508, 510 (1972) (same).

198. 102 N.C. App. 93 (1991).

199. *See also Pulliman*, 78 N.C. App. at 131-33.

200. *See Wall,* 96 N.C. App. at 49-50; *Smith,* 155 N.C. App. at 512-13.

201. *See, e.g.,* State v. Lorenzo, 147 N.C. App. 728, 734-35 (2001) (indictment charging conspiracy to traffic in marijuana by delivery was not defective for failing to name the person to whom defendant allegedly conspired to sell or deliver the marijuana).

202. *See* State v. Ledwell, 171 N.C. App. 328, 331 (2005).

unlawful possession.[203] Indictments charging possession with intent to sell or deliver need not allege the person to whom the defendant intended to distribute the controlled substance.[204]

For case law pertaining to drug quantity, see *infra* pp. 46–47. For case law pertaining to the name of the controlled substance, see *infra* pp. 47–48.

3. Trafficking

An indictment charging conspiracy to traffic in controlled substances by sale or delivery is sufficient even if it does not identify the person with whom the defendant conspired to sell or deliver the controlled substance.[205]

For case law pertaining to drug quantity in trafficking cases, see *infra* pp. 46–47.

4. Maintaining a Dwelling

The specific address of the dwelling need not be alleged in an indictment charging the defendant with maintaining a dwelling.[206]

5. Drug Paraphernalia

In *State v. Moore*,[207] an indictment charging possession of drug paraphernalia alleged that the defendant possessed "drug paraphernalia, to wit: a can designed as a smoking device." However, none of the evidence at trial related to a can; rather, it described crack cocaine in a folded brown paper bag with a rubber band around it. After denying the defendant's motion to dismiss, the trial court granted the State's motion to amend the indictment striking "a can designed as a smoking device" and replacing it with "drug paraphernalia, to wit: a brown paper container." The court of appeals held that because this change constituted a substantial alteration of the indictment, it was impermissible and the motion to dismiss should have been granted. It reasoned: "As common household items and substances may be classified as drug paraphernalia when considered in the light of other evidence, in order to mount a defense to the charge of possession of drug paraphernalia, a defendant must be apprised of the item or substance the State categorizes as drug paraphernalia." Without citing *Moore,* a later case held that no plain error occurred when the indictment charged the defendant with possessing "drug paraphernalia, SCALES FOR PACKAGING A CONTROLLED SUBSTANCE," but the trial court instructed the jury that it could find the defendant guilty if it concluded that he knowingly possessed drug paraphernalia, without mentioning scales or packaging.[208]

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203. *See Bennett*, 280 N.C. at 169.

204. *See* State v. Campbell, 18 N.C. App. 586, 589 (1973) (decided under prior law).

205. *See Lorenzo*, 147 N.C. App. at 734.

206. *See* State v. Grady, 136 N.C. App. 394, 396-98 (2000) (no error in allowing amendment of dwelling's address in indictment for maintaining dwelling for use of controlled substance; address changed from "919 Dollard Town Road" to "929 Dollard Town Road"; because the specific designation of the dwelling's address need not be alleged in an indictment for this offense, the amendment did not "substantially alter the charge set forth in the indictment"; also, defendant could not have been misled or surprised because another count in the same indictment contained the correct address).

207. 162 N.C. App. 268 (2004).

208. State v. Shearin, 170 N.C. App. 222, 232-33 (2005).

6. Obtaining Controlled Substance by Fraud or Forgery

Cases involving challenges to indictments charging obtaining a controlled substance by forgery are annotated below.

State v. Brady, 147 N.C. App. 755, 758 (2001) (no error in allowing amendment to change the controlled substance named from "Xanax" to "Percocet" in an indictment for obtaining a controlled substance by forgery; the name of the controlled substance is not necessary in an indictment charging this offense).

State v. Baynard, 79 N.C. App. 559, 561-62 (1986) (indictments charging crime of obtaining controlled substance by fraud and forgery under G.S. 90-108(a)(10) were adequate to support conviction, even though they did not specifically state that defendant presented forged prescriptions knowing they were forged; indictments alleged that the offense was done "intentionally" and contained the words "misrepresentation, fraud, deception and subterfuge," all of which implied specific intent to misrepresent).

State v. Fleming, 52 N.C. App. 563, 565-66 (1981) (indictment properly charged offense under G.S. 90-108(a)(10); the illegal means employed was alleged with sufficient particularity).

State v. Booze, 29 N.C. App. 397, 398-400 (1976) (indictment alleging the time and place and the persons from whom defendant attempted to acquire the controlled substance, identifying the controlled substance, and stating the illegal means with particularity, "by using a forged prescription and presenting it to" the named pharmacists, was sufficient; "it was not necessary to make further factual allegations as to the nature of the forged prescriptions or to incorporate the forged prescriptions in the bills").

7. Amount of Controlled Substance

When the amount of the controlled substance is an essential element of the offense, it must be properly alleged in the indictment. Amount is an essential element with felonious possession

of marijuana,[209] felonious possession of hashish,[210] and trafficking in controlled substances.[211] Quantity is not an element of an offense under 90-95(a)(1).[212]

8. Drug Name

When the identity of the controlled substance is an element of the offense,[213] the indictment must allege a substance that is included in the schedules of controlled substances.[214] Thus, when an indictment alleged that the defendant possessed "Methylenedioxyamphetamine (MDA), a controlled substance included in Schedule I," and no such controlled substance by that name is listed in Schedule I, the indictment was defective.[215] Similarly, an indictment that identified the controlled substance allegedly possessed, sold, and delivered as "methylenedioxymethamphetamine a controlled substance which is included in Schedule I of the North Carolina Controlled Substances Act" was defective because although 3, 4-Methylenedioxymethamphetamine was listed in

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209. *See* State v. Partridge, 157 N.C. App. 568, 570-71 (2003) (indictment charging felonious possession of marijuana was defective because it did not state drug quantity; the weight of the marijuana is an essential element of this offense); State v. Perry, 84 N.C. App. 309, 311 (1987) (the elements of felony possession were set out with sufficient clarity in indictment that specifically mentioned drug quantity).

210. *See* State v. Peoples, 65 N.C. App. 168, 168 (1983) (indictment that failed to allege the amount of hashish possessed could not support a felony conviction).

