UNC SCHOOL OF GOVERNMENT

2018 Misdemeanor Defender Training

September 18 – 21, 2018 / Chapel Hill, NC

ELECTRONIC MATERIALS*

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

Tuesday, September 18

12:15-1:00	Check-in
1:00-1:30	Introduction
1:30-2:45	**Basics of Driving While Impaired: Elements, Sentencing, and Motions Practice** (75 min.) Shea Denning, Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
2:45-3:00	Break *(light snack provided)*
3:00-3:45	**Basics of Driving While Impaired**, cont'd. (45 min.) Shea Denning, Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
3:45 to 4:00	Break
4:00-5:00	**Pretrial Release Advocacy** (60 min.) Mani Dexter, Attorney North Carolina Prisoner Legal Services, Raleigh, NC
5:00	Adjourn

*IDS employees may not claim reimbursement for lunch

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Wednesday, September 19

9:00-10:00	**Ethical Issues in District Court** (ETHICS) (60 min.) Whitney Fairbanks, Assistant Director/General Counsel North Carolina Office of Indigent Defense Services, Durham, NC
10:00-10:45	**Client Interviewing** (45 min.) Valerie Pearce, Regional Defender North Carolina Office of Indigent Defense Services, Durham, NC
10:45-11:00	Break
11:00-12:45	**Interviewing Workshops** (105 min.) Rooms: 2321, 2505, 2508, 2509, 2510, 2600
12:45-1:45	Lunch *(provided in building)**
1:45-3:15	**Introduction to Structured Sentencing** (90 min.) Jamie Markham, Thomas Willis Lambeth Distinguished Chair in Public Policy UNC School of Government, Chapel Hill, NC
3:15-3:30	Break *(light snack provided)*
3:30-4:30	**Probation Violations** (60 min.) Jamie Markham, Thomas Willis Lambeth Distinguished Chair in Public Policy UNC School of Government, Chapel Hill, NC
4:30-5:30	**Introducing Evidence** (60 min.) John Donovan, Magistrate Judge Judicial District 14, Durham, NC
5:30	Adjourn

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Thursday, September 20

9:00-9:30	**Negotiating Effectively** (30 min.) Elizabeth Hopkins Thomas, Attorney Mannette & Thomas, Chapel Hill and Raleigh, NC
9:30-11:00	**Negotiating Workshops** (90 min.) Rooms: 2321, 2505, 2508, 2509, 2510, 2600
11:00-11:15	Break
11:15-12:30	**Reading Driving Records and Getting Your Client Back on the Road** (75 min.) Michael Paduchowski, Attorney Law Office of Matthew Charles Suczynski, Chapel Hill, NC
12:30-1:30	Lunch *(provided in building)**
1:30-2:30	**Suppressing Evidence in District Court** (60 min.) Phil Dixon, Jr., Defender Educator UNC School of Government, Chapel Hill, NC
2:30-3:15	**Problems with Pleadings** (45 min.) Belal Elrahal, Assistant Public Defender Mecklenburg County Office of the Public Defender, Charlotte, NC
3:15-3:30	Break *(light snack provided)*
3:30-4:15	**IDS' Resources and Policies** (45 min.) Thomas Maher, Executive Director North Carolina Office of Indigent Defense Services, Durham, NC
4:15	Adjourn

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Friday, September 21 (Mini Bench Trial School Using Hypotheticals)

9:00-10:00	**Theory of Defense/Emotional Themes** (60 min.) Tucker Charns, Regional Defender North Carolina Office of Indigent Defense Services, Durham, NC
10:00-10:30	**Cross Examination** (30 min.) Phil Dixon, Jr., Defender Educator UNC School of Government, Chapel Hill, NC
10:30-10:45	Break
10:45-12:15	**Cross Examination Workshops** (90 min.) Rooms: 2321, 2505, 2508, 2509, 2510, 2600
12:15-1:15	Lunch *(provided in building)**
1:15-1:45	**Direct Examination** (30 min.) Susan Brooks, Public Defender Administrator North Carolina Office of Indigent Defense Services, Durham, NC
1:45-3:15	**Direct Examination Workshops** (90 min.) Rooms: 2321, 2505, 2508, 2509, 2510, 2600
3:15-3:30	Break *(light snack provided)*
3:30-4:15	**Rules of Evidence Refresher** (45 min.) Jonathan Broun, Attorney North Carolina Prisoner Legal Services, Raleigh, NC
4:15-4:30	Wrap-up and Closing Remarks
4:30	Adjourn

CLE HOURS: 21.50
Includes 1 hour of ethics/professional responsibility

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

Chapter 2

Implied Consent Offenses

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

I. Driving While Impaired

A. Elements

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

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

Each of these elements is discussed in further detail below.

1. Drive

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

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

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

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

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

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

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

2. Vehicle

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

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

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

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

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

10. *Id.* at 475.

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

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

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

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

12. *Id*. § 20-4.01(49).

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

14. *Id.* at 121.

15. *Id.* at 124.

16. *Id.*

17. G.S. 4.01(49).

18. *Id.* § 20-4.01(7a).

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

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

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

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

3. Street, Highway, or Public Vehicular Area

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

a. Street, Highway

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

b. Public Vehicular Area

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

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

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

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

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

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

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

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

4. While Impaired

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

a. Under the Influence of an Impairing Substance

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

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

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

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

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

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

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

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

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

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

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

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

(i) Alcohol

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

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

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

(iii) Drug

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

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

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

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

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

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

b. Proving Appreciable Impairment

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

(i) Opinion Testimony

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

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

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

Arresting Officer: Yes, I did.

Prosecutor: What was that opinion?

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

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

46. *Id.*

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

48. *See id.*

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

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

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

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

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

(ii) Proving Impairment by Drugs

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

(A) Drug Recognition Expert Combined with Chemical Analysis

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

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

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

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

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

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

(B) Opinion Testimony from Experienced Officer

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

(C) Defendant's Admission Corroborated by Expert Testimony

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

c. Per Se Impairment

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

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

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

55. *Id.* at 259.

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

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

(i) Alcohol Concentration

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

(ii) Relevant Time after Driving

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

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

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

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

59. *Id.* at 635.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) Results Shall Be Deemed Sufficient

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

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

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

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

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

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

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

79. *Id.* at 81, 84.

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

81. *Id.*

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

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

(v) Margin of Error

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

(vi) Proving Per Se Impairment with a Chemical Analysis

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

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

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

85. *Id.* at 165.

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

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

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

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

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

91. *Id.* § 20-4.01(3a).

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

(A) Confrontation Clause and Notice and Demand

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

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

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

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

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

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

(1) Chemical Analysis of Breath in District Court

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

107. *Id.*

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

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

110. *Id.* at 324.

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

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

113. *Id*. § 20-139.1(e2).

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

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

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

(a) Remote Testimony

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

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

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

(B) Proving Per Se Impairment Without a Chemical Analysis

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

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

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

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

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

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

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

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

123. *Id.* at 592.

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

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

126. 330 N.C. at 592.

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

128. *Id.* at 506.

129. *Id.* at 507.

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

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

(C) Retrograde Extrapolation

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

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

132. *Id.* at 507.

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

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

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

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

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

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

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

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

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

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

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

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

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

d. Schedule I Controlled Substance

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

B. Pleading Requirements

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

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

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

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

142. *Id.* § 90-89(3)m.

143. *Id.* § 90-89(3)c.

144. *Id.* § 90-90(1)d.

145. *Id.* § 90-90(1).

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

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

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

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

150. *Id.* at 437.

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

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

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

C. Aiding and Abetting

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

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

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

See Smith, *Blakely Bill*, at 28.

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

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

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

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

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

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

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

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

154. See *supra* note 153.

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

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

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

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

159. *Id.* at 1184.

PRETRIAL RELEASE ADVOCACY

2018 Misdemeanor Defender Training

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Fundamentals of bail

- Intended to assure appearance of client in court
- Default is release (laws and policies)
- In reality, functions to keep poor people in jail
- Biased against people of color

What we can do

- Systemic changes:
  - Eliminate/reduce money bail
  - More use of risk assessments (but they have problems also)
  - Selective pretrial supervision (if high risk)
- Change the discussion:
  - Danger to the community is NOT what individual client might do
    - Mitigate with risk assessments and selective supervision
  - Danger is actual harm that will result in jailing bailable defendants pretrial
    - Financial costs to families and communities
    - Worse case outcomes (convictions and sentences)
    - More FTAs
    - More future criminal conduct (before and after resolution of case)
    - Less reliable criminal justice system
      - Leads to less trust in criminal justice system
        - Especially for people of color
- Individual cases:
  - Prepare (gather information)
  - Communicate (with client and with others, on both sides)
  - Understand the issues
  - Advocate
    - Early involvement
    - Bond hearings
    - Appeal to Superior Court
    - Petition for Writ of Habeas Corpus

Efforts around the country to improve pretrial release

- Organizations
- Legislation
- Litigation

Resource materials provided:

NCCALJ Report on North Carolina
PJI North Carolina Update 2018
The Hidden Costs of Pretrial Detention
Downstream Consequences of Misdemeanor Pretrial Detention
Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes
An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System
DOJ Amicus Brief in *Walker*

Sample pleadings:

Appeal of Bond to Superior Court
Petition for Writ of Habeas Corpus

CRIMINAL INVESTIGATION & ADJUDICATION

COMMITTEE REPORT
[APPENDIX C: PRETRIAL JUSTICE]

In September 2015, Chief Justice Mark Martin convened the North Carolina Commission on the Administration of Law and Justice (NCCALJ), a sixty-five member, multidisciplinary commission, requesting a comprehensive and independent review of North Carolina's court system and recommendations for improving the administration of justice in North Carolina. The Commission's membership was divided into five Committees: (1) Civil Justice, (2) Criminal Investigation and Adjudication, (3) Legal Professionalism, (4) Public Trust and Confidence, and (5) Technology. Each Committee independently made recommendations within its area of study.

This is the report of the Criminal Investigation and Adjudication Committee along with Appendix C, Pretrial Justice. To access the Committee's full report and all four appendices, or to access the full report of the NCCALJ, including all five of the Committee reports, visit www.nccalj.org.

North Carolina Commission on the Administration of Law & Justice

CRIMINAL INVESTIGATION & ADJUDICATION
COMMITTEE REPORT

This report contains recommendations for the future direction of the North Carolina court system as developed independently by citizen volunteers. No part of this report constitutes the official policy of the Supreme Court of North Carolina, of the North Carolina Judicial Branch, or of any other constituent official or entity of North Carolina state government.

EVIDENCE-BASED RECOMMENDATIONS TO IMPROVE THE STATE'S CRIMINAL JUSTICE SYSTEM

COMMITTEE CHARGE & PROCEDURES

The Criminal Investigation and Adjudication Committee of the North Carolina Commission on the Administration of Law and Justice (NCCALJ) was charged with identifying areas of concern in the state's criminal justice system and making evidence-based recommendations for reform. Starting with a comprehensive list of potential areas of inquiry, the Committee narrowed its focus to the four issues identified below. Its inquiry into these issues emphasized data-driven decision-making and a collaborative dialogue among diverse stakeholders. The Committee was composed of representatives from a broad range of stakeholder groups and was supported by a reporter. When additional expertise was needed on an issue, the Committee formed subcommittees (as it did for Juvenile Reinvestment and Indigent Defense) or retained outside expert assistance from nationally recognized organizations (as it did for Criminal Case Management and Pretrial Justice).

The Committee met nine times. The subcommittee on Indigent Defense met four times; the

subcommittee on Juvenile Reinvestment met twice. Commissioners heard from interested persons and more than thirty state and national experts and judicial officials. The Committee chair, reporter, and subcommittee members gave presentations to and sought feedback on the Committee's work from a variety of groups, including for example, the N.C. Sheriffs' Association, N.C. Senior Resident Superior Court Judges, N.C. Chief District Court Judges, N.C. Police Chiefs, and the governing body of the N.C. Police Benevolent Association. In addition to support from the Committee reporter, NCCALJ staff, the North Carolina Administrative Office of the Courts' Research and Planning Division, the National Center for State Courts (NCSC), and the North Carolina Sentencing Policy and Advisory Commission provided data and research. The Committee prepared an interim report, which was presented to the public in August 2016 for online feedback and in-person comments at four public meetings held around the state. That feedback was considered by the Committee in formulating its final recommendations. For more detail on all of the Committee's recommendations, please see the attached Appendices noted below.

RECOMMENDATIONS

The Criminal Investigation and Adjudication Committee of the North Carolina Commission on the Administration of Law and Justice makes the following evidence-based recommendations to improve the state's criminal justice system:

• JUVENILE REINVESTMENT

As detailed in Appendix A, the Committee recommends that North Carolina raise the juvenile age to eighteen for all crimes except violent felonies and traffic offenses. Juvenile age refers to the cut-off for when a child is adjudicated in the adult criminal justice system versus the juvenile justice system. Since 1919, North Carolina's juvenile age has been set at age sixteen; this means that in North Carolina sixteen- and seventeen-year-olds are prosecuted in adult court. Only one other state in the nation still sets the juvenile age at sixteen. Forty-three states plus the District of Columbia set the juvenile age at eighteen; five states set it at seventeen. The Committee found, among other things, that the vast majority of North Carolina's sixteen- and seventeen-year-olds commit misdemeanors and nonviolent felonies; that raising the age will make North Carolina safer and will yield economic benefit to the state and its citizens; and that raising the age has been successfully implemented in other states, is supported by scientific research, and would remove a competitive disadvantage that North Carolina places on its citizens.

In addition to recommending that North Carolina raise the juvenile age, the Committee's proposal includes a series of recommendations designed to address concerns that were raised by prosecutors and law enforcement officials and were validated by evidence. These recommendations include, for example, requiring the Division of Juvenile Justice to provide more information to law enforcement officers in the field, providing victims with a right to review certain decisions by juvenile court counselors, and implementing technological upgrades so that prosecutors can have meaningful access to an individual's juvenile record. Importantly, the

Committee's recommendation is contingent upon full funding. The year-long collaborative process that resulted in this proposal also resulted in historic support from other groups, including the North Carolina Sheriffs' Association, the North Carolina Association of Chiefs of Police, the North Carolina Police Benevolent Association, the North Carolina Chamber Legal Institute, the John Locke Foundation, and Conservatives for Criminal Justice Reform. Additionally, this issue has received significant public support. Of the 178 comments submitted on it during the NCCALJ public comment period, 96% supported the Committee's recommendation to raise the age.