211. *See* State v. Outlaw, 159 N.C. App. 423 (trafficking indictment that failed to allege weight of cocaine was invalid) (citing State v. Epps, 95 N.C. App. 173 (1989)); State v. Trejo, 163 N.C. App. 512 (2004) (rejecting defendant's argument that the indictments charging him with trafficking in marijuana by possession and trafficking in marijuana by transportation were fatally defective because each failed to correctly specify the quantity of marijuana necessary for conviction; indictment charging trafficking in marijuana by possession alleged that defendant "possess[ed] 10 pounds or more but less than 50 pounds" of marijuana; the indictment charging defendant with trafficking in marijuana by transportation alleged that defendant "transport[ed] 10 pounds or more but less than 50 pounds" of marijuana; indictments, although overbroad, did allege the required amount of marijuana; fact that challenged indictments were drafted to include the possibility that defendant possessed and transported exactly ten pounds of marijuana (which does not constitute trafficking in marijuana) does not invalidate the indictments); *Epps*, 95 N.C. App. at 175-76 (quashing conspiracy to traffic in cocaine indictment for failure to refer to amount of cocaine); State v. Keyes, 87 N.C. App. 349, 358-59 (1987) (although statute makes it a trafficking felony to possess "four grams or more, but less than 14 grams" of heroin, the indictment charged possession of "more than four but less than fourteen grams of heroin"; distinguishing *Goforth*, discussed below, and holding that variance was not fatal; the indictment excludes from criminal prosecution the possession of exactly four grams, whereas the statute includes the possession of exactly four grams; the indictment, while limiting the scope of defendant's liability, is clearly within the confines of the statute); State v. Goforth, 65 N.C. App. 302, 305 (1983) (applying prior law that criminalized trafficking in marijuana at weights of in excess of 50 pounds and holding that indictment charging conspiracy to traffic "in at least 50 pounds" of marijuana was defective). *But see Epps*, 95 N.C. App. at 176-77 (affirming trafficking by sale conviction even though relevant count in indictment did not allege a drug quantity; defendant was charged in a two-count indictment, count one charged trafficking by possession of a specified amount of cocaine and count two charged trafficking by sale but did not state an amount; the two counts, when read together, informed defendant that he was being charged with trafficking by sale).

212. *See* State v. Hyatt, 98 N.C. App. 214, 216 (1990) ("while the quantity of drugs seized is evidence of the intent to sell, 'it is not an element of the offense'"); *Peoples*, 65 N.C. App. at 169 (same).

213. *See, e.g., supra* pp. 43, 44.

214. State v. Ahmadi-Turshizi, 175 N.C. App. 783, 784-85 (2006); State v. Ledwell, 171 N.C. App. 328 (2005).

215. *Ledwell*, 171 N.C. App. at 331-33.

Schedule I, methylenedioxymethamphetamine was not.[216] Notwithstanding this, cases have held that controlled substance indictments will not be found defective for minor errors in identifying the relevant controlled substance, such as "cocoa" instead of cocaine,[217] cocaine instead of a mixture containing cocaine,[218] and the use of a trade name instead of a chemical name.[219]

T. Weapons Offenses and Firearm Enhancement

Several cases addressing indictment issues with regard to weapons offenses and the firearm enhancement in G.S. 15A-1340.16A are annotated below.

1. Shooting into Occupied Property

State v. Pickens, 346 N.C. 628, 645-46 (1997) (no fatal variance between indictment alleging that defendant fired into an occupied dwelling with a shotgun and evidence establishing that the shot came from a handgun; the essential element of the offense is "to discharge ... [a] firearm"; indictment alleging that defendant discharged "a shotgun, a firearm" alleged that element and the averment to the shotgun was not necessary, making it mere surplusage in the indictment).

State v. Cockerham, 155 N.C. App. 729, 735-36 (2003) (indictment charging shooting into occupied property was not defective for failing to allege that defendant fired into a "building, structure or enclosure"; indictment alleged defendant shot into an "apartment" and as such was sufficient; an indictment which avers facts constituting every element of the offense need not be couched in the language of the statute).

State v. Bland, 34 N.C. App. 384, 385 (1977) (no fatal variance between indictment alleging that defendant shot into an occupied building and evidence showing that he shot into an occupied trailer; indictment specifically noted that the occupied building was located at 5313 Park Avenue, the address of the trailer).

State v. Walker, 34 N.C. App. 271, 272-74 (1977) (indictment not defective for failing to allege that the defendant knew or should have known that the trailer was occupied by one or more persons).

2. Possession of Firearm by Felon

G.S. 14-415.1 makes it a crime for a felon to possess a firearm or weapon of mass destruction. G.S. 14-415.1(c) provides that an indictment charging a defendant with this crime "shall be separate from any indictment charging him with other offenses related to or giving rise to a charge under this section." It further provides that the indictment

> must set forth the date that the prior offense was committed, the type of offense and the penalty therefore, and the date that the defendant was convicted or plead guilty to such

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216. *Ahmadi-Turshizi*, 175 N.C. App. at 785-86.

217. *See* State v. Thrift, 78 N.C. App. 199, 201-02 (1985).

218. State v. Tyndall, 55 N.C. App. 57, 61-62 (1981) (although the indictment alleged that defendant sold cocaine rather than a mixture containing cocaine, this was not a fatal variance).

219. State v. Newton, 21 N.C. App. 384, 385-86 (1974) (no fatal variance between indictment charging that defendant possessed Desoxyn and evidence that showed defendant possessed methamphetamine; Desoxyn is a trade name for methamphetamine hydrochloride).

offense, the identity of the court in which the conviction or plea of guilty took place and the verdict and judgment rendered therein.

The court of appeals has held that the statutory requirement that the indictment state the conviction date for the prior offense is directory and not mandatory.[220] Thus, it concluded that failure to allege the date of the prior conviction did not render an indictment defective.[221] Also, *State v. Boston,*[222] rejected a defendant's claim that an indictment for this offense was fatally defective because it failed to state the statutory penalty for the prior felony conviction. The court held that "the provision . . . that requires the indictment to state the penalty for the prior offense is not material and does not affect a substantial right," that the defendant was apprised of the relevant conduct, and "[t]o hold otherwise would permit form to prevail over substance." Other relevant cases are summarized below.

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

State v. Langley, 173 N.C. App. 194, 196-99 (2005) (in conviction under a prior version of G.S. 14-415.1, the court held that there was a fatal variance where the indictment charged that the defendant was in possession of a handgun and the State's evidence at trial tended to show that defendant possessed a firearm with barrel length less than 18 inches and overall length less than 26 inches, a sawed-off shotgun).[223]

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

State v. Coltrane, __ N.C. App. __, 656 S.E.2d 322 (2008) (the trial court did not err by allowing the State to amend the allegation that the defendant's underlying felony conviction occurred in Montgomery County Superior Court to state that it occurred in Guilford County Superior Court; the indictment correctly identified all of the other allegations required by G.S. 14-415.1(c).

State v. Bishop, 119 N.C. App. 695, 698-99 (1995) (indictment was not invalid for failing to allege (1) that possession of the firearm was away from defendant's home or business; (2) that defendant's prior Florida felony was "substantially similar" to a particular North Carolina crime; and (3) to which North Carolina statute the Florida conviction was similar; omission of the situs of the offense was not an error because situs is an exception to the offense, not an essential element; omission of a statement that the Florida felony was "substantially similar" to a particular North Carolina crime was not an error because the indictment gave sufficient notice of the offense charged; the indictment clearly described the felony committed in Florida, satisfying the requirements of G.S. 14-415.1(b)(3) and properly charging defendant with possession of firearms by a felon).