• CRIMINAL CASE MANAGEMENT

The Committee recommends that North Carolina engage in a comprehensive criminal case management reform effort, as detailed in the report prepared for the Committee by the National Center for State Courts (NCSC) and included as Appendix B. Article I, section 18 of the North Carolina Constitution provides that "right and justice shall be administered without favor, denial, or delay." Regarding the latter obligation, North Carolina is failing to meet both model criminal case processing time standards as well as its own more lenient time standards. Case delays undermine public trust and confidence in the judicial system and judicial system actors. When unproductive court dates cause case delays, costs are inflated for both the court system and the indigent defense system by dedicating — sometimes repeatedly — personnel such as judges, courtroom staff, prosecutors, and defense lawyers to hearing and trial dates that do not move the case toward resolution. Unproductive court dates also are costly for witnesses, victims, and defendants and their families, when they miss work and incur travel expenses to attend proceedings. Case delay also is costly for local governments, which must pay the costs for excessive pretrial detentions, pay to transport detainees to court for unproductive hearings, and pay officers for time spent traveling to and attending such hearings. Delay also exacerbates evidence processing backlogs for state and local crime labs and drives up costs for those entities. The report at Appendix B provides a detailed road map for implementing the recommended case management reform effort, including, among other things, adopting or modifying time standards and performance measures, establishing and evaluating pilot projects, and developing caseflow management templates. The report, which also recommends that certain key participants be involved in the project and a project timeline, was unanimously adopted by the Committee.

• PRETRIAL JUSTICE

As described in the report included as Appendix C, the Committee unanimously recommends that North Carolina carry out a pilot project to implement and assess legal- and evidence-based pretrial justice practices. In the pretrial period — the time between arrest and when a defendant is brought to trial — most defendants are entitled to conditions of pretrial release. These can include, for example, a written promise to appear in court or a secured bond. The purpose of pretrial conditions is to ensure that the defendant appears in court and commits no harm while on release. Through pretrial conditions, judicial officials seek to "manage" these two pretrial risks. Evidence shows that North Carolina must improve its approach to managing pretrial risk. For example, because the state lacks a preventative detention procedure, the only option for detaining highly dangerous defendants

is to set a very high secured bond. However, if a highly dangerous defendant has financial resources — as for example a drug trafficker may — the defendant can "buy" his or her way out of pretrial confinement by satisfying even a very high secured bond. At the other extreme, North Carolina routinely incarcerates pretrial very low risk defendants simply because they are too poor to pay even relatively low secured bonds. In some instances these indigent defendants spend more time in jail during the pretrial phase than they could ever receive if found guilty at trial. These and other problems — and the significant costs that they create for individuals, local and state governments, and society — can be mitigated by a pretrial system that better assesses and manages pretrial risk. Fortunately, harnessing the power of data and analytics, reputable organizations have developed empirically derived pretrial risk assessment tools to help judicial officials better measure a defendant's pretrial risk. One such tool already has been successfully implemented in one of North Carolina's largest counties. The recommended pilot project would, among other things, implement and assess more broadly in North Carolina an empirically derived pretrial risk assessment tool and develop an evidence-based decision matrix to help judicial officials best match pretrial conditions to empirically assessed pretrial risk. Such tools hold the potential for a safer and more just North Carolina.

• INDIGENT DEFENSE

As discussed in more detail in Appendix D, the Committee offers a comprehensive set of recommendations to improve the State's indigent defense system. Defendants who face incarceration in criminal court have a constitutional right to counsel to represent them. If a person lacks the resources to pay for a lawyer, counsel must be provided at state expense. Indigent defense thus refers to the state's system for providing legal assistance to those unable to pay for counsel themselves. North Carolina's system is administered by the Office of Indigent Defense Services (IDS). When the State fails to provide effective assistance to indigent defendants, those persons can experience unfair and unjust outcomes. But the costs of failing to provide effective representation are felt by others as well, including victims and communities. Failing to provide effective assistance also creates costs for the criminal justice system as a whole, when problems with indigent defense representation cause trial delays and unnecessary appeals and retrials. While stakeholders agree that IDS has improved the State's delivery of indigent defense services, they also agree that in some respects the system is in crisis. The attached report makes detailed recommendations to help IDS achieve this central goal: ensuring fair proceedings by providing effective representation in a cost-effective manner. The report recommends, among other things, establishing single district and regional public defender offices statewide; providing oversight, supervision, and support to all counsel providing indigent defense services; implementing uniform indigency standards; implementing uniform training, qualification, and performance standards and workload formulas for all counsel providing indigent services; providing reasonable compensation for all counsel providing indigent defense services; and reducing the cost of indigent defense services to make resources available for needed reforms. Implementation of these recommendations promises to improve fairness and access, reduce case delays, and increase public trust and confidence.

This report contains recommendations for the future direction of the North Carolina court system as developed independently by citizen volunteers. No part of this report constitutes the official policy of the Supreme Court of North Carolina, of the North Carolina Judicial Branch, or of any other constituent official or entity of North Carolina state government.

APPENDIX C

PRETRIAL JUSTICE

Criminal Investigation and Adjudication Committee
October 2016

PRETRIAL JUSTICE REFORM FOR NORTH CAROLINA

NCCALJ COMMITTEE ON CRIMINAL INVESTIGATION & ADJUDICATION REPORT

OCTOBER 2016

The Committee unanimously recommends that the Chief Justice appoint a Pretrial Justice Study Team (Study Team) to carry out a Pilot Project to implement and assess legal- and evidence-based pretrial justice practices. As used here, the term legal- and evidence-based pretrial justice practices refers to practices that comport with the law and that are driven by research. Such practices have been endorsed by many justice system stakeholder groups, including the Conference of Chief Justices; the Conference of State Court Administrators; the International Association of Chiefs of Police; the National Sheriffs' Association; the Association of Prosecuting Attorneys; the National Legal Aid and Defenders Association; the National Association of Criminal Defense Lawyers; the National Association of Counties; and the American Bar Association. Their use has been shown to produce excellent results. With one exception, legal and evidence-based pretrial justice practices are not in place in North Carolina. Although one North Carolina jurisdiction—Mecklenburg County—has implemented some of these practices, all such practices are not in place in that jurisdiction and to date rigorous evaluation of their implementation has not been done. The Committee recommends implementing and evaluating the full range of legal- and evidence-based pretrial justice practices identified below in North Carolina through a Pilot Project in five to seven counties.

Background

After identifying pretrial justice reform as a top priority for its work, in February 2016, the Committee received an overview of how pretrial release currently works in North Carolina; heard from John Clark, senior manager, Technical Assistance, Pretrial Justice Institute (PJI) and a team of PJI experts about current research and developments in pretrial risk assessment and risk management; received a briefing on Mecklenburg County's experience with pretrial justice reform; and heard a briefing on the Commonwealth of Virginia's experience with the same. In the Spring of 2016, the Committee issued a Request for Expert Assistance on Pretrial Release Reform. Subsequently the Commission, through the National Center for State Courts, contracted with PJI to provide the requested assistance. Additionally, the Committee received and considered an 88-page response from the North Carolina Bail Agents Association, and heard from that Association's President and members at its October 2016 meeting.

Pilot Project

The recommended Pilot Project should include, at a minimum, the following legal- and evidence-based pretrial justice practices. All of these practices are discussed in more detail in the PJI report, from which much of this content is directly drawn.[i]

- The use of an empirically-derived pretrial risk assessment tool by the magistrate and all subsequent decisionmakers. Implementing an empirically-derived pretrial risk assessment tool is the keystone to a 21st century, legal and evidence-based pretrial release system. First, research demonstrates that such tools are highly effective in sorting defendants into categories showing their probabilities of success on pretrial release in terms of public safety

and court appearance. Second, such tools can track any disparate impacts that might result through their use on racial and ethnic groups; if disparities arise, they can be easily identified, which is the first step in addressing them. Third, using an empirically-derived pretrial risk assessment tool allows a jurisdiction to make valid comparisons between different types of release or specific conditions of release. Fourth, knowing the risk levels of defendants who are in jail helps a jurisdiction assess whether it is using its expensive jail resources for those who need to be there because of their risks. Fifth, knowing the risk levels of defendants coming through the system can help officials plan for, and justify to taxpayers, the resources needed to address the risks. Recognizing these benefits, at least seven states – Colorado, Delaware, Hawaii, Kentucky, New Jersey, Virginia, and West Virginia – have passed laws requiring the use of statewide empirically-derived pretrial risk assessment tools. The Committee recommends use of the Arnold Foundation's PSA-Court tool, in part because it already has been successfully implemented in Mecklenburg County, North Carolina.

- The development of a decision matrix to help magistrates and judges make pretrial release decisions. Once the risk assessment is completed on a defendant, the next step is to determine how to use that information to make a release/detention decision. Research is providing guidance on how to do that, matching identified risk levels with appropriate risk management strategies. For example, defendants who are found to be low risk have very high rates of success on pretrial release. Research has shown that these already high rates cannot be improved by imposing restrictive conditions of release on low risk defendants. Also, it must be recognized that although the charge may provide little information on a defendant's risk to public safety or to fail to appear in court, the impact of new criminal activity or failing to appear on the more serious charge is perceived to be much greater. Therefore, many jurisdictions using empirically-derived pretrial risk assessment tools have developed matrices that combine the risk level with charge types, for example, non-violent misdemeanor, violent misdemeanor, non-violent felony, and violent felony. The resulting intersection of the risk level and charge type produces a suggested release/detention decision. The decision itself remains within the discretion of the judge or magistrate after considering the risk assessment, the matrix, and any other relevant factors.
- The implementation of risk management strategies aimed at matching risk levels with the most appropriate level of support or supervision. Put another way: any conditions set on a defendant's pretrial release should be related to the risk identified for that individual defendant.
- A constitutionally valid preventative detention procedure to ensure that wealthy defendants who present an unacceptable risk cannot secure release simply by paying a money bond.
- Encouraging use of criminal process that does not require arrest for low-risk defendants.
- Early involvement by the prosecutor and defense counsel in the setting of conditions of pretrial release.
- Procedures for timely review, in every case, by a judge of a magistrate's pretrial release determination for in-custody defendants.
- Evaluation of a variety of conditions of pretrial release (including but not limited to: secured bonds, unsecured bonds, pretrial services, electronic monitoring, and court date reminder systems) for defendants based on their assessed risk.
- Training for all Pilot Project participants.
- Robust, uniform empirical evaluation of all components of the Pilot Project that takes into consideration the three goals of the pretrial release decision-making process: to provide

reasonable assurance of the safety of the community; to provide reasonable assurance of appearance in court; and to maximize pretrial release.
- Recommendations by the Study Team regarding whether or not any of the components of the Pilot Project should be implemented more broadly or statewide.

The Committee recommends that the Study Team be chaired by a North Carolina judicial official and be supported by technical assistance from a well-regarded and nationally known entity in the field of pretrial justice reform as well as full-time administrative staff. In its first phase, the Study Team should identify, for the Director of the North Carolina Administrative Office of the Courts, any changes to statutes or court rules that are required to carry out the Pilot Study.

Committee Members

Committee members included:

Augustus A. Adams, N.C. Crime Victims Compensation Committee
Asa Buck III, Sheriff Carteret County & Chairman N.C. Sheriffs' Association
Randy Byrd, President, N.C. Police Benevolent Association
James E. Coleman Jr., Professor, Duke University School of Law
Kearns Davis, President, N.C. Bar Association
Paul A. Holcombe, N.C. District Court Judge
Darrin D. Jordan, lawyer, & Commissioner, N.C. Indigent Defense Commission
Robert C. Kemp III, Public Defender & Immediate Past President, N.C. Defenders' Association
Sharon S. McLaurin, Magistrate & Past-President, N.C. Magistrates' Association.
R. Andrew Murray Jr., District Attorney & Immediate Past President, N.C. Conference of District Attorneys
Diann Seigle, Executive Director, Carolina Dispute Settlement Services
Anna Mills Wagoner, Senior Resident Superior Court Judge
William A. Webb, Commission Co-Chair, Committee Chair & Ret. U.S. Magistrate Judge

[i] See attached. UPGRADING NORTH CAROLINA'S BAIL SYSTEM: A BALANCED APPROACH TO PRETRIAL JUSTICE USING LEGAL AND EVIDENCE-BASED PRACTICES, Pretrial Justice Institute, 2016. The PJI report is also available online at http://nccalj.org/wp-content/uploads/2016/10/Upgrading-NCs-Bail-System-PJI-2016-003.pdf.

UPGRADING NORTH CAROLINA'S BAIL SYSTEM:
A BALANCED APPROACH TO PRETRIAL JUSTICE USING LEGAL AND EVIDENCE-BASED PRACTICES

PRETRIAL JUSTICE INSTITUTE

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August 15, 2016

Gaithersburg, MD

Updated August 2016

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PREFACE

The North Carolina Commission on the Administration of Law and Justice contracted, through the National Center for State Courts with the Pretrial Justice Institute (PJI) to produce a report containing evidence-based recommendations to improve North Carolina's pretrial justice system.

The Pretrial Justice Institute is a market-driven organization that advances safe, fair and effective pretrial justice that honors and protects all people. We do this by monitoring the state of policy and practice across the states, convening communities of practice to reach common goals, communicating about the law and research to diverse groups of people, demonstrating that moving from resource- to risk-based decision-making is possible, and operating with business discipline.

Below are several terms that appear in this report, and definitions for how those terms are used.

Bail: Based on legal and historical research as well as accepted notions underlying pretrial social science research, "bail" is defined as a process of conditional pretrial release.[1] Technically, bail is not money. States should not be faulted for blurring the concepts of money (a condition of release) and bail (release) because for roughly 1,500 years, paying money (or giving up property before that) was the only condition used in England and America to provide reasonable assurance of court appearance. Nevertheless, recognizing that bail is not money helps states move forward in their efforts to improve pretrial justice without unnecessary confusion.

North Carolina defines bail as money, (G.S. 15A-531(4); G.S. 58-71-1(2)), but this definition does not appear to pose the major problems we see in other states, such as constitutional "right to bail" provisions. When trying to articulate the right that North Carolina defendants enjoy, however, at least some local pretrial release policies contain quotes from U.S. Supreme court opinions equating the "right to bail" with the "right to release" before trial and the "right to freedom before conviction." Making sense of these and other statements made about bail throughout its history requires an understanding that bail means release.