State v. Riggs, 79 N.C. App. 398, 402 (1986) (indictment charging that defendant possessed "a Charter Arms .38 caliber pistol, which is a handgun" was not invalid for failing to allege the length of the pistol).

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220. State v. Inman, 174 N.C. App. 567 (2005).

221. *Id.* at 571.

222. 165 N.C. App. 214 (2004).

223. At the time, the prior version of the statute made it a crime for a felon to possess "any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches, or any weapon of mass destruction as defined by G.S. 14-288.8(c)." G.S. 14-415.1(a) (2003).

3. Possession of Weapon of Mass Destruction

State v. Blackwell, 163 N.C. App. 12 (2004) (no fatal variance between indictment charging possession of weapon of mass destruction that alleged possession of "a Stevens 12 gauge single-shot shotgun" and evidence at trial that shotgun was manufactured by Jay Stevens Arms; even if there was no evidence that the shotgun was a "Stevens" shotgun, there would be no fatal variance because "any person of common understanding would have understood that he was charged with possessing the sawed-off shotgun that he used to shoot the victim).

4. Firearm Enhancement

G.S. 15A-1340.16A provides for an enhanced sentence if the defendant is convicted of a felony falling within one of the specified classes and the defendant used, displayed, or threatened to use or display a firearm during commission of the felony. The statute provides that an indictment is sufficient if it alleges that "the defendant committed the felony by using, displaying, or threatening the use or display of a firearm and the defendant actually possessed the firearm about the defendant's person."[224]

U. Motor Vehicle Offenses

1. Impaired Driving

G.S. 20-138.1(c) and 20-138.2(c) allow short-form pleadings for impaired driving and impaired driving in a commercial vehicle respectively. For a discussion of the implications of *Blakely v. Washington,*[225] on these offenses, see *supra* p. 16. A case dealing with an allegation regarding the location of an impaired driving offense is summarized below.

State v. Snyder, 343 N.C. 61, 65-68 (1996) (indictment alleged that offense occurred on a street or highway; trial judge properly permitted the State to amend the indictment to read "on a highway or public vehicular area"; although the *situs* of the impaired driving offense is an essential element, the indictment simply needs to contain an allegation of *a situs* covered by the statute and no greater specificity is required; change in this case merely a refinement in the description of the type of *situs* on which the defendant was driving rather than a change in an essential element of the offense).

2. Habitual Impaired Driving

Under the current version of the habitual impaired driving statute,[226] this offense is committed when a person drives while impaired and has three or more convictions involving impaired driving within the last ten years. Under an earlier version of the statute, the "look-back period" for prior convictions was only seven years. At least one case has held, in connection with a prosecution under the prior version of the statute, that it was error to allow the State to amend a habitual impaired driving indictment to correct the date of a prior conviction and thereby bring it within the seven-year look-back period.[227] Indictments charging habitual impaired driving must conform to G.S. 15A-928. Cases on point are summarized below.

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224. G.S. 15A-1340.16A(d).
225. 542 U.S. 296 (2004).
226. G.S. 20-138.5.
227. State v. Winslow, 360 N.C. 161 (2005).

State v. Mark, 154 N.C. App. 341, 344-45 (2002) (rejecting defendant's argument that indictment violated G.S. 15A-928 because count three was entitled "Habitual Impaired Driving"), *aff'd,* 357 N.C. 242 (2003).

State v. Lobohe, 143 N.C. App. 555, 557-59 (2001) (indictment which alleged in one count the elements of impaired driving and in a second count the previous convictions elevating the offense to habitual impaired driving properly alleged habitual impaired driving) (citing G.S. 15A-928(b)).

State v. Baldwin, 117 N.C. App. 713, 715-16 (1995) (indictment alleged the essential elements of habitual impaired driving; contrary to defendant's claim, it alleged that defendant had been previously convicted of three impaired driving offenses).

3. Speeding to Elude Arrest

G.S. 20-141.5 makes it a misdemeanor to operate a motor vehicle while fleeing or attempted to elude a law enforcement officer who is in lawful performance of his or her duties. The crime is elevated to a felony if two or more specified aggravating factors are present, or if the violation is the proximate cause of death.

An indictment for this crime need not allege the lawful duties the officer was performing.[228] When the charge is felony speeding to elude arrest based on the presence of aggravating factors, the indictment is sufficient if it charges those aggravating factors by tracking the statutory language.[229] Thus, when the aggravating factor is "reckless driving proscribed by G.S. 20-140,"[230] the indictment need not allege all of the elements of reckless driving.[231] However, when the aggravating factor felony version of this offense is charged, the aggravating factors are essential elements of the crime and it is error to allow the State to amend the indictment to add an aggravating factor.[232]

4. Driving While License Revoked

In *State v. Scott,*[233] the court rejected the defendant's argument that an indictment for driving while license revoked was defective because it failed to list the element of notice of suspension. Acknowledging that proof of actual or constructive notice is required for a conviction, the court held that "it is not necessary to charge on knowledge of revocation when unchallenged evidence shows that the State has complied with the provisions for giving notice of revocation.[234]

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228. State v. Teel, 180 N.C. App. 446, 448-49 (2006).

229. State v. Stokes, 174 N.C. App. 447, 451-52 (2005) (indictment properly charged this crime when it alleged that the defendant unlawfully, willfully and feloniously did operate a motor vehicle on a highway, Interstate 40, while attempting to elude a law enforcement officer, T.D. Dell of the Greensboro Police Department, in the lawful performance of the officer's duties, stopping the defendant's vehicle for various motor vehicle offenses, and that at the time of the violation: (1) the defendant was speeding in excess of 15 miles per hour over the legal speed limit; (2) the defendant was driving recklessly in violation of G.S. 20-140; and (3) there was gross impairment of the defendant's faculties while driving due to consumption of an impairing substance); *see also* State v. Scott, 167 N.C. App. 783, 787-88 (2005) (indictment charging driving while license revoked as an aggravating factor without spelling out all elements of that offense was not defective).

230. G.S. 20-141.5(b)(3).

231. *Stokes,* 174 N.C. App. at 451-52.

232. State v. Moses, 154 N.C. App. 332, 337-38 (2002) (error to allow the State to amend misdemeanor speeding to allude arrest indictment by adding an aggravating factor that would make the offense a felony).

233. 167 N.C. App. 783 (2005).

234. *Id.* at 787.