At its core, pretrial justice is simply an attempt to release and detain the right defendants, using legal and evidence-based practices to create rational, fair, and transparent pretrial processes. Except when necessary to make some point, this report will mostly avoid using the word "bail" in favor of the term "release." When the term bail is used, however, such as describing "money-based bail practices" or making various references to the bail literature, the reader should recognize that the authors define "bail" as a process of conditional pretrial release.

[1] Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, National Institute of Corrections, (2014), [hereinafter *Fundamentals]*.

Empirically-derived risk assessment: A core element of evidence-based pretrial justice practices is the use of an objective risk assessment tool that has been constructed and tested on the basis of research demonstrating the tool's success in sorting defendants into categories showing their probabilities of appearance in court and of completing the pretrial period without any arrests for new criminal activity. This paper uses the term "empirically-derived risk assessment" to describe such tools.

Legal and evidence-based practices: Legal and evidence-based practices are "interventions and practices that are consistent with the pretrial legal foundation, applicable laws, and methods research has proven to be effective in decreasing failures to appear in court and danger to the community during the pretrial stage. The term is intended to reinforce the uniqueness of the field of pretrial services and ensure that criminal justice professionals remain mindful that program practices are often driven by law and when driven by research, they must be consistent with the pretrial legal foundation and the underlying legal principles."[2]

Secured bond: As used in this report, a secured bond is one that requires a financial condition be met before a defendant can be released from custody. That condition can be met by payment of the bond amount by the defendant or others (e.g., family or friends) or by guarantee of payment by a licensed commercial bail bonding company.

Unsecured bond: An unsecured bond is one in which the defendant pays no money to the court in order to be released, but is liable for the full amount of the bond upon his or her failure to appear in court.

[2] Marie VanNostrand, Legal and Evidence-Based Practices: Applications of Legal Principles, Laws and Research to the Field of Pretrial Services, Nat'l Inst. of Corr. (2007), at 12.

EXECUTIVE SUMMARY

This report focuses on helping North Carolina officials work toward a balanced approach to achieving the three goals of the pretrial release decision-making process: to provide reasonable assurance of the safety of the community; to provide reasonable assurance of appearance in court; and to maximize pretrial release. It does so by focusing on legal and evidence-based practices—ones that fully comport with the law and that are driven by research. The use of such practices has been fully endorsed by all the key justice system stakeholder groups, including: the Conference of Chief Justices; the Conference of State Court Administrators; the International Association of Chiefs of Police; the National Sheriffs' Association; the Association of Prosecuting Attorneys; the National Legal Aid and Defenders Association; the National Association of Criminal Defense Lawyers; the National Association of Counties; and the American Bar Association. And the use of such practices has been shown to produce excellent results.

Except for very promising work being done in Mecklenburg County, legal and evidence-based pretrial justice practices are not in place in North Carolina. Magistrates and judges in the state place significant emphasis on an antiquated tool—bond guidelines—which several federal courts around the country have recently called unconstitutional. Courts also rely heavily on a release option—the secured bond—that was established in the 19th Century to address a problem that was unique to that time; the ability of a criminal defendant to flee into the vast wilderness of America's growing frontier and simply disappear, never to face prosecution. And only 40 of the state's 100 counties are served by pretrial services programs that can provide supervision of defendants released by the court with conditions of pretrial release. Many of these programs have very limited supervision capacity.

The model for legal and evidence-based pretrial release practices in North Carolina includes the use of an empirically-derived pretrial risk assessment tool, the development of a decision matrix that would help magistrates and judges make pretrial release decisions, the implementation of risk management strategies aimed at matching risk levels with the most appropriate level of support or supervision, the expanded use of citation releases by law enforcement, the very early involvement of the prosecutor and defense, and the initiation of automatic bond reviews for in-custody misdemeanor defendants.

Implementing such a model of legal and evidence-based practices in North Carolina would be greatly facilitated by changes in the state's laws. Current North Carolina law does not expressly provide for a right to actual pretrial release—it is crafted only in terms of setting or not setting conditions—nor does it articulate a procedure for preventive detention of high risk defendants. A right merely to have conditions set, coupled with the statutory provisions discussing those conditions as well as no decent process for risk-based detention, naturally moves North Carolina magistrates and judges toward using secured money conditions to address risk for both court appearance and public safety, and toward attempting to use unattainable money conditions to detain defendants posing extremely high pretrial risk. In addition, although the statute speaks of pretrial risk, it makes determinations of who is entitled to having release

conditions set based primarily on charge as a proxy for risk, and subtly points judicial officials toward using the money condition to address risk. The better practice would be to set forth a right to release for all except extremely high-risk defendants (or defendants who are not as risky but who also face extremely serious charges, or both), provide for a lawful and transparent detention provision based on risk to allow pretrial detention with no conditions, and then create mechanisms so that persons released pretrial are released immediately.

Based on this review of pretrial justice in North Carolina, the following actions are recommended.

Short-Term Recommendations:

- Judicial officials should immediately begin issuing unsecured bonds for pretrial release instead of secured bonds.
- State officials should appoint a Legal and Evidence-Based Practices Implementation Team to oversee the implementation of the recommendations of this report.
- The Implementation Team should develop a vision statement for a state-wide, data-driven pretrial justice system in North Carolina.
- The Implementation Team should develop an Implementation Plan based upon the vision statement, with a focus on initially implementing the plan in 5 to 7 pilot counties.
- The Implementation Team should incorporate the following elements in its plan:
    - The use of an empirically-derived pretrial risk assessment tool by every magistrate in every criminal case at the initial appearance
    - The use of a release/detention matrix that factors risk level and charge type
    - The development of differentiated risk management procedures that match the identified risk to the appropriate supervision level
    - The expanded use of citations by law enforcement
    - Early involvement of prosecutor and defense counsel
    - The institution of automatic bond review procedures for misdemeanor defendants
    - Uniform data reporting standards.
- The Implementation Team should draft language for bills or proposed court rules that incorporate the changes in law needed to implement the plan in the pilot counties.
    - The Implementation Team should develop a preventive detention framework for defendants who present unacceptably high risk
    - The Implementation Team should develop a release framework for defendants who are not detained
    - The Implementation Team should draft other legislation and/or court rules needed to implement the recommendations in this report

Mid-Term Recommendations:

- The Implementation Team should fully implement the plan in the pilot counties.

- The Implementation Team should ensure that all staff with a role in implementing the plan are fully informed of its purpose and rationale and trained for successful implementation.
- The Implementation Team should establish a data dashboard to monitor outcomes and regularly review the data and make appropriate adjustments to the plan.

Long-Term Recommendations:

- The Implementation Team should begin implementing the plan in the remaining counties of the state.
- The Implementation Team should develop a plan for sustaining changes that have been made and holding accountable those who make the changes.
- North Carolina officials should consider what role, if any, secured bonds should continue to play in the state's pretrial system, and draft appropriate proposals for statutory or court rule amendments.

As the Commission recognizes, implementing these recommendations will not be easy, but the benefits that will flow from doing so will be worth the effort. A well-functioning legal and evidence-based pretrial release process benefits justice system officials who can better see, and thus have greater control over, the process and the extent to which it is achieving the three goals of the pretrial release decision. It also benefits defendants going through the system, reducing instances of racial disparities, giving all defendants a sense of procedural justice, and upholding their Constitutional rights. It benefits victims, giving them perceptions of safety and predictability, and improving their chances of experiencing reparations for harm done to them. Finally, it benefits taxpayers, who have a better understanding of how their taxes are being spent and what outcomes they are getting.

I. ACHIEVING A BALANCED APPROACH TO PRETRIAL RELEASE THROUGH LEGAL AND EVIDENCE-BASED PRACTICES

There are three goals of the pretrial release decision: (1) to provide reasonable assurance of the safety of the public; (2) to provide reasonable assurance of the appearance of defendants in court; and (3) to provide due process for those accused of a crime, with "[t]he law favor[ing] the release of defendants pending adjudication of charges."[3] When jurisdictions focus on one or two of these goals at the expense of a balanced approach considering all three, the inevitable result is a dysfunctional system where many defendants who could be safely released remain in jail and many others who pose unacceptably high risks are released.

It is becoming increasingly clear that an option developed in the 19th Century – the secured bond – is inherently incapable of achieving the balanced approach that effective 21st Century public policy demands. When first introduced, the assumption that a secured bond provided a financial incentive for a defendant to appear in court gave justice system officials some hope in addressing at least one of the three goals of pretrial release. And since the capability to empirically test this assumption did not exist, this assumption became an article of faith, and it remains so today in many jurisdictions. In accepting this assumption, courts developed tools, such as those currently used in many North Carolina local pretrial release policies, that assume that the maximum sentence that defendants face defines their level of risk, and that a dollar amount that falls within a suggested range is the best way to address those risks.

Justice system officials across the country have relied on the secured bond option so often and for so long, not because there was evidence that it was effective, but because familiarity has bred acceptance – and because the commercial bail bonds industry that has benefited financially from its continued use has fought against any proposals or actions to implement new, evidence-based practices.[4]

Information showing how ill-suited secured bonds are in achieving the goals of the pretrial release decision can no longer be ignored. Science has provided new, evidence-based tools that show how to achieve the balanced approach, and do so in a way that aligns with the requirements of the law. States around the country, including, now, North Carolina, are looking at the science with the aim of creating a balanced system of pretrial justice that is supported by research and that honors the spirit and the letter of the law.

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[3] *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007) Std. 10-1.1, at 1.

[4] See, for example: https://www.themarshallproject.org/2016/06/29/a-professional-bounty-hunter-who-likes-the-bail-system-just-the-way-it-is?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20160630-530#.N7zxLibBb.

The law requires a balanced approach

The law favors the release of defendants pending trial. As summed up by U.S. Supreme Court Justice Robert Jackson in a 1951 case:

> The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense.[5]

But the law also recognizes that some defendants pose unmanageable risks to public safety and non-appearance, and can, if strict procedural steps are followed, be held without bond.[6]

An examination of the history of bail and pretrial release reveals that for centuries, dating back to Medieval England, bail was an "in or out" proposition. Defendants who were bailable under the law were to be released, and those who were non-bailable were to be detained. This system carried over from England to this country during the colonial period and after independence. It was in the mid-1800's, when defendants found it easy to flee and disappear into parts of the growing country that the idea of secured bonds came about. By 1900, the secured bond system had given rise to the for-profit bail bonding industry. Almost immediately afterwards, and numerous times since, analysts drew attention to the dysfunctions of the pretrial release system that relied on secured bonds.[7] As one researcher noted almost 90 years ago: "In too many instances, the present system neither guarantees security to society nor safeguards the rights of the accused. It is lax with those with whom it should be stringent and stringent with those with whom it could safely be less severe."[8]

The legal issues raised by the use of secured bonds are now receiving attention by the federal courts. In the past two years, number of cases have been filed in federal courts challenging the use of secured bonds on the grounds that requiring indigent defendants to post financial bonds as a pre-condition to release violates their 14th Amendment equal protection rights. The civil rights law firm Equal Justice Under Law (EJUL) has amassed almost a dozen victories in class action challenges to money bail systems in several states, including Alabama, Georgia, Kansas, Louisiana, Missouri, and Mississippi.[9] These suits have forced the courts in those jurisdictions to drastically reform their bail-setting practices.

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[5] *Stack v. Boyle*, 342 U.S. 1, 7 (1951); *see also* United States 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.")
[6] *Salerno*, 481 U.S. at 755.
[7] *Fundamentals*, *supra* note 1, at 35-48.
[8] Arthur L. Beeley, *The Bail System in Chicago*, (1927, reprinted 1966).
[9] For information on these suits, go to the EJUL website at: http://www.equaljusticeunderlaw.org.

The empirical evidence supports a balanced approach

The research has clearly identified several negative consequences of using an unbalanced approach to pretrial release. The first of these consequences is the large number of bailable defendants who remain in jail for either a portion or the entirety of the pretrial period because they cannot meet the condition of their release – posting a secured bond. According to the Bureau of Justice Statistics, approximately 460,000 persons were being held in jails throughout the United States on June 30, 2014 awaiting disposition of their charges, representing 63% of all jail inmates.[10] While not all of these defendants are bailable, most are. 89% of detained felony defendants in a national survey remained in custody throughout the pretrial period on secured bonds that were never posted.[11] As shown in Section II of this report, there are large numbers of persons sitting in North Carolina jails because of inability to meet their release condition – posting a secured bond.

A second consequence of using an unbalanced approach is the impact of short-term incarceration – the few days it may take a person who does have the financial resources to post a secured bond to come up with the money to do so. One study found that, when *controlling for other factors*, defendants who had scored as low risk on the empirically-derived pretrial risk assessment tool and who were held in jail for just 2-3 days after arrest were 39% more likely to be arrested on a new charge while the first case was pending than those who were released on the first day, and 22% more likely to fail to appear. Low risk defendants who were held 4-7 days were 50% more likely to be arrested, and 22% more likely to fail to appear; those held -14 days were 56% more likely to have a new charge and 41% more likely to have a failure to appear. The same patterns held for medium risk defendants who were in jail for short periods.[12] While the study did not explore why short-term incarceration leads to these findings, they may simply reflect the disruption caused to people's lives by being in jail for just a few days.

In short, being held in jail for just a few days while making financial arrangements for a secured bond negatively impacts all three goals of the pretrial release decision: it delays release, it leads to higher rates of new criminal activity, and it leads to higher rates of failure to appear in court.