V. General Crimes

1. Attempt

An indictment charging a completed offense is sufficient to support a conviction for an attempt to commit the offense.[235] This is true even though the completed crime and the attempt are not in the same statute.[236] G.S. 15-144, the statute authorizing use of short-form indictment for homicide, authorizes the use of the short-form indictment to charge attempted first-degree murder.[237]

2. Solicitation

In solicitation indictments, "it is not necessary to allege with technical precision the nature of the solicitation."[238]

3. Conspiracy

For the law regarding conspiracy to sell or deliver controlled substances indictments, see *supra* p. 44. For cases pertaining to allegations regarding the date of a conspiracy offense, see *supra* p. 8.

Conspiracy indictments "need not describe the subject crime with legal and technical accuracy because the charge is the crime of conspiracy and not a charge of committing the subject crime."[239] Thus, the court of appeals has upheld a conspiracy indictment that alleged an agreement between two or more persons to do an unlawful act and contained allegations regarding their purpose, in that case to "feloniously forge, falsely make and counterfeit a check."[240] The court rejected the defendant's argument that the indictment should have been quashed for failure to specifically allege the forgery of an identified instrument.[241]

4. Accessory After the Fact to Felony

Accessory after the fact to a felony is not a lesser included offense of the principal felony.[242] This suggests that an indictment charging only the principal felony will be insufficient to convict for accessory after the fact.[243]

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235. *See* G.S. 15-170; State v. Gray, 58 N.C. App. 102, 106 (1982); State v. Slade, 81 N.C. App. 303, 306 (1986)

236. *See Slade*, 81 N.C. App. at 306 (1987) (discussing State v. Arnold, 285 N.C. 751, 755 (1974), and describing it as a case in which the defendant was indicted for the common law felony of arson but was convicted of the statutory felony of arson).

237. State v. Jones, 359 N.C. 832, 834-38 (2005) (noting that it is sufficient for the State to insert the words "attempt to" into the short form language); State v. Reid, 175 N.C. App. 613, 617-18 (2006) (following *Jones*).

238. State v. Furr, 292 N.C. 711, 722 (1977) (holding "indictment alleging defendant solicited another to murder is sufficient to take the case to the jury upon proof of solicitation to find someone else to commit murder, at least where there is nothing to indicate defendant insisted that someone other than the solicitee commit the substantive crime which is his object").

239. State v. Nicholson, 78 N.C. App. 398, 401 (1985) (rejecting defendant's argument that conspiracy to commit forgery indictment was fatally defective because it "failed to allege specifically the forgery of an identified instrument").

240. *Id.*

241. *See id.*

242. *See* State v. Jones, 254 N.C. 450, 452 (1961).

243. *Compare infra* n. 246 & accompanying text (discussing accessory before the fact). For a case allowing amendment of an accessory after the fact indictment, see *State v. Carrington*, 35 N.C. App. 53, 56-58 (1978) (indictments charged defendant with being an accessory after the fact to Arthur Parrish and an

W. Participants in Crime

An indictment charging a substantive offense need not allege the theory of acting in concert,[244] aiding or abetting,[245] or accessory before the fact.[246] Thus, the short-form murder indictment is sufficient to convict under a theory of aiding and abetting.[247] Because allegations regarding these theories are treated as "irrelevant and surplusage,"[248] the fact that an indictment alleges one such theory does not preclude the trial judge from instructing the jury that it may convict on another such theory not alleged,[249] or as a principal.[250]

unknown black male in the murder and armed robbery of a named victim; trial court did not err by allowing amendment of the indictments to remove mention of Parrish, who had earlier been acquitted).

244. *See* State v. Westbrook, 345 N.C. 43, 57-58 (1996).

245. *See* State v. Ainsworth, 109 N.C. App. 136, 143 (1993) (rejecting defendant's argument that first degree rape indictment was insufficient because it failed to charge her explicitly with aiding and abetting); State v. Ferree, 54 N.C. App. 183, 184 (1981) ("[A] person who aids or abets another in the commission of armed robbery is guilty … and it is not necessary that the indictment charge the defendant with aiding and abetting."); State v. Lancaster, 37 N.C. App. 528, 532-33 (1978).

246. *See* G.S. 14-5.2 ("All distinctions between accessories before the fact and principals … are abolished."); *Westbrook*, 345 N.C. at 58 (1996) (indictment charging murder need not allege accessory before the fact); State v. Gallagher, 313 N.C. 132, 141 (1985) (indictment charging the principal felony will support trial and conviction as an accessory before the fact).

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

248. State v. Estes, __ N.C. App. __, 651 S.E.2d 598 (2007).

249. *Estes*, __ N.C. App. __, 651 S.E.2d 598 (trial judge could charge the jury on the theory of aiding and abetting even though indictment charged acting in concert).

250. State v. Fuller, 179 N.C. App. 61, 66-67 (2006) (where superseding indictment charged the defendant only with aiding and abetting indecent liberties, the trial judge did not err in charging the jury that it could convict if the defendant was an aider or abettor or a principal).

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The Story of the Case: Factual and Emotional Case Theory

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1

Start off with something "unlawyerly".

2

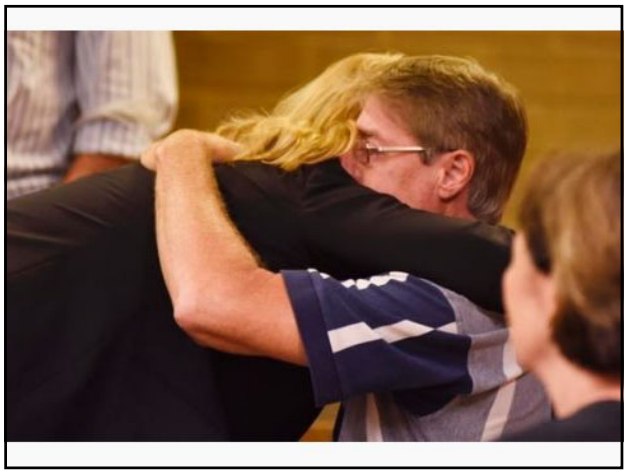
Think of the last time something moved you.

3

Think of something heroic.

4

5



6

7

Write a quick note to yourself about this thought.

8

Factual and Emotional Theory of the Case

9

Why Have One
What It Is Not
What It Is
How to Get One

10

Why have one?

11

Imagine a tool, a hack, a shortcut that:

12

- Helps a helpless person
- Puts a stop to bullying
- Makes your job easier and you look great while you do it

13

Magic?

14

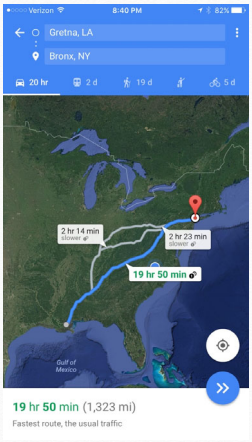
A Hack?

15

A factual and emotional case story gets you where you want to go and stops you from going where you don't.

16

A Map



17

Emotional and Factual Theory

- You can tell a busy ADA or judge what your case is about in 30 seconds
- You are always ready to argue your case
- It gives you swagger
- It makes you THAT lawyer

18

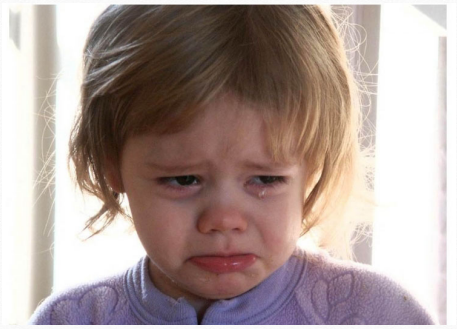
Without an emotional and factual theory, you are lost.

19

20

Without an emotional and factual theory, your client loses.

21



22

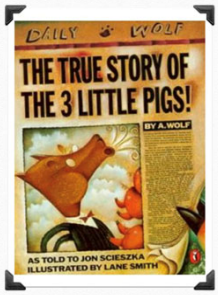
Every bad case is better with a factual and emotional case story.

23

Every case.
Every time.

24

- The Three Little Pigs
- The Real Story of the BB Wolf



25

What is not an emotional and factual case theory.

26

Reasonable Doubt

27

Nothing factual or emotional.

28

Here is a reasonable doubt test: ask a mother.

29

- Mom, did anyone *actually* see me blow down that straw house?
- Mama, I don't really know what happened and no one can said I did.
- Mommy, you know those pigs have never liked me and you know you should never believe a pig.

30

Would a mother believe that?

31

If your mother wouldn't believe you, the judge won't believe you.

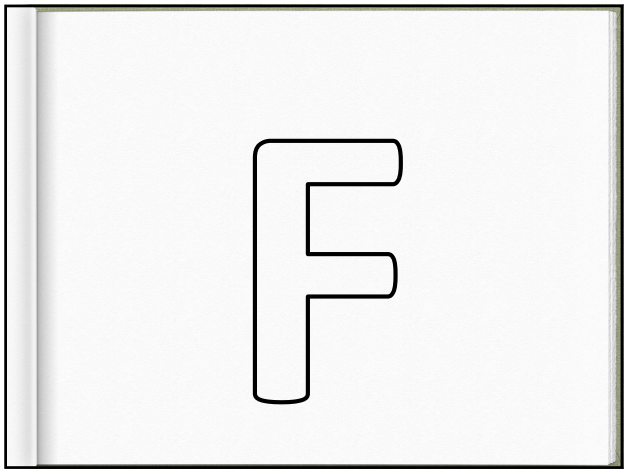
32

And your mother likes you.

33

You go with reasonable doubt as your case theory, you will fail.

34



35

Your client is F'ed
The case is F'ed
You are F'ed

36

Legalese won't help.

37

Legalese is a dead language and will kill your case:

- Alibi
- Self-defense
- Voluntary intoxication
- Entrapment

38

There is no emotion behind these words.

39

There are no facts behind these words.

40

- He was at Lowe's, loading mulch, when he heard the fire trucks race to Mr. A. Pig's house.
- Mr. A. Pig came at him with a steak knife, screaming, spitting and Mr. BB Wolf had seconds to fight back before he was killed

41

I'm waiting….

What *is* an Emotional and Factual Case Theory?

42

It is one central story that has the factual, emotional and legal reason why the right outcome for the judge is something good for your client. It is your client's story of innocence, of less blame or unfairness. It is what guides you through every part of the trial. It resolves problems and questions for the judge, it does not hide from them.

43

Elements of Factual and Emotional Case Theory

- One central story
- With factual, emotional and legal reasons why the judge should do the right thing
- Story of innocence, less blame or unfairness
- It is what guides you

44

It is one central story.

45

One story line.

Do not compete with yourself.

46

- Story of a wolf, just trying to borrow a cup of sugar when he accidentally blew down his neighbor's straw house. The neighbor was a pig anyway, who has a record for driving drunk and cannot be trusted. Besides, cross-species identification is unreliable. And that house was old anyway.

47

Factual, emotional and legal reasons why judge should do the right thing.

48

Facts, Emotion, Law

- Facts bring out emotion and move people.
- Nobody likes being told what to do or what to feel.
- The law is the background music.
- Find the right facts, the judge will find the right law.

49

50

Which moves you?

- Pigs are not reliable witnesses. You should not believe them.
- Mr. B.A. Pig, the brother of Mr. A. Pig, was scared when he saw a wolf knocking at his brother's house. He turned away quickly to call 911.

51

Which moves you?

- There is no evidence that my client had the intent to hurt anyone. The State has not one witness that can say he did.
- BB Wolf went to borrow a cup of sugar for his grandmother's cake. All he was looking for was a little help.

52

Which moves you?

- The evidence shows that Mr. BB Wolf was voluntarily intoxicated when he blew down Mr. A. Pig's house.
- Mr. BB Wolf, not understanding measurements and how much alcohol is in vanilla extract, was not thinking straight and thought he was at his grandmother's house when he knocked on Mr. A. Pig's door.

53

Story of innocence, less blame or unfairness.

54

Let me tell you a story…

- Think about the best storytellers.
  - They get us right at the start
  - They know how they want you to feel
  - They know not to waste audience's time

55

Think about the worst

- Unfocused
- No set theme
- "And then she said..and then I told her…wait, never mind, but listen…."

56

It is what guides you through every part of the trial.

57

An emotional and factual case theory gives you checklists.

58

CHECKLIST

- Opening:
  - Story can be the opening
  - If your story is about an accident, don't talk about mis-identification

59

CHECKLIST

- Cross-examination:
  - What points to make
  - What points don't help
  - What to leave alone

60

If your emotional and factual theory is mistaken identification, don't go after the witness's prior record.

61

CHECKLIST

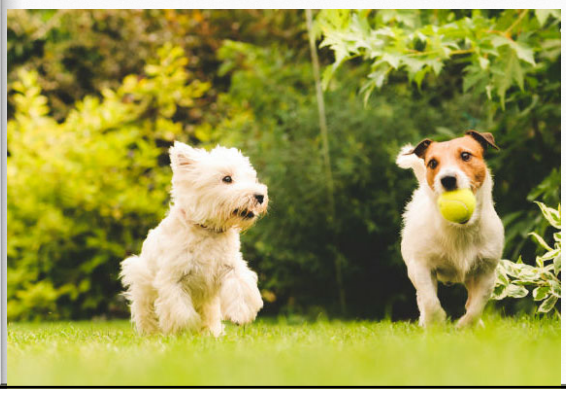
- Direct
  - What points to make
  - What points don't advance the story

62

If your emotional and factual theory is that the event never happened, don't talk about self-defense.

63

I want one! How do I get one?



64

FIVE STEPS

- Find your facts.
- Pick your brand (genre).
- Choose your three best and worst facts.
- Write a headline.
- Write a lead-in paragraph.