There are also major consequences for low and moderate risk defendants who remain incarcerated throughout the pretrial period, unable to post secured bonds. The same study also found that, again *controlling for other factor*s, low risk defendants who were held in jail throughout the pretrial period due to their inability to post their bonds were 28% more likely to recidivate within 24 months after adjudication than low risk defendants who were released pretrial. Medium risk defendants detained

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[10] Todd D. Minton and Zhen Zeng, *Jail Inmates at Midyear 2014*, Bureau of Justice Statistics (2015).
[11] Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009 – Statistical Tables*, Bureau of Justice Statistics (2013), at 17.
[12] Christopher Lowenkamp, Marie VanNostrand, and Alex Holsinger, *The Hidden Costs of Pretrial Detention*, Laura and John Arnold Foundation (2013), [hereinafter *Hidden Costs*].

throughout the pretrial period were 30% more likely to recidivate within the following two years.[13]

Such results might be palatable if secured money bonds were found to be more effective in terms of public safety and court appearance. The for-profit bail bonding industry routinely cites studies purporting to show that that is the case, relying on data collected by the Bureau of Justice Statistics (BJS). Despite repeated claims to the contrary by the commercial bail bonding industry, the BJS data survey was not designed to make assessments of the effectiveness of one type of bond over any other type.[14] As a result of these claims by the bail bonding industry, BJS took the highly unusual step of issuing a Data Advisory, warning that its "data are insufficient to explain causal associations between the patterns reported, such as the efficacy of one type of pretrial release over another."[15]

One study, however, overcomes the methodological flaws of research cited by the bonding industry, by controlling for risk levels and allowing for valid comparisons. That study found that, across all risk levels, there were no statistically significant differences in outcomes (i.e. court appearance and public safety rates) between defendants released without having to post financial bonds and those released after posting such a bond. The study also looked at the jail bed usage of defendants on the two types of bonds. Defendants who did not have to post financial bonds before being released spent far less time in jail than defendants who had to post. This is not surprising, since defendants with secured bonds must find the money to satisfy the bond or make arrangements with a bail bonding company in order to obtain release. Also, 39% of defendants with secured bonds were never able to raise the money and spent the entire pretrial period in jail. In summary, the study found that unsecured bonds, which do not require defendants to post money before being released, offer the same public safety and court appearance benefits as secured bonds, but do so with substantially less use of jail bed space.[16] Unlike any of the studies cited by the for-profit bail bonding industry, this study looked at all three goals of the pretrial release decision – safety, appearance, and release.

It is not surprising that secured money bonds have no impact on public safety rates. Secured bonds allow defendants who have access to money to purchase their pretrial release, regardless of the risk they may pose to public safety. Ironically, under

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[13] Id.

[14] Kristen Bechtel, John Clark, Michael R. Jones, and David Levin, *Dispelling the Myths: What Policy Makers Need to Know About Pretrial Research*, Pretrial Justice Institute (2012).

[15] Bureau of Justice Statistics, *Data Advisory: State Court Processing Statistics Data Limitations* (2010), at 1. The State Court Processing Statistics Project collected data on the processing of felony cases in 40 on the nation's 75 largest counties. Among the data elements collected were: was the defendant released during the pretrial period; if so, what type of release; and what was the failure to appear rate and rate of new criminal activity by type of release. The project 's methodology was not designed to make sure that the release type groups were similar when looking at failure to appear and new criminal activity rates by release type, which is why the Bureau of Justice Statistics issued the Advisory to make clear that any such comparisons were invalid.

[16] Michael R. Jones, *Unsecured Bonds: The "As Effective" and "Most Efficient" Pretrial Release Option* (2013), [hereinafter *Unsecured Bonds*]. This study was conducted from data on 1,970 defendants from 10 different counties in Colorado in 2011.

this system, magistrates and judges actually may make it easier for defendants deemed to pose unacceptable public safety risks to get out, when, to address those risks, they set high secured bond amounts. While the intent of the judicial officer may be that the defendant will not be able to post the bond, the economic reality is that the higher the bond amount, the higher the profit margin for the bonding company that does business with a high-danger-risk defendant. For example, a commercial bail bonding company might make $1,500 from a $10,000 bond, but the company can earn $15,000 from a $100,000 bond, giving the company a greater incentive to write a higher bond. [17]

And since the bonding company is only liable for bond forfeiture if the defendant fails to appear in court – not if the defendant is arrested for new criminal activity while on pretrial release – bonding out high-danger-risk, high-bond defendants is a no-risk venture for the company. It is not surprising that research shows that about half of high-danger risk defendants get out of jail pending trial.[18]

An unbalanced approach adversely impacts defendants, particularly those of color, and taxpayers

Research has consistently shown that, all else being equal, defendants who are detained throughout the pretrial period receive much harsher outcomes than those who obtain release.[19] A recent study quantified just how harsh these outcomes are for those found by an empirically-derived risk assessment tool to be low and moderate risk. The study found that low risk defendants who were detained throughout the pretrial period were five times more likely to get a jail sentence and four times more likely to get a prison sentence than their low risk counterparts who were released pretrial. Medium risk defendants who were detained pretrial were four times more likely to get a jail sentence and three times more likely to get a prison sentence. Both low and medium risk defendants who were detained pretrial also received much longer jail and prison sentences than their counterparts who spent the pretrial period in the community.[20]

Disparities unleashed by secured money bonds fall most heavily on racial minorities. Studies have consistently shown that African American defendants have higher secured bond amounts and are detained on secured bonds at higher rates than white defendants, a factor contributing to the disproportionate confinement of persons of color.[21]

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[17] *Rational and Transparent Bail Decision Making: Moving From a Cash-Based to a Risk-Based* Process, Pretrial Justice Institute (2012), at 8-9, [hereinafter *Rational and Transparent*].
[18] Laura and John Arnold Foundation, *Developing a National Model for Pretrial Risk Assessment: Research Summary* (2013).
[19] *Rational and Transparent*, *supra* note 17, at 2.
[20] Christopher Lowenkamp, Marie VanNostrand, and Alex Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, Laura and John Arnold Foundation (2013).
[21] Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST Q.,170, 187 (2005); Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release and Decisions and Outcomes*: *A Comparison of Hispanic, Black and White Felony Arrestees*, 41 CRIMINOLOGY 873, 880-81 (2003).

Requiring defendants to post financial bonds as a pre-condition to being released pretrial has obvious implications for those of low economic means – even when they are able to pay the bondsman's fees, usually about 15% of the full value of the bond. The money may have come out of family funds for groceries or the next month's rent. And, of course, those who are unable to make a bond payment may fall into deeper economic despair through the loss of jobs and housing while in pretrial confinement.

North Carolina citizens seem to understand how the state's justice system impacts those with little money, and those of certain racial and ethnic groups. A 2015 survey of state residents showed that 64% of respondents believe that low-income people are likely to receive unfair treatment from the courts. Forty-seven percent felt that African Americans were treated more harshly, including 67% of African American respondents who felt that way, and 46% of respondents felt that Hispanics received worse treatment.[22]

Detaining persons pretrial also greatly impacts taxpayers, with no return benefit. It has been estimated that budgets for the operation of county jails rose from $5.7 billion in 1983 to $22.2 billion in 2011. These figures do not, however, take into consideration the costs that come out of other county budget lines, such as employee pension benefits and contracted health care to jail inmates, leaving the total costs to taxpayers unknown. "Because the costs provided are too often incomplete, policymakers and the public are seldom aware of the full extent of their community's financial commitment to the operations of the local jail. Given the outsize role that jails play in the country's criminal justice system – incarcerating millions of people annually – it is striking that the national price tag for jails remains unknown and that taxpayers who foot most of the bill remain unaware of what their dollars are buying."[23] And given the significant growth in jail spending, it is not surprising that 40% of jails in a national survey state that reducing jail costs is one of their most serious issues.[24]

In short, the current system produces no discernable benefits for anyone, except for one group – the for-profit bail bonding industry. It is not surprising, then, that the industry fights every effort to introduce legal and evidence-based pretrial justice practices.

A national movement for legal and evidence-based pretrial justice is underway

Ignoring the protests of the commercial bail bonding industry, over the past four years, there have been significant and unprecedented calls from key and diverse justice system stakeholders for implementing legal and evidence-based pretrial justice practices aimed at making sure that only those who pose unmanageable risks are detained pretrial.

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[22] *Elon University Poll, State Courts, October 29-November 2, 2015* (2015), at 4.
[23] Christian Henrichson, Joshua Rinaldi, and Ruth Delaney, *The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration*, Vera Inst. Justice, 5 (2015).
[24] Natalie R. Ortiz, *County Jails at a Crossroads: An Examination of the Jail Population and Pretrial Release*, Nat'l Assn. of Counties, (2015), at 8.

For example, in 2012, after a year of study, the Conference of State Court Administrators issued a Policy Paper concluding that "[m]any of those incarcerated pretrial do not present a substantial risk of failure to appear or a threat to public safety, but do lack the financial means to be released. Conversely, some with financial means are released despite a risk of flight or threat to public safety, …" The Policy Paper went on to say that "[e]vidence-based assessment of the risk a defendant will fail to appear or will endanger others if released can increase successful pretrial release without financial conditions that many defendants are unable to meet. Imposing conditions on a defendant that are appropriate for that individual following a valid pretrial assessment substantially reduces pretrial detention without impairing the judicial process or threatening public safety."[25]

Endorsing this Policy Paper, the Conference of Chief Justices issued a resolution that "urge(d) that court leaders promote, collaborate, and accomplish the adoption of evidence-based assessment of risk in setting pretrial release conditions and advocate for the presumptive use of non-financial release conditions to the greatest degree consistent with evidence-based assessment of flight risk and threat to public safety and to victims of crime."[26]

Several other national associations also have issued policy statements or resolutions calling for bail reform. These include: the International Association of Chiefs of Police, the National Sheriffs' Association, the American Jail Association, the Association of Prosecuting Attorneys, the National Legal Aid and Defenders Association, the National Association of Criminal Defense Lawyers, the American Probation and Parole Association, and the National Association of Counties.[27]

These organizations, along with the National Judicial College, the National Center for State Courts, the American Bar Association, the National Association of Court Management, the National Criminal Justice Association, the Global Board of Church and Society of the United Methodist Church, the National Conference of State Legislatures, the Council of State Governments, the National Organization for Victim Assistance, along with dozens of other groups and individuals, are members of a Pretrial Justice Working Group, convened by the PJI and the Bureau of Justice Assistance of the U.S. Department of Justice to pursue legal and evidence-based enhancements to pretrial justice.[28]

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[25] *Evidence-Based Pretrial Release* Policy Paper available on the National Center for State Court's website at: http://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/Evidence%20Based%20Pre-Trial%20Release%20-Final.ashx.

[26] Resolution available at the National Center for State Court's website at: http://ccj.ncsc.org/~/media/Microsites/Files/CCJ/Resolutions/01302013-pretrial-release-Endorsing-COSCA-Paper-EvidenceBased-Pretrial-Release.ashx.

[27] Statements available at http://www.pretrial.org/get-involved/pretrial-national-coalition/.

[28] Information on Working Group progress available at: http://www.pretrial.org/download/infostop/Implementing%20the%20Recommendations%20of%20the%20National%20Symposium%20on%20Pretrial%20Justice-%20The%202013%20Progress%20Report.pdf.

North Carolina is not alone in exploring bail reform. Legislatures in four states – Colorado, Kentucky, New Jersey and Alaska – recently re-wrote their bail laws to bring them in line with legal and evidence-based pretrial justice practices.[29] Several other states, including Arizona, Indiana, Maine, Maryland, Nevada, New Mexico, Texas, and Utah, have commissions or task forces examining statutory or court rule changes needed to incorporate legal and evidence-based practices.[30]

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[29] Colorado House Bill 13-1236 (2013), Kentucky House Bill 463 (2011), New Jersey Senate Bill 946 (2014), Alaska Senate Bill 91 (2016).

[30] In Arizona, the Chief Justice has appointed a Task Force on Fair Justice for All, tasked with identifying what changes are needed to assure that people are "not jailed pending the disposition of charges merely because they are poor." See: http://www.ncsc.org/~/media/Microsites/Files/PJCC/Pretrial%20Justice%20Brief%203%20-%20AZ%20final.ashx. In Indiana, the Chief Justice appointed a Committee to Study Pretrial Release to advise the court on the use of an empirically-derived pretrial risk assessment tool for the state, and on alternatives to secured bonds. See: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=13&ved=0ahUKEwio3ban2I7OAhWESyYKHbUMCDQ4ChAWCCgwAg&url=http%3A%2F%2Fwww.ncsc.org%2F~%2Fmedia%2FMicrosites%2FFiles%2FPJCC%2FPretrial%2520Justice%2520Brief%25206%2520-%2520IN%252012-30-2015.ashx&usg=AFQjCNEcAouXXDmNV6xWki_k91_zJc6KrA&bvm=bv.127984354,d.eWE. In Maine, the governor, chief justice, president of the senate and speaker of the house, have established a Task Force on Pretrial Justice Reform charged with producing recommendations for legislative action that will "reduce the financial and human costs of pretrial incarceration" without compromising public safety or the integrity of the criminal justice system. The directive establishing the task force is available at: http://www.courts.maine.gov/maine_courts/committees/2015%20PJR.pdf. In Maryland, the governor appointed a Commission to Reform Maryland's Pretrial Release System; the Commission issued a report calling for statewide pretrial risk assessment using empirically-derived risk assessments. The Commission report is available at: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0ahUKEwiOm7up047OAhVG2yYKHdXYAk4QFggpMAI&url=http%3A%2F%2Fgoccp.maryland.gov%2Fpretrial%2Fdocuments%2F2014-pretrial-commission-final-report.pdf&usg=AFQjCNHRPiZKczlN7kKA2ItgW_sMU19sLw&bvm=bv.127984354,d.eWE. In Nevada, the Supreme Court appointed a Committee to Study Evidence-Based Pretrial Release with the purpose of identifying an empirically-derived pretrial risk assessment tool for that state. Information about that committee is available at: http://nvcourts.gov/AOC/Templates/documents.aspx?folderID=19312. In New Mexico, the Supreme Court appointed an Ad Hoc Pretrial Release Committee to make recommendations for rule changes that would incorporate legal and evidence-based pretrial release practices. See: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0ahUKEwiggrXQ107OAhVNySYKHaHBAP4QFggzMAM&url=https%3A%2F%2Fsupremecourt.nmcourts.gov%2Fuploads%2FFileLinks%2F68d7e94c91244c3582e80b8272c30db1%2F2015_55.pdf&usg=AFQjCNHYXvihSggAhjTD7AW61_kc--eHqg. In Texas, the Chief Justice has appointed a Criminal Justice Committee under the Texas Judicial Council to explore ways of enhancing pretrial justice in that state. See: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKEwjWr63l0Y7OAhXEOiYKHSXjA4MQFggkMAE&url=http%3A%2F%2Fwww.txcourts.gov%2Ftjc%2Fnews%2Fjudicial-council-creates-criminal-justice-committee.aspx&usg=AFQjCNFDRc6uwg2-qgCDRveQj6nSLepoAA. In Utah, a committee of the Utah Judicial Council, the rule-making body for the judiciary, has recommended court rule changes that would include a clear statement of the presumption of release, free of financial conditions; use of a risk assessment for every defendant booked into a jail in the state; the availability across the state of supervision for moderate- and higher-risk defendants; and uniform, statewide data collection on relevant pretrial process and outcome measures. *Report to the Utah Judicial Council on Pretrial Release and Supervision Practices*, Utah State Courts, November 2015.