65

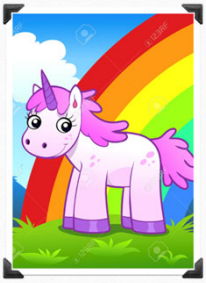
1. FACTS

- Find all the facts you can.
- Talk to your client, listen to your client.
- Read every piece of paper.
- Talk and listen to every witness.
- Field trip!

66

THAT'S THE IDEAL WORLD.

REAL WORLD?



67

REAL WORLD.

- Find all the facts you can.
- Talk to your client, listen to your client.
- Read every piece of paper.
- Talk and listen to every witness.
- Field trip.

68

2. Pick Your Genre

69

- **It just never happened** (mistake)
- **It happened but I didn't do it** (mistaken identification, alibi)
- **It happened, I did it but it was not a crime** (self-defense, accident, missing elements)
- **It happened, I did it, it was a crime but not *this* crime** (lesser included or another crime)
- **It happened, I did it, it was the charged crime, but I'm not responsible** (insanity, voluntary intoxication, duress)
- **It happened, I did it, it was a crime, I'm responsible, so what?** (jury nullification)

70

Tips on Choices

- Gets harder as you go down the list
- Mistake over lies almost every time
- Less you have to take on, the better

71

For Mr. BB Wolf

- Never happened?
- It happened but I didn't do it?
- It happened, I did it, but it is not a crime?
- It happened, I did it, it is a crime but not this crime?
- It happened, I did it, it's this crime but I'm not responsible?
- It happened, I did it, it's this crime but so what?

72

For Mr. BB Wolf

- It happened, I did it, but it is not a crime: ACCIDENT.

73

3. Choose Your Facts

- Three best that support your theory.
- Three not so good that you need to address to support your theory.

74

Three Good Facts

- He has allergies
- He was baking a cake for his grandmother
- He still had the empty cup in his hand

75

Three Bad Facts

- He blew down Mr. A. Pig's house.
- He and Mr. A. Pig were enemies.
- He was eating Mr. A. Pig when the police arrived.

76

4. Write a Headline

77

Headline is to help focus.

78

Headline How-To: U

- Unique
- Urgent
- Ultra-Specific
- Useful

79

UNIQUE

- Remember your audience
- Stand out in a busy court
- Grab attention

80

URGENT

- Get to the point
- Don’t delay
- Think about the subject lines of emails

81

ULTRA-SPECIFIC

- Legalese is not specific
- Neither is DEFENDANT
- Paint a picture

82

USEFUL

- It will explain your case and why you should get what you are requesting
- It tells you what to focus on
- It reminds you what the case is about

83

Mr. BB Wolf

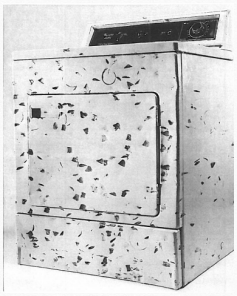
84

AN INTENT TO BORROW TURNS TO SORROW:

Grandson's Generosity and a Pig's Prejudice Results in Accidental Death

85

Practice Make Perfect



86

Red Honda Cuts In Traffic as Mom Races to Store to Beat Closing Time

87

Exhausted Man Works All Night to Pay Fine to Avoid Day in Jail

88

Husband Walks by Dirty Dishes, Wife Walks Out

89

5. WRITE A PARAGRAPH FOR YOUR FACTUAL AND EMOTIONAL CASE THEORY

90

"I would have written you a shorter letter if I had had the time".

Mark Twain

91

Stories take time

- Taking time up front saves you time and your client from doing time

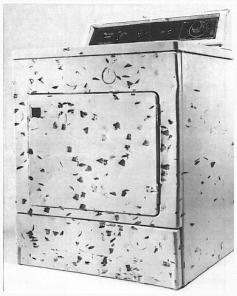
92

Telling the Story

- Wordsmithing
- Use facts to bring out the emotion
- Let the reader lead
- Paint a picture
- Emotionally hook your judge
- Turn the chronology around: start from the end
- Quotes from the case

93

Practice Make Perfect



94

"I didn't hurt anybody and I am going to jail?"; that's what 19 year old Shawn Shaw asked when he got to the police station in March. He got a speeding ticket last summer, 64 in a 55. He got sick and lost his job at Wendy's. He could not pay his ticket. He got his job back in February and was on his way home at 11:30 one night when he came to a DWI checkpoint. He was sober but tired. When the officer discovered that his license was revoked, he arrested Mr. Shaw and he went to jail that night. His mother got him out of jail the next night but he lost his job again. "I didn't hurt anybody and I am going to jail?" What can the answer be to that question?

95

- The red Honda, the down payment coming from her last paycheck from McDonald's, pulled in front of me. Her "My Kids An Honor Student" bumpersticker had to be older than that kid was now. She drove like the wind. ABC stores close at 9.

96

For BB Wolf's grandmother's birthday, he always baked a cake. That morning, he woke up, suffering from his usual allergies: coughing and roof-raising sneezing. He was not going to disappoint her. He got out the mixing bowl, the flour, the butter and saw he was out of sugar. He didn't have time to walk into town. He decided that, although his neighbors were not his best friends, they would want to help him with his grandmother's cake and loan him some sugar.

97

He knocked on the door of A. Pig's straw house, softly at first and then, as he heard voices, a bit harder. Each knock made dust fly. As hard as he tried, he could not hold back a great sneeze. To his shock, that sneeze leveled that straw house. He stepped carefully inside, calling out to A. Pig. Silence. He could, however, smell bacon and saw why: A. Pig had been blown into the fireplace. And rather than waste a good breakfast, the most important meal of the day as his grandmother taught him, BB had a few slices of pork belly, And that is what the police saw when they arrived: a wolf eating breakfast, still holding an empty cup for the sugar for his grandmother's birthday cake.

98

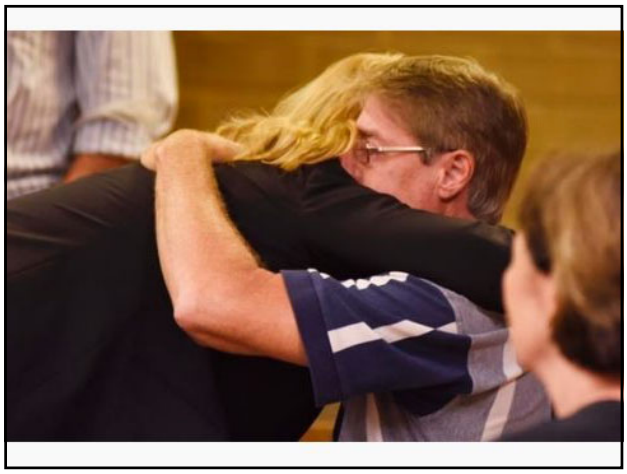
The End.

99

Wait. Remember those heroic slides?

100

101



102

103

Judges want to be heroes, too.

104

So do assistant district attorneys.

105

Let them.

106

COMMENTS, QUESTIONS?

Think you can do it?
Think you should?

107

CROSS EXAMINATION

2020 MISDEMEANOR DEFENDER

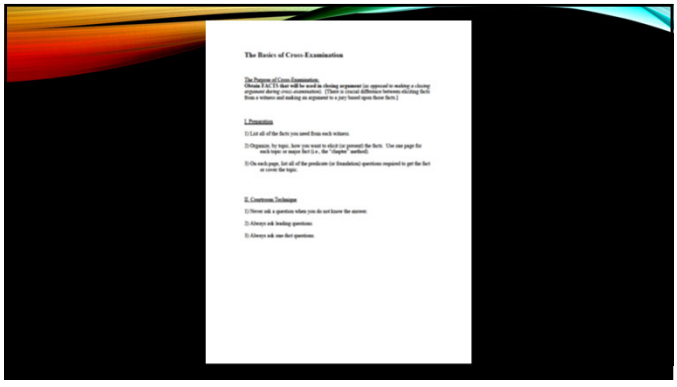
JEFF CONNOLLY
IDS REGIONAL DEFENDER

1

MAIN POINTS

1. Organized plan
2. Effective delivery

2



The Basics of Cross-Examination

The Purpose of Cross-Examination.
Ohtani § 6.7C To 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.

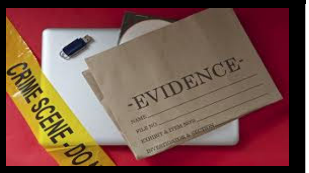
3

WHY CROSS?

- To Advance your theory of the case
- To Discredit prosecution case
- To get Ammo for closing argument
- If cross isn't serving these purposes, you don't need to cross

4

HOW TO GET READY FOR CROSS?



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

5

HOW TO PREPARE A CROSS

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

6

HOW TO CROSS

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

7

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

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

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

8

HOW TO CROSS

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

9

HOW NOT TO CROSS

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

10

MORE NOT TO DO ON CROSS

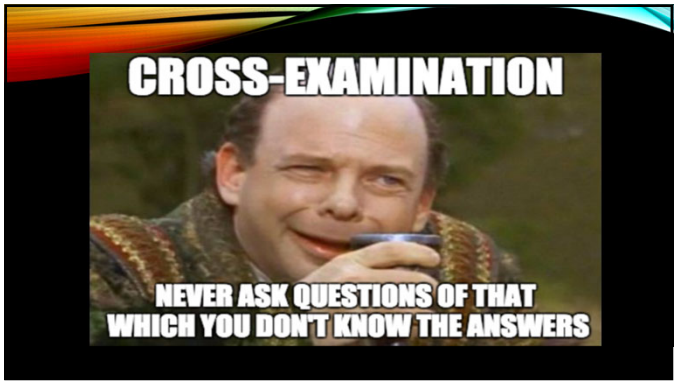
- Don't repeat the direct examination
- Don't ask the ultimate question (So, . . .)

11

MORE NOT TO DO ON CROSS

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

12



13

COMMON GROUNDS OF IMPEACHMENT

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

14

OTHER CROSS TECHNIQUES

- Stretching
- Looping
- Omissions
- Impeachment by Prior Statement

15

BASIC LAW OF CROSS

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

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BASIC LAW OF CROSS

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

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MAIN TAKEAWAYS

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

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QUESTIONS?

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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.

CROSS-EXAMINATION SKILLS

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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."

New Misdemeanor Defender
Training Fact Problem

State v. Ronny Clements: misdemeanor larceny of beer from Quickie Mart

1) Report of Alice Tubbs, Quickie Mart Clerk

Tubbs is a 60 year-old African American woman who has been working at the Quickie Mart on South Blount Street in downtown Raleigh for two years. On July 11, she was working as the cashier at the Quickie Mart at 10:00pm, when five teenage males came in. Two of them were black and three were white. Some of them had on baggy pants and necklaces and they were "cutting up". She had the feeling they were up to no good and started watching them using the mirrors in the corners of the store. They spread out in different aisles, cracking jokes and laughing loudly while they handled merchandise.

Two of the white males went to the beer cooler and Tubbs focused on them because they did not seem of age to buy alcohol. One was wearing a black T-shirt with an eagle on it and no hat. His hair was dark but he had long hair in the back dyed blonde, which stood out to Tubbs as unusual. The other was wearing an oversized white T-shirt, a backpack, and a Durham Bulls cap. The one in the cap looked shorter (between 5'6" and 5'9") and thinner than the male in the black T-shirt, who was at least 6 feet tall and muscular. The one in the cap started to walk in the direction of the store exit, but the taller male yanked him by the backpack, pulled off the backpack, and stuffed it in the smaller male's hands. Ms. Tubbs could not hear what they were saying, except that the taller man addressed the other, "Boy!" in a stern voice. The one in the cap then unzipped his backpack and held it open while the taller male took a case of Pabst Blue Ribbon beer from the cooler, put it in the backpack, and zipped it. The smaller male in the cap put the backpack on and they both started walking towards the checkout counter. The other three males also quickly approached the checkout counter. One of them asked Ms. Tubbs, "How much is this?" holding up a box of candy, while the two males who had taken the beer walked by the checkout counter and towards the store exit. They were about five feet from the exit when Ms. Tubbs said in a loud voice, "You need to pay for what's in that backpack." They all started to run except the young man in the Bulls cap who froze. Someone yelled, "Boy, you better run!" and pulled him by his backpack strap out of the store. All five then took off running down the block.

Ms. Tubbs called 911 and reported the theft. Officer Davis arrived and learned that the store's video camera was not functional. Ms. Tubbs said the owner of the Quickie Mart was so cheap and mean that he would sooner see his employees get killed than pay a dime for proper security. She had called him to report the theft right after she called the police and he had berated her for causing the store to lose money. She had had it with that man and was going to quit. Now that she thought about it, those kids had done her a favor and she wished they had gotten away with more merchandise.

2) Report of Officer Davis

I knew from Ms. Tubbs' description that the male in the black T-shirt with the eagle on it was Harland White. White has short, dark hair with a long "rat tail" peroxided white, and a muscular build from his high school football days. I have dealt with White many times before. In fact, I asked him some questions about break-ins in the neighborhood earlier this week when I ran into him on Fayetteville Street. I thought he might want to provide a little cooperation since he has a court date coming up for misdemeanor B & E and he already has one on his record.

The next day, July 12, I went to White's home and told him he had been caught on video tape stealing beer from the Quickie Mart. He said, "Man, that was all Ronny Clements. You can't pin that shit on me. I was just along for the ride and had no idea that boy was going to pull that stunt. You know he's joined the family business, dealing smack with his brother Jordie. They are messed up." We discussed the possibility of a PJC for White's pending charge in exchange for his honest testimony against Ronny Clements.