Legal and evidence-based practices produce excellent results

Interest is growing in legal and evidence-based practices because they work. The District of Columbia provides one example of what can happen when a jurisdiction implements such practices. In DC, the pretrial services program, using an empirically-derived risk assessment tool, either recommends non-financial release – with or without conditions, depending on the assessed risk level – or that a hearing be held to determine whether the defendant should be held without bond. The program never recommends a monetary bond. The program also supervises conditions of release imposed by the court and sends court date reminder notices to all released defendants. The outcomes are impressive – 80% of defendants are released on non-monetary bonds and 15% are held without bond. The remaining 5% are held on other charges. Of those released, during FY 2012, 89% made all of their court appearances and 88% were not rearrested on new charges while their cases are pending. Only 1% was rearrested for a violent offense. Moreover, 88% of defendants remained on release at the conclusion of their cases without a revocation for non-compliance with release conditions.[31] These results were achieved without the use of secured money bonds.

Kentucky provides another example. In 2011, Kentucky began implementing the latest in legal and evidence-based practices, including reducing reliance on monetary bonds and basing recommendations on the results of an empirically-derived pretrial risk assessment tool. In the first two years after introducing these practices, the non-financial pretrial release rate went from 50% to 66%, with no negative impact on court appearance and public safety rates. In fact, the court appearance rate inched up from 89% to 91% and the public safety rate from 91% to 92%.[32] In 2013, Kentucky's statewide pretrial services program began using an empirically-derived risk assessment tool developed and tested by the Laura and John Arnold Foundation, the Public Safety Assessment–Court (PSA–Court). This tool was constructed after a study of over a million cases from jurisdictions all across the country. It is designed to be universal; that is, it can perform well in every jurisdiction in the country. A study conducted after the first six months of use in Kentucky showed that pretrial release rates rose to 70% of all defendants, and the increased release rate was accompanied by a 15% reduction in new criminal activity of defendants on pretrial release.[33]

In North Carolina, Mecklenburg County has been using the Arnold Foundation's PSA–Court tool since 2014. Mecklenburg County's pretrial services program, which administers this tool, also has developed a release matrix that combines a risk score and charge severity to arrive at a recommendation by the program regarding release.[34] An analysis of how PSA-Court was performing in Mecklenburg County after the first three months showed that it was successfully sorting defendants into risk categories for both

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[31] *Pretrial Services Agency for the District of Columbia: FY 2012 Organizational Assessment*, Dist. of Col. Pretrial Services Agency (2012), at 10.
[32] *Pretrial Reform in Kentucky*, Administrative Office of the Courts, Kentucky Courts of Justice (2013).
[33] *Results from the First Six Months of the Public Safety Assessment – Court in Kentucky*, Laura and John Arnold Foundation (2014).
[34] *See infra* p. 23 (discussing such matrices in general).

new criminal activity and failure to appear. For both of these outcomes, failure rates were lowest for those defendants scored by the tool as low risk, rising in step as the risk levels rose. The data also showed that pretrial release rates were highest for the lowest risk group, and declined in step with the rises in risk, meaning that judicial officials were using the results of the risk assessment tool to help make decisions. These actions resulted in a 93% public safety rate and a 98% court appearance rate in 2015,[35] with no increase in reported crime.

[35] Data provided by Jessica Ireland, Mecklenburg County Pretrial Services, 7/19/16. See also: http://charmeck.org/mecklenburg/county/news/Pages/Mecklenburg-County-Recognized-as-Model-for-Pretrial-Reform.aspx.

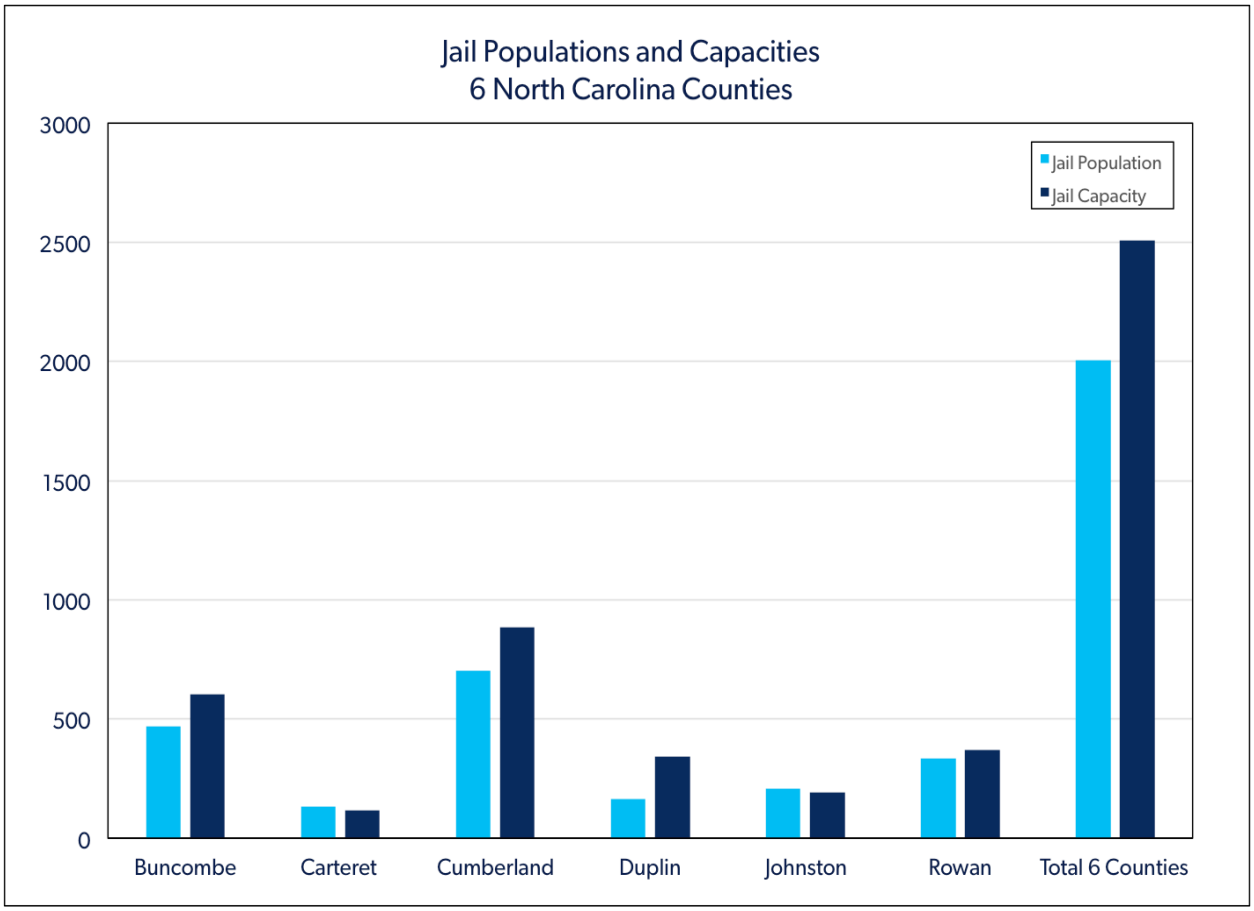
II. PRETRIAL JUSTICE IN NORTH CAROLINA: CURRENT PRACTICES

This section discusses the state of pretrial release in North Carolina with a review of available data and a discussion of the pretrial release process.

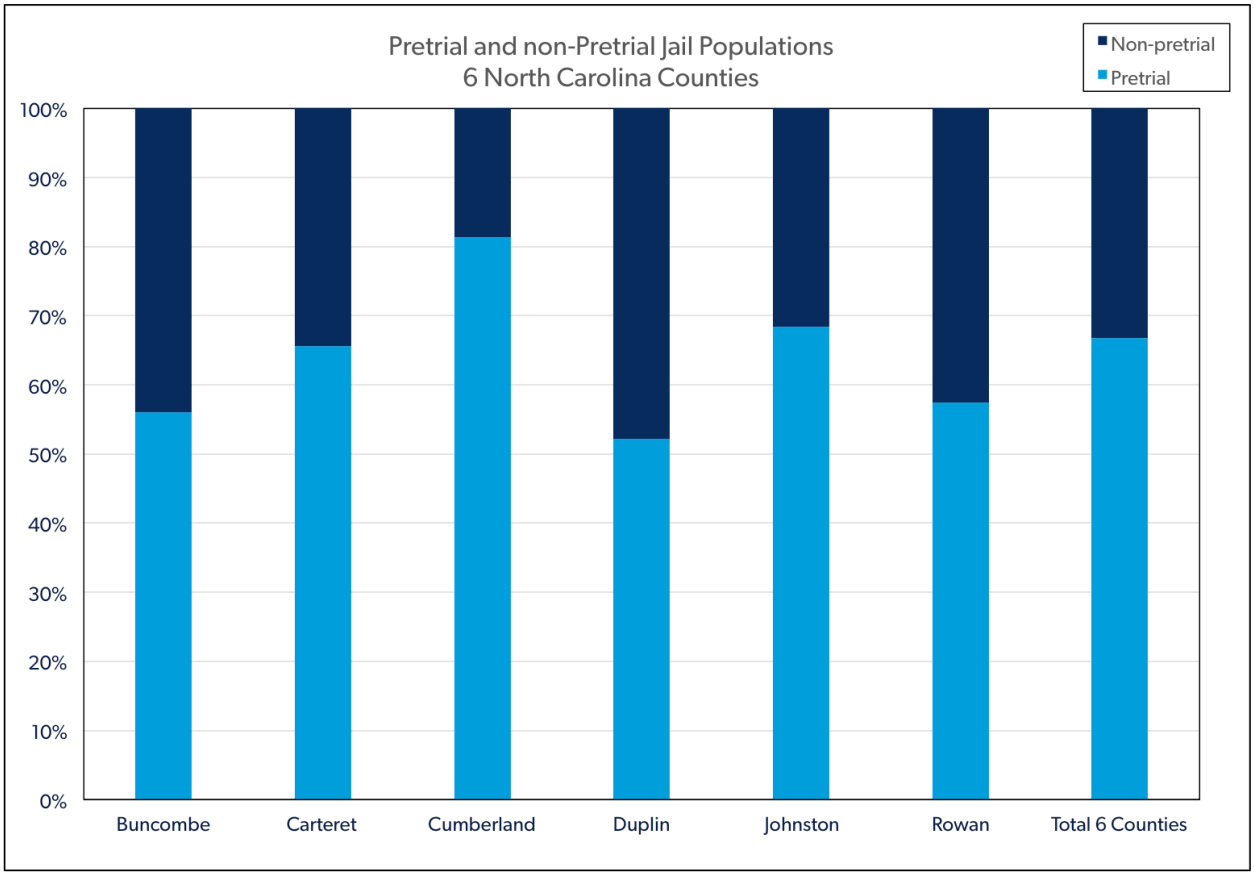
Analysis of Jail Data

Commission staff submitted for analysis jail data for six North Carolina counties. The six counties represent 10.3% of North Carolina's population and are a diverse demographic and geographic mix. They include Buncombe, Cumberland, Johnston and Rowan Counties, all part of larger metropolitan statistical areas, along with less densely populated and rural Carteret and Duplin Counties. The data comprised a "snapshot" of the jail populations in each of the six counties on a recent date.

Overall, on the date that the snapshots were taken, the jails were at 80% capacity (Column Graph 1), ranging from 48% in Duplin County to over-capacity at 111% in Carteret County.

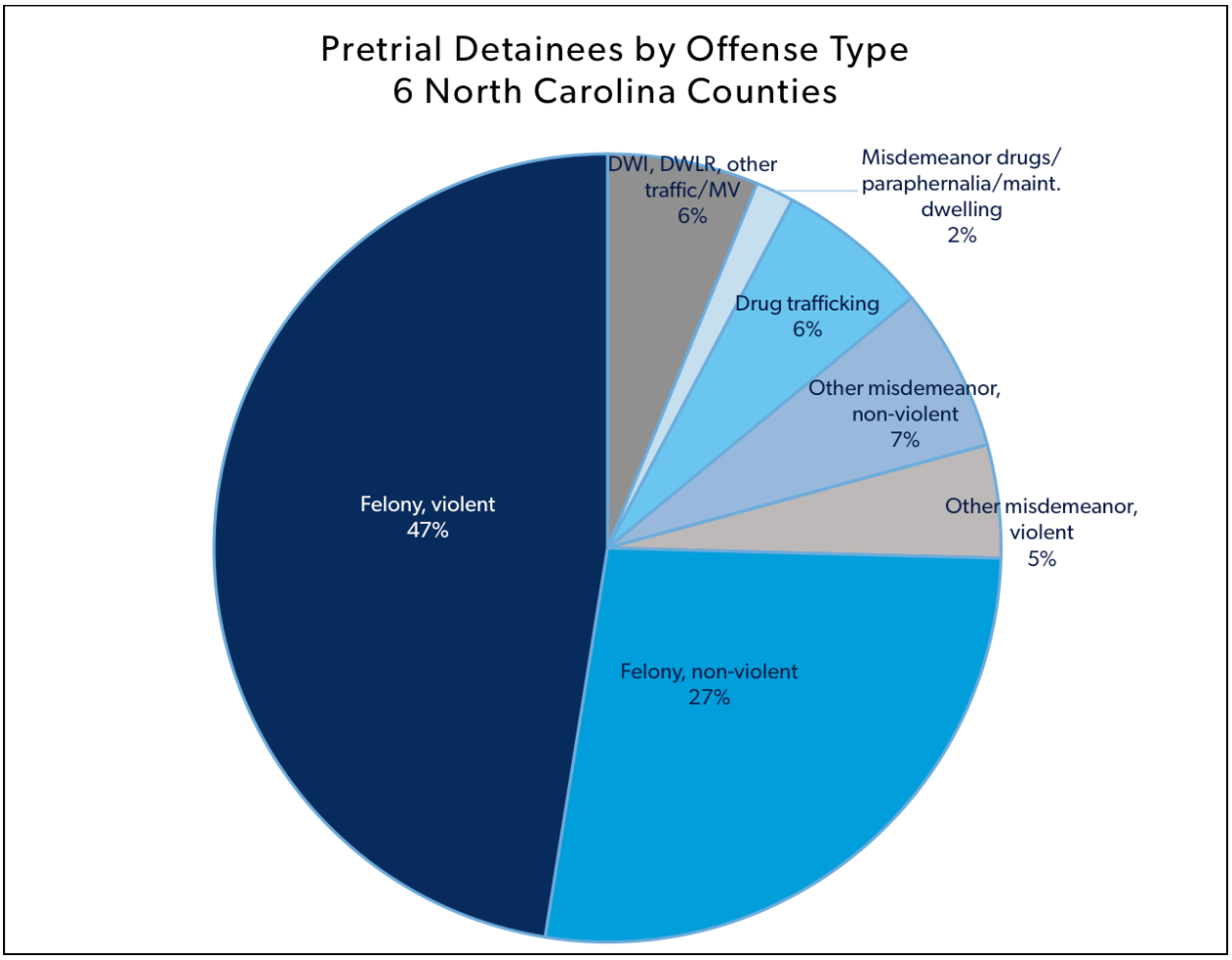


Across the six counties, on the dates of the snapshots, 67% of inmates were pretrial, ranging from a low of 52% in Duplin County to a high of 81% in Cumberland County (column graph below).



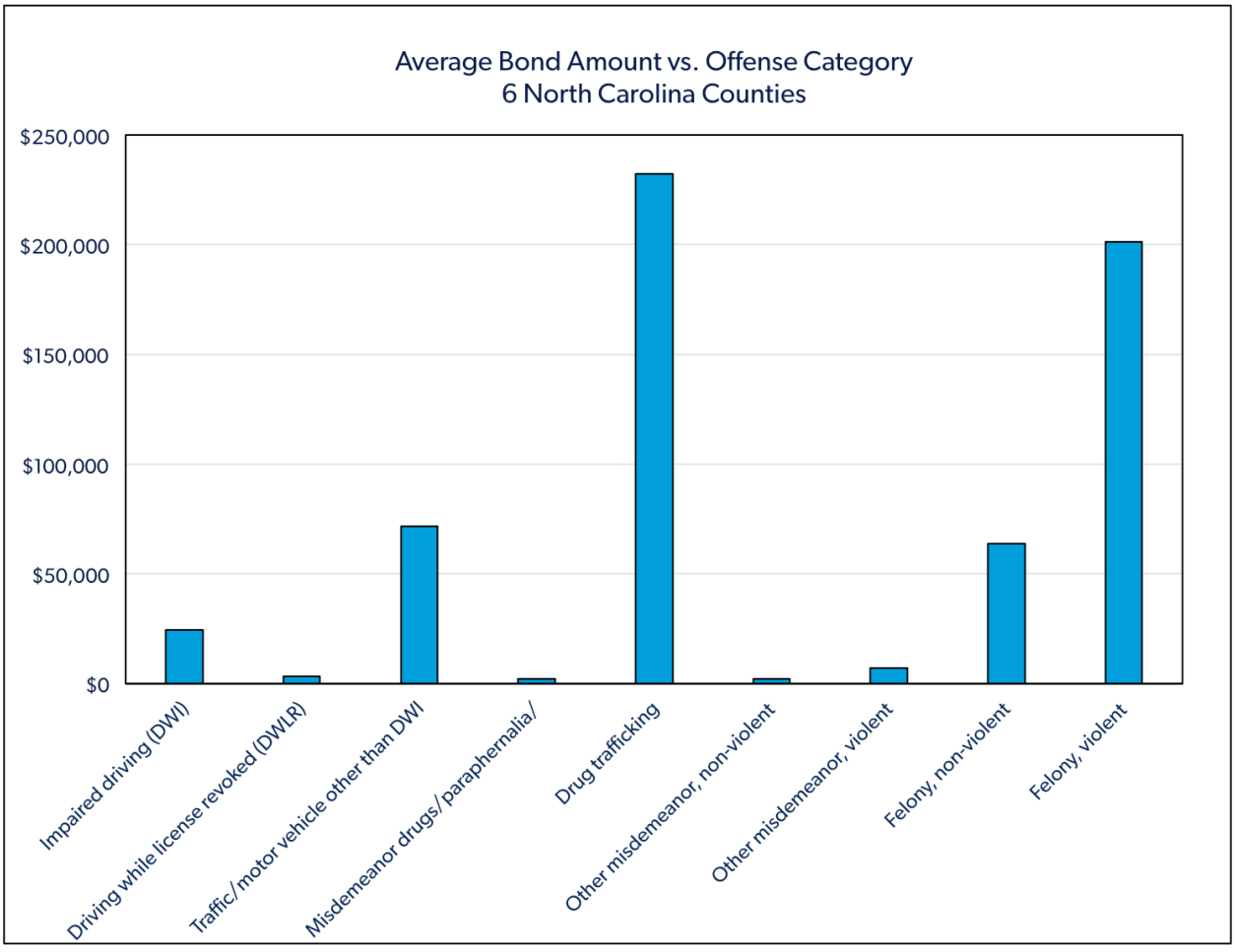
Virtually all pretrial detainees (1,268 out of 1,338 or 95%) were detained on cash or secured bond. The remaining 5% (70 detainees) who were being held without bond fell into three offense categories: violent misdemeanors, non-violent felonies, and violent felonies. Most of these (64) belonged to the violent felony category, with many of these being first degree homicide cases.

The top charge for a majority (75%) of pretrial detainees was either a violent (47.5%) or non-violent (27.1%) felony (pie chart below). As discussed in Section IV, by just knowing the top charge, and not the risk levels, of detained defendants, it is not possible to assess whether holding these defendants is a good use of jail space.

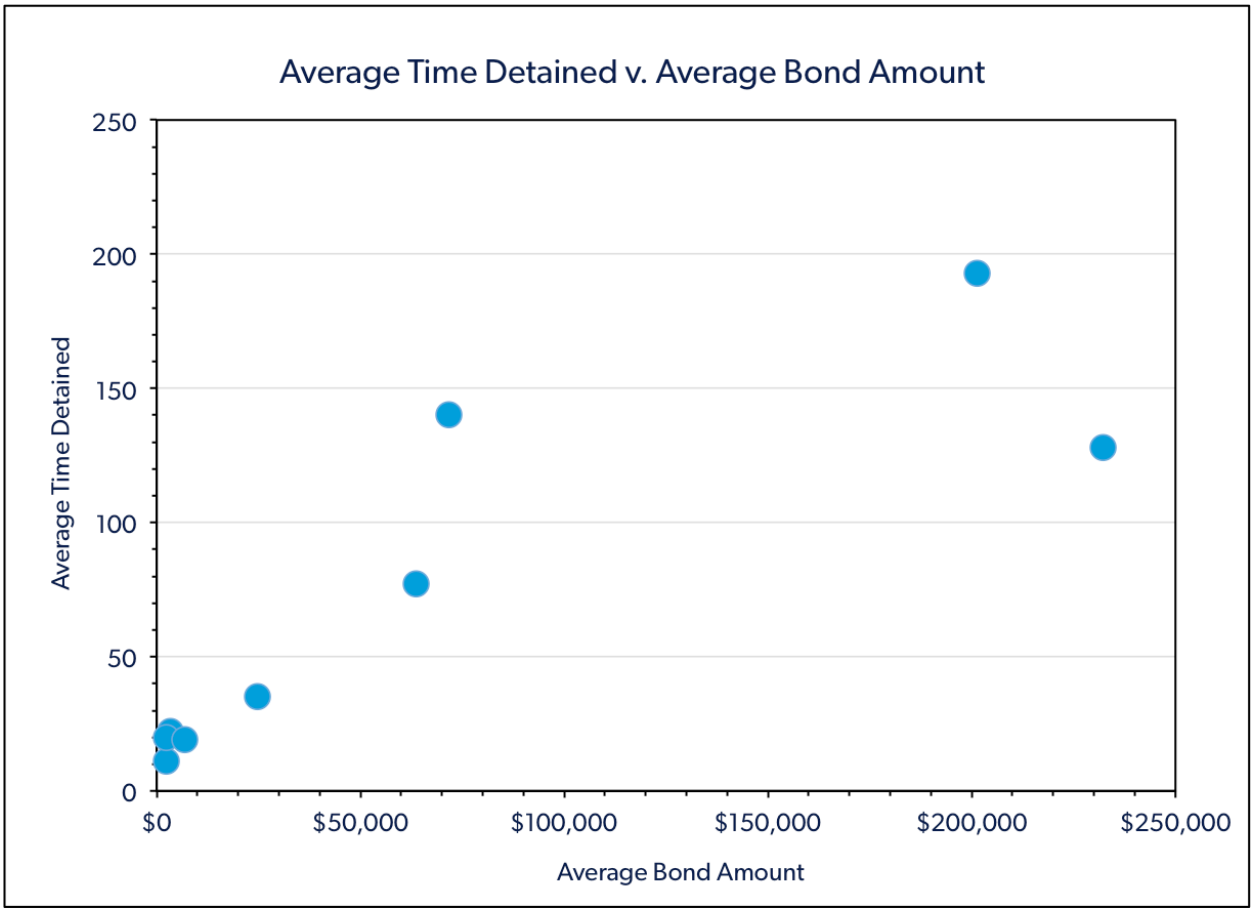


Information regarding the average, high and low bond amount for each of 9 offense categories was provided. In general, the more serious the offense, the higher the bond amount (Table below). However, the ranges were large for all offense categories. For example, bond amounts for individuals charged with a non-violent felony ranged from $100 to $2,000,000, violent felonies $1,000 to $3,000,000, and drug trafficking $8,000 to $2,000,000. The highest average bond amounts (graph below) were for drug trafficking ($232,131) and violent felonies ($201,261).

Offense Category	Lowest cash or secured bond amount	Highest cash or secured bond amount	Average cash or secured bond amount
Impaired driving (DWI), any type	$1,000	$200,000	$24,610
Driving while license revoked (DWLR), any type	$500	$10,000	$3,286
Traffic/motor vehicle other than DWI or DWLR	$500	$800,000	$71,827
Misdemeanor drugs/paraphernalia/maint. dwelling	$200	$20,000	$2,248
Drug trafficking	$8,000	$2,000,000	$232,131
Other misdemeanor, non-violent	$200	$25,000	$2,288
Other misdemeanor, violent	$100	$75,000	$6,997
Felony, non-violent	$100	$2,000,000	$63,688
Felony, violent	$1,000	$3,000,000	$201,261

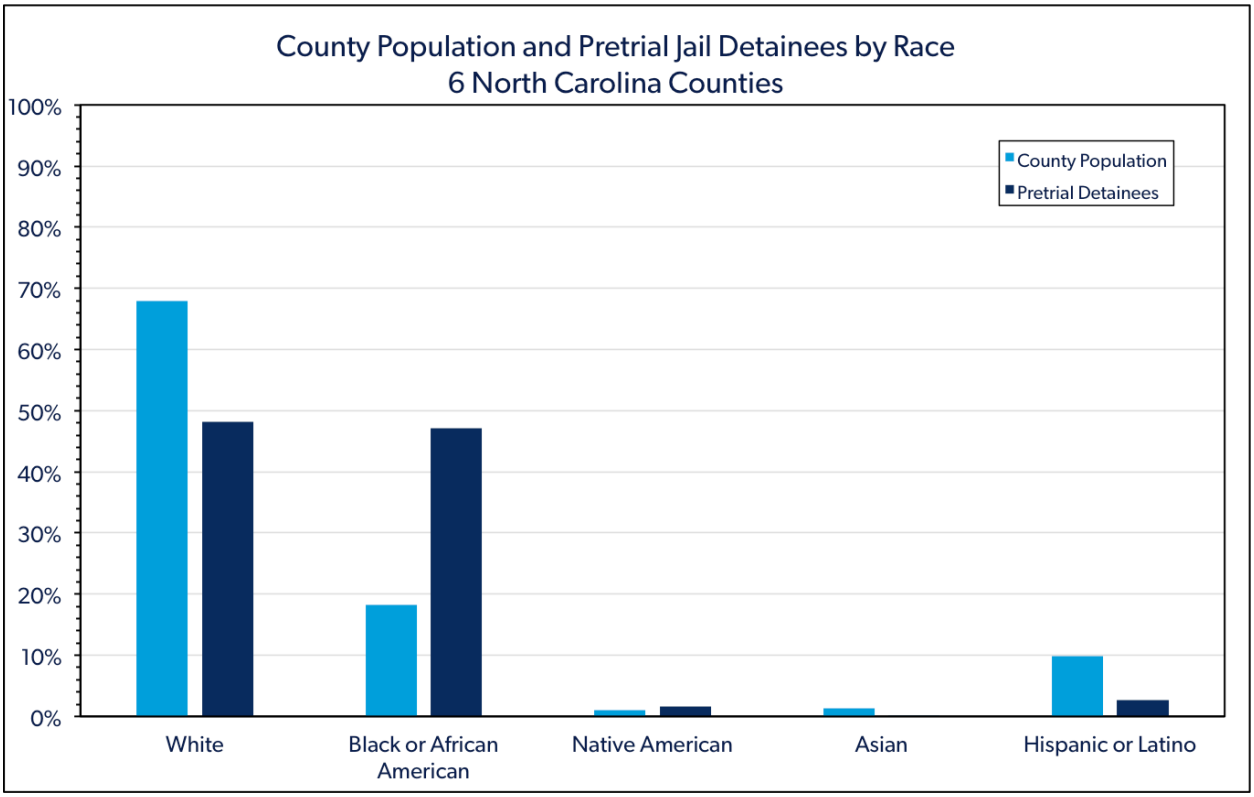


The next chart looks at average days detained. The snapshots that were taken to collect these data show who was in jail on the date of the snapshot for each of the six counties. As such, the data can only show how long defendants were in custody in pretrial status on the date of the snapshot. It cannot show their total length of stay – which would be a more meaningful measure.[36] With that caveat in mind, as the chart below shows, the average number of days detained is directly correlated to the average amount of the bond, that is, individuals stay longer in jail as bond amounts increase. These data must be viewed with the recognition that, as noted earlier, a snapshot of a jail population on a given date can only say how long each person had been in custody as of that date. It cannot provide the total length of stay, which is a much more meaningful figure to know.



African Americans were disproportionately represented in the pretrial population (chart below); although they make up only 18.2% of the population sample, they comprise 47.1% of pretrial detainees. As mentioned above in the discussion of the offense type, it is difficult to know how to put these data into context without knowing the risk level of defendants. This is discussed more in the next section.

[36] To determine total length of stay requires conducting a snapshot of all persons released from jail during a given time period. Time constraints prevented Commission staff from obtaining this information.