That afternoon, I interviewed Ronny Clements at his apartment building. I told him that he was caught on video tape stealing beer from the Quickie Mart and that Harland White was prepared to testify against him. He said, "Harland White? That guy has always had it in for me. He used to give Jim Sharp and me wedgies in the locker room in high school. He beat the hell out of Jim too when Jim told on him. Broke his drum for marching band too." Ronny denied involvement in the larceny but did not account for his whereabouts, saying, "I know my rights. I don't have to talk to you. This is BS."

Consistent with Ms. Tubbs' description, Ronny Clements was a young, white male, 5'8", and slight of build, wearing a silver chain with a cross on it and a Durham Bulls cap. I obtained warrants for arrest for misdemeanor larceny for Ronny Clements and Harland White.

3) Interview of Client and Family Members

a) Your client, Ronny Clements, a 19 year-old white man, is 5'8", weighs 135 lbs., wears his hair in a "mohawk", and often wears a necklace with a big silver cross on it. He lives in an apartment in downtown Raleigh with his mother and brother. He says that he has two prior juvenile delinquency adjudications for misdemeanor larceny, and one prior adult misdemeanor conviction for possessing marijuana.

Ronny says that he was not at the Quickie Mart on the night of July 11. He was home with his 25 year-old brother, Jordan Clements, from 8:00pm on. (His mother was working an extra shift and was gone all day, arriving home after midnight.) When asked what he and Jordan were doing at home that night, Ronny initially says "Nothing, hanging out," but when pressed, admits he was helping his brother package marijuana and make small sales to clients who dropped by. He only knows the clients by their first names or street names, and does not know how to contact them.

b) Jordan Clements has a record for drug offenses, including two felony convictions of sale of cocaine for which he recently served 12 months in prison. He also pled guilty to forging checks belonging to an elderly neighbor in 2012. Jordan confirms that Ronny was at home with him on

the night of July 11, and remembers that they were watching the Cubs/Cardinals game on TV. Other than that, he claims he does not remember what they were doing or whether anyone visited the apartment.

c) Mrs. Clements says that Ronny graduated from high school, but academics were a struggle for him because he has a learning disability. She had to take time off from work for school meetings about his IEP. She wishes that he would attend college but so far he does not show any interest. She is worried that he is spending too much time with his older brother Jordan, who has had drug trouble and may not be a good influence. Ronny's father died of cancer when Ronny was six years-old, which was very hard on him. He has always been a small boy, and she thinks his size combined with not having a father around made him a target for bullies. He is an obedient son who takes pride in cleaning and maintaining her car.

Cross and Direct Workshop Assignments

1. Decide on a theory of defense.

2. Prepare a direct examination that advances your theory of defense through one of the following witnesses:

- Your client, Ronny Clements
- Your client's brother, Jordan Clements
- Your client's mother, Mrs. Clements
- Jim Sharp

3. Prepare a cross examination that advances your theory of defense through one of the following witnesses:

- Alice Tubbs, the store clerk
- Harland White

THE THREE P'S OF DIRECT EXAMINATION

2020 Misdemeanor Defender Program

Susan Brooks, IDS

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#1: PLAYERS

Select witnesses who advance your theory of the case

2

#2: PREPARATION

a) Think about your questions
   i. Open-ended
   ii. Specific
b) Prepare and practice with the witness

3

#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

4

THE END

Take a bow and SIT DOWN

5

THE THREE P'S OF DIRECT EXAMINATION

1. PLAYERS

   Select witnesses who advance your theory of the case

2. PREPARATION

   a. Think about your questions

      i. Open-ended

      - Who
      - What
      - When
      - Where
      - How
      - Why
      - Tell us about/Describe

      ii. Specific

   i. Prepare and practice with the witness

3. PRODUCTION

   a. Remember primacy & recency

   b. Use "chapters" and "signposts"

   c. Elicit factual details

   d. Tap into your frustrated inner actor

   e. Have a conversation with the witness

   f. LISTEN

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.

State v. Big Bad Wolf

1

Leading Questions

- Rule 611(c) "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony."

2

Hearsay

- Rule 801(c) " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted."
- Rule 802: "Hearsay is not admissible except as provided by statute or these rules."

3

Lack of Personal Knowledge

- Rule 602: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter."

4

Speculation

- Rule 602 "Lack of Personal Knowledge"
- Rule 701: "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perceptions of the witness, and (b) is helpful to a clear understanding of his testimony or determination of a fact in issue."

5

You can lead on cross

- Rule 611 (c): "Ordinarily leading questions should be allowed on cross examination."

6

Impeachment

- A prior statement that is inconsistent with the witnesses testimony may be used to impeach that witness.

7

Right to confrontation

- Sixth Amendment to the United States Constitution: "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him."
- Crawford v. Washington, 541 U.S. 36 (2004)

8

Other crimes evidence

- Rule 404(b): "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident."
- Rule 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

9

Privileges

- Husband-wife (communications) N.C Gen. Stat. 8-57
- Doctor-patient 8-53
- Clergyman-communicants 8-53.2
- Psychologist-patient 8-53.3
- Social worker privilege 8-53.7
- Optometrist-patient privilege 8-53.9
- Attorney client privilege

10

Polygraphs

- The results of polygraph examinations are strictly forbidden to be placed into evidence.

11

Rule 702

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

12

- (1) The testimony is based upon sufficient facts or data.
- (2) The testimony is the product of reliable principles and methods.
- (3) The witness has applied the principles and methods reliably to the facts of the case.

13

Opinion on truth telling

- Improper opinion evidence under Rule 701 and improper expert evidence under Rule 702.

14

Evidence of prior crimes for impeachment purposes subject to limitations

- Rule 609 "General rule.--For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter.

  (b) Time limit.--Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence."

15

Can't ask about bad, but not dishonest, misconduct

- Rule 608(b) "Specific instances of conduct.--Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."

16

Can't ask a witness about their religious beliefs

- Rule 610: "Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced; provided, however, such evidence may be admitted for the purpose of showing interest or bias."

17

Corroboration

- In North Carolina, prior consistent statements of the witness may be introduced to corroborate that witness's testimony.

18

Third party guilt evidence

The admissibility of evidence of the guilt of one other than the defendant is governed now by the general principle of relevancy. Evidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard. It must point directly to the guilt of the other party. Under Rule 401 such evidence must tend *both* to implicate another *and* [to] be inconsistent with the guilt of the defendant.

State v. Cotton, 318 N.C. 663, 351 S.E.2d. 277 (1987)

19

Out of court statements not hearsay if not being offered for truth of the matter asserted.

20

Hearsay exception: statement against interest

- Rule 804(b) ( ) "(b) Hearsay exceptions.--The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
- Statement Against Interest.--A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement."

21