Analysis of Process

Persons arrested in North Carolina are brought "without unnecessary delay" before a magistrate for an initial appearance.[37] At this hearing, with limited exceptions,[38] defendants are entitled to have a pretrial release condition set. In determining those conditions, magistrates must impose the least of the following: written promise to appear; release to the custody of a designated person or organization; unsecured bond; secured bond; and house arrest with electronic monitoring, which must be used with a secured bond.[39]

While the analysis of the jail data suggests that there are large numbers of defendants in North Carolina jails on release conditions that they cannot meet, data are not available for this report to show the extent to which each of the options that are available to the magistrate and judge (i.e., written promise to appear, unsecured bond, secured bond) are used, nor on the ultimate pretrial release rate, rate of new criminal

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[37] G.S. 15A-501(2), -511(a)(1).

[38] Exceptions include capital cases, certain drug trafficking cases, certain fugitives, certain firearm offenses, certain gang-related offenses, parole violations, and certain probation violations. *See* Jessica Smith, *Criminal Proceedings Before North Carolina Magistrates* (UNC 2014) [hereinafter *Criminal Proceedings*], at pp. 27-34. Also, magistrates cannot set a bond in certain domestic violence cases at the initial appearance. *Id.* at p. 35. Those defendants must appear before a judge to have conditions set in 48 hours. *Id.* If a judge does not set conditions in 48 hours, the magistrate has the authority to do so. *Id.*

[39] G.S. 15A-534(a).

activity while on pretrial release, and rate of non-appearance in court. As a result, it is not possible to assess the extent to which the three goals of the pretrial release process – release, public safety, and court appearance – are being met in North Carolina.

It is, however, possible to look at the pretrial release practices that are used in the state, and compare them to legal and evidence-based practices. There are several areas of concern regarding the present process.

First, each judicial district has its own local pretrial release policy, and these policies mirror what is in the statute. However, many of these policies also include bond guidelines, which match the charge classification or the maximum penalty the defendant would face if convicted with a dollar secured bond amount or a range of amounts. Such policies make two assumptions, both of which legal and evidence-based practices show are false: (1) that the charge classification or maximum penalty defines the risks to public safety and court appearance that the defendant poses and (2) that money is the best way to address those risks. The pretrial risk assessment research shows that multiple factors, when considered together, provide the best models for predicting probability of success on pretrial release.[40] And, as noted earlier, research shows that, when controlling for risk levels, defendants who are not required to post a secured bond as a condition of pretrial release have the same public safety and court appearance rates as those who do, but without consuming the expensive jail bed resources used by many of those with secured bonds.[41]

Second, an empirically-derived pretrial risk assessment tool is used currently in only one of the state's 100 counties – Mecklenburg County. As discussed in the next section, the use of an empirically-derived risk assessment is a critical component of legal and evidence-based pretrial justice practices.

Third, only about 40 counties in the state are served by pretrial services entities, which supervise defendants on pretrial release.[42] Even in those counties where pretrial services exist, the statute specifies that the senior resident superior court judge may order that defendants can be released to the supervision of the program if both the defendant and the pretrial services program agree.[43] This approach undermines legal and evidence-based practices. If the empirically-derived pretrial risk assessment tool suggests that a particular defendant should be supervised on pretrial release, the judicial official should have the authority to order such supervision. Neither the defendant nor the pretrial services program should have the ability to, in effect, veto the judicial official's desired action. A potentially dangerous defendant should never be given the option of choosing whether to be supervised in the community or to buy his way out of jail with no supervision.

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[40] See, for example, the Virginia Pretrial Risk Assessment Instrument in Appendix A.
[41] *Unsecured Bonds*, *supra* note 16.
[42] According to a 2007 report, at that time there were 33 pretrial services programs operating within North Carolina, serving 40 of the state's 100 counties. *Pretrial Services Programs in North Carolina: A Process and Impact Assessment*, N.C. Governor's Crime Commission (2007), at 2.
[43] G.S. 15A-535(b).

Fourth, the law requires a formal process for bond review for felony defendants who remain incarcerated on a secured bond, but no such process is required for detained misdemeanor defendants. As a result, many misdemeanor defendants remain in jail for periods exceeding the sentence they could receive if convicted, and many plead guilty just so that they can be released. A new study of misdemeanor defendants from Harris County, Texas shows the serious consequences that can flow when holding misdemeanor defendants on secured bonds.[44] The study, which was conducted by the Rand Corporation and the University of Pennsylvania and which controlled for a wide range of other factors, found that, compared to their released counterparts, detained misdemeanor defendants were 25% more likely to plead guilty, and 43% more likely to be sentenced to jail, with jail sentences more than double of released defendants with a jail sentence. Researchers also found that, again controlling for other factors, detained misdemeanor defendants experienced a 30% increase in felony arrests within 18 months after completion of the case, and a 20% increase in misdemeanors, replicating the findings of research described earlier on the criminogenic effects of pretrial detention.[45] Based on these findings, researchers estimated that if Harris County had released on personal bond just those misdemeanor detainees who were held on bonds of $500 or less "the county would have released 40,000 additional defendants pretrial, and these individuals would have avoided approximately 5,900 criminal convictions, many of which would have come through erroneous guilty pleas. Incarceration days in the county jail – severely overcrowded as of April 2016 – would have been reduced by at least 400,000. Over the next 18 months post release, these defendants would have committed 1,600 fewer felonies and 2,400 fewer misdemeanors.... Thus, with better pretrial detention policy, Harris County could save millions of dollars per year, increase public safety, and likely reduce wrongful convictions."[46]

[44] Paul Heaton, Sandra G. Mayson, Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention* (July 14, 2016). Available at SSRN: http://ssrn.com/abstract=2809840 orhttp://dx.doi.org/10.2139/ssrn.2809840.
[45] *Hidden Costs, supra* note 12.
[46] *Supra* note 44, at 45-46.

III. LEGAL AND EVIDENCE-BASED PRETRIAL JUSTICE PRACTICES: MODELS FOR NORTH CAROLINA

This section describes the elements of a legal and evidence-based pretrial release system, and discusses how the implementation of these elements in North Carolina can bring the state's pretrial justice practices into the 21st Century.

Risk assessment

For a number of reasons, having an empirically-derived pretrial risk assessment tool is the keystone to a 21st century, legal and evidence-based pretrial release system. First, research demonstrates that such tools are highly effective in sorting defendants into categories showing their probabilities of success on pretrial release in terms of public safety and court appearance. The table below shows the results of the Colorado Pretrial Assessment Tool (CPAT) in Denver, Colorado.[47] As the table shows, for both safety and appearance, the success rates fall as the risk levels rise. Using the CPAT when making a pretrial release decision, a judicial officer in Denver knows a defendant scoring as a Risk Level 1 has a 96% probability of completing the pretrial period without being charged with new criminal activity while on pretrial release, and a 95% probability of making all court appearances. There is nothing in the risk assessment approach currently used by most North Carolina counties – the bond guidelines – that can produce such quantitative information.

Risk Assessment Outcomes, Denver, Colorado

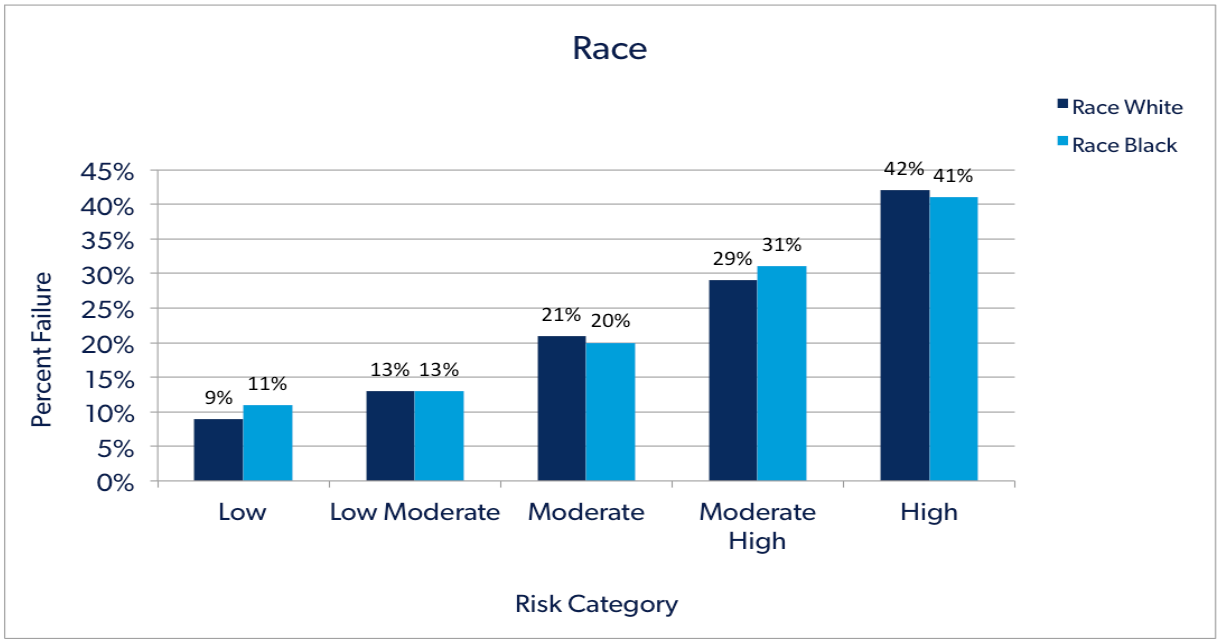
Risk Level	Safety Rate	Appearance Rate
1	96%	95%
2	93%	86%
3	86%	84%
4	80%	77%

Source: *The Colorado Pretrial Risk Assessment Tool (CPAT)*, Pretrial Justice Institute and JFA Institute (2012)

Second, such tools can track any disparate impacts that might result through their use on racial and ethnic groups. If disparities do arise, they can be easily identified, which is the first step in addressing them. The chart below shows a breakdown by race and risk level of the Arnold Foundation's PSA-Court risk assessment tool, the same tool being used currently in Mecklenburg County. In developing this tool, researchers ran statistical tests designed to identify disparities. As the chart shows, there has been very little variation in risk levels among African American versus white defendants using the PSA-Court tool.[48] The tool currently used in most North Carolina counties – the bond guidelines – provide no similar opportunity to test for any built-in biases of the tool, or to monitor for disparate outcomes. And, as noted above, data from North Carolina jails show that there are a large number of African Americans, disproportionate to their

[47] *The Colorado Pretrial Risk Assessment Tool (CPAT)*, Pretrial Justice Institute and JFA Institute (2012).
[48] *Results of the First Six Months of the Public Safety Assessment – Court in Kentucky*, Laura and John Arnold Foundation (2014), at 4.

population in the community, who are in jail pretrial.[49] With an empirically-derived pretrial risk assessment tool – one that has been tested for disparities – North Carolina officials would be able to contextualize the race data presented earlier and begin to address any identified issues.



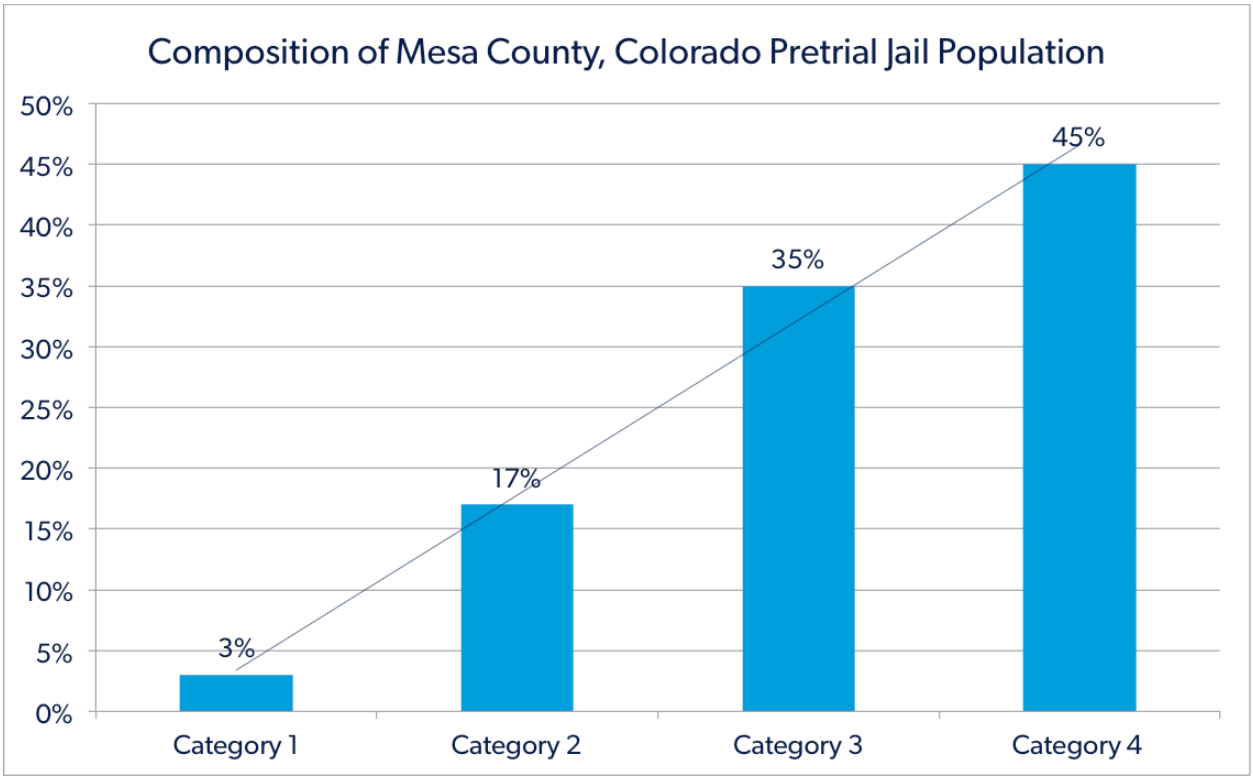
Source: *Results of the First Six Months of the Public Safety Assessment – Court in Kentucky*, Laura and John Arnold Foundation (2014).

Third, having an empirically-derived pretrial risk assessment tool allows a jurisdiction to make valid comparisons between different types of release, or specific conditions of release. For example, as noted earlier, the for-profit bail bonding industry touts studies showing that defendants released through commercial bonds have higher appearance rates than defendants released through other means. But without knowing the risk levels of defendants it is not possible to know whether defendants in one group are comparable, in terms of risk, to defendants in another group. Such comparisons cannot presently be made in most North Carolina jurisdictions, but they can be made in jurisdictions that have implemented empirically-derived pretrial risk assessment.

Fourth, knowing the risk levels of defendants who are in jail helps a jurisdiction assess whether it is using its expensive jail resources for those who need to be there because of their risks. The data presented in Section II from the six North Carolina counties shows the charges of those who were in jail during the day the snapshot was taken, but since their risk level was unknown, it is very difficult to assess whether this was a good use of jail space.[50] When Mesa County, Colorado officials first implemented the Colorado risk assessment tool, they leaped at the opportunity to look at the risk

[49] *Supra* pp. 15-16.
[50] Once Mecklenburg County began using an empirically-derived pretrial risk assessment tool, it was possible to see how jail space was being used in that jurisdiction. See: http://nccalj.org/wp-content/uploads/2016/02/Final-Presentation-raleigh-1.pdf, Slides 11 & 12.

levels of the pretrial defendants they were holding, and they found that there were high percentages of low risk defendants in jail. County officials have been using the risk assessment levels to track progress in addressing that situation. As the chart below shows, officials can now report to their community how they are using the jail for the pretrial population – 80% of the pretrial detainees are scored in the two highest risk categories. Before implementing the risk assessment tool, county officials were in the same position as North Carolina officials – they could only point to data showing that there were large numbers of persons in jail pretrial on low level offenses or low bonds – without any knowledge of their risk levels.



Source: Data provided by Mesa County, Colorado.

Fifth, knowing the risk levels of defendants coming through the system can help officials plan for, and justify to taxpayers, the resources needed to address the risks. Numerous pretrial risk assessment studies have demonstrated that the overwhelming majority of defendants fall into low or medium risk categories, meaning that they should require minimal resources for monitoring in the community. Knowing risk levels can help budget officers better project funding needs.[51]

[51] An analysis of costs in the federal system found that detaining a defendant pretrial costed an average of $19,000 per defendant, while the costs for supervising a defendant in the community ranged from $3,100 to $4,600 per defendant. The analysis took into consideration the costs of supervision, any treatment, and any costs associated with law enforcement returning defendants who had failed to appear for court. Marie VanNostrand and Gina Keebler, *Pretrial Risk Assessment in the Federal Court*, 73 FED. PROB., (2009), at 6.

Recognizing these benefits, at least seven states – Colorado, Delaware, Hawaii, Kentucky, New Jersey, Virginia, and West Virginia – have passed laws requiring the use of statewide empirically-derived pretrial risk assessment tools.[52]

The Arnold Foundation's PSA-Court tool offers several benefits for use in North Carolina. First, it is presently being used in Mecklenburg County, so there is in-state experience with the tool, giving judges, prosecutors and defenders from around the state the opportunity to speak with their counterparts in Mecklenburg County about their experience working with the tool.

Second, the PSA–Court tool has been validated using data from 1.5 million cases from over 300 local, state and federal jurisdictions all across the country, meaning that it is the most universal pretrial risk assessment tool in existence. Currently 29 jurisdictions, including three states – Arizona, Kentucky and New Jersey – use the tool.[53] This should give North Carolina officials confidence that it will perform well in North Carolina.

Third, the risk assessment can be completed using information typically available at the time of the initial appearance before the magistrate.[54] It does not require an interview with the defendant by a pretrial services program or other entity. This is important given that most North Carolina counties, even those that have pretrial services programs, do not presently have the capacity to interview defendants prior to the initial appearance before the magistrate.

As a result, this report recommends that officials explore implementing Arnold's PSA-Court tool in jurisdictions throughout North Carolina.[55] Since the tool is not yet publicly available and a timeline for its availability is uncertain, as a backup this report recommends that North Carolina use the Virginia Pretrial Risk Assessment instrument (VPRAI). The VPRAI was first developed in Virginia in 2003 after a study of data from seven diverse jurisdictions throughout the state.[56] It was re-validated in 2009 from nine diverse Virginia jurisdictions.[57] A copy of the Virginia Pretrial Risk Assessment instrument is in Appendix A.

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[52] Colo. Rev. Stat. §16-4-106, 4(c); 11 Del. C. §2104(d), §2105; Haw. Rev. Stat. §353-10; Ky. Rev. Ann. §431.066; 446.010(35); N. J. Stat. Ann. §2A:162-16; §2A-162-17; Va. Code Ann. §19.2-152.3; W. Va. Code Ann. §62-11F-1 et seq.

[53] See: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKEwig1YDn5I7OAhUFOyYKHaXyB4cQFgglMAE&url=http%3A%2F%2Fwww.arnoldfoundation.org%2Finitiative%2Fcriminal-justice%2Fcrime-prevention%2Fpublic-safety-assessment%2F&usg=AFQjCNE6Iwblltg8uh1AFDgmYPbfcgjgXA.

[54] In Mecklenburg County, however, the tool has been implemented only for use by the district court judge.

[55] See Section V, Recommendations. The factors included in this tool are listed in Appendix E.

[56] Marie VanNostrand, *Assessing Risk Among Pretrial Defendants in Virginia: The Virginia Pretrial Risk Assessment Instrument*, Virginia Department of Criminal Justice Services, 2003.

[57] Marie VanNostrand and Kenneth Rose, *Pretrial Risk Assessment in Virginia*, Virginia Department of Criminal Justice Services, 2009.

Release/Detention Matrix

Once the risk assessment is completed on a defendant, the next step is to determine how to use that information to make a release/detention decision. Research is providing guidance on how to do that, matching identified risk levels with appropriate risk management strategies. For example, defendants who are found to be low risk have very high rates of success on pretrial release. Research has shown that these already high rates cannot be improved by imposing restrictive conditions of release on low risk defendants.[58] The research shows that the only result to expect when imposing restrictive conditions of release on low risk defendants is an increase in technical violations.[59] Instead, the most appropriate response is to release these low risk defendants on personal bonds with no specific conditions, and no supervision other than to receive a reminder notice of their court dates.[60]

Other studies have found that high risk defendants who are released with supervision have higher rates of success on pretrial release than similarly-situated unsupervised defendants. For example, one study found that, when controlling for other factors, high risk defendants who were released with supervision were 33% less likely to fail to appear in court than their unsupervised counterparts.[61]

A reality that any jurisdiction faces is that, even though the charge or type of charge may provide little information on a defendant's risk to public safety or to fail to appear in court, the impact of new criminal activity or failing to appear on the more serious charge is perceived to be much greater. Therefore, many jurisdictions that use empirically-derived pretrial risk assessment tools have developed matrices that combine the risk level with charge types, for example, non-violent misdemeanor, violent misdemeanor, non-violent felony, and violent felony. The resulting intersection of the risk level and charge type produces a suggested release/detention decision. The decision itself remains within the discretion of the judge or magistrate after considering the risk assessment, the matrix, and any other relevant factors.

A copy of the matrix used in Virginia, based on the VPRAI, is in Appendix B. If North Carolina adopts the VPRAI, this matrix, called the Pretrial Praxis, should be used in concert with the VPRAI.

Risk Management

Any conditions set on a defendant's pretrial release should be related to the risk identified for that individual defendant and should be the least restrictive necessary to reasonably assure the safety of the public and appearance in court.[62] The research on

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[58] *Pretrial Risk Assessment in Federal Court, supra* note 46.
[59] Id.
[60] Id.
[61] Christopher Lowenkamp and Marie VanNostrand, *Exploring the Impact of Supervision on Pretrial Outcomes*. (New York: Laura and John Arnold Foundation, 2013.)
[62] *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007) Std. 10-5.2 (a) at 106-107.

risk management is not as advanced as it is on risk assessment. With the current state of research, it is not possible to identify which conditions of release work best for all defendants. But there is some research to guide policy makers.

As noted above, research has shown that putting conditions of non-financial release on low risk defendants actually increases their likelihood of failure on pretrial release. Rather, the most appropriate response is to release these low risk defendants on personal recognizance with no specific conditions.[63]

Several studies have shown that simply reminding defendants of their upcoming court dates can have a dramatic impact on reducing the likelihood of failure to appear. One study found that calling and speaking with defendants to remind them about their court dates cut the failure to appear rate from 21% to 8%.[64] Another study tested the impact of a pilot court date reminder project that using an automated telephone dialing system to contact defendants. The study found that the project led to a 31% drop in the failure to appear rate and an annual cost saving of $1.55 million.[65]

Two studies that have considered the defendant's risk level, as determined by an empirically-derived risk assessment tool, have found that supervision results in lower rates of failure to appear and new criminal activity when compared to their risk-level counterparts who received no supervision.[66]

The Virginia Pretrial Praxis[67] takes all of this research into consideration, incorporating different options for managing any identified risks. These include release on personal recognizance or unsecured bonds with no conditions of release other than to receive a court date reminder, followed by release on gradually increasing levels of supervision based on identified risks.[68]

Citations

The American Bar Association's Standards for Criminal Justice (Pretrial Release) state that "[i]t should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective

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[63] *Pretrial Risk Assessment in Federal* Court, *supra* note 54.
[64] Jefferson County, *Colorado Court Date Notification Program: FTA Pilot Project Summary* (2005).
[65] Matt O'Keefe, *Court Appearance Notification System: 2007 Analysis Highlights* (2007). *See also:* Michael N. Herian and Brian H. Bernstein, *Reducing Failure to Appear in Nebraska: A Field Study*, THE NEBRASKA LAWYER (2010); and Wendy White, *Court Hearing Call Notification Project*, Coconino County Criminal Justice Coordinating Council (2006).
[66] John S. Goldkamp and Michael D. White, *Restoring Accountability in Pretrial Release: The Philadelphia Pretrial Release Supervision Experiments*, JOURNAL OF EXPERIMENTAL CRIMINOLOGY, 2(2) (2006), at 143-181; Christopher Lowenkamp Marie VanNostrand, *Exploring the Impact of Supervision on Pretrial Outcomes*. Laura and John Arnold Foundation (2013).
[67] See Appendix B.
[68] See Appendix C.

enforcement of the law. This policy should be implemented by statutes of statewide applicability."[69]

At least one state has changed its laws recently, expanding the use of citation releases. In 2012, Maryland enacted legislation mandating that law enforcement officers issue a citation in lieu of custodial arrest when the officer has grounds to make a warrantless arrest for persons facing misdemeanor or ordinance offenses that carry a maximum penalty of 90 days or less, and for possession of marijuana. The law allows the law enforcement officer to fingerprint and photograph the individual before the citation release. In the year after the law went into effect, there was an 80% increase in the number of citations issued in the state and nearly 20,000 fewer initial appearances in court. "From a cost perspective, the further expansion of criminal citations has the potential to save money by reducing arrests and booking costs."[70]

Prosecutor involvement at the initial hearing

Ideally, prosecutors should review criminal charges immediately after arrest, prior to the initial bail hearing before a judicial officer, to weed out those cases not likely to advance. Many cases are dropped after review by prosecutors – one study found that 25% of all felony cases are ultimately dropped.[71] Experienced prosecutors, those who have extensive trial experience and who know what is needed to get a conviction, are best equipped to do a review of cases before the initial appearance than less experienced prosecutors. The District of Columbia prosecutor's office has been doing this for many years. In 2012, of the 27,000 cases brought to the office by law enforcement, 8,000 were declined before the initial appearance before a judicial officer – thus stopping at the front door of the courts about 30% of all new arrests, cases that would have needlessly bogged down the system.[72]

In addition to screening cases early, prosecutors should be present at the initial appearance of the defendant before the magistrate. At the hearing, the prosecutor should make appropriate representations on behalf of the state on the issue of pretrial release. As the National District Attorneys Association standards state, at that hearing "[p]rosecutors should recommend bail decisions that facilitate pretrial release rather than detention."[73]

In North Carolina, prosecutors are not routinely present at the initial appearance before the magistrate.

Defense representation

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[69] *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007) Std. 10-2.1, at 63.
[70] *Commission to Reform Maryland's Pretrial System: Final Report* (2014), at 27-28.
[71] Reaves, *supra* note 11, at 24
[72] *The United States Attorneys Office for the District of Columbia: 2012 Annual Report* (2013) at 31.
[73] *National Prosecution Standards: 3rd Edition*, National District Attorneys Association, 2009, Std 4-1.1.

The U.S. Supreme Court has said that "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of the adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel."[74]. The Court stopped short of saying that an attorney must be present at the hearing, only that the right to counsel attaches at that time.

The American Council of Chief Defenders, however, calls on all public defender offices to "dedicate sufficient resources to the bail hearing and/or first appearance, where the pretrial release terms are set." At that hearing, public defenders should "obtain and use crucial risk assessment information for making relevant and persuasive arguments regarding appropriate release conditions for their clients."[75] Research has shown that indigent defendants who are represented by counsel at the bail hearing are released non-financially at about 2½ times the rate of those who were unrepresented.[76]

Defense attorneys do not presently represent indigent defendants at the initial appearance before the magistrate in North Carolina. In many North Carolina jurisdictions, the defendant first receives counsel at the first appearance in District Court.

Bond review of defendants unable to post bond

As noted in Section II, current North Carolina law requires a first appearance (which includes a review of pretrial conditions) before a district court judge for in-custody defendants charged with a felony. However, no such hearing is required for in-custody defendants charged with misdemeanors. This can, and often does, result in misdemeanor defendants remaining in pretrial confinement for periods longer than they might serve as a sentence if convicted. This "gap" in the law seems to be unique to North Carolina. In other states, a defendant who remains in custody after an initial hearing before a magistrate will appear before a judge the next court business day for a bond review hearing, regardless of the charge level.

Data/performance measures

Collecting data on the impact and outcomes of evidence-based practices is crucial for 21st Century pretrial justice. Jurisdictions should be able to report on data on all criminal cases relating the three goals of the bail decision:

- Public safety rate (defendants not arrested for new criminal activity while on pretrial release) for all released defendants, broken down risk level and by release type.

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[74] *Rothgery v. Gillespie*, 554 U.S. 191 (2008), at 20.
[75] American Council of Chief Defenders, *Policy Statement on Fair and Effective Pretrial Justice Practices* (2011), at 14.
[76] Douglas L. Colbert, Ray Paternoster and Shawn Bushway, *Do Attorneys Really Matter? The empirical and Legal Case for the Right of Counsel at Bail*, CARDOZO LAW REVIEW, 23 (2002) at 1719-1793.

- Court appearance rate for all released defendants (percentage of defendants who did not fail to appear for all scheduled hearings, resulting in the issuance of a warrant or order for arrest), broken down by risk level and by release type.
- Pretrial release rate, broken down by risk level, release type, and time between arrest and release.

Other important measures include:

- Number of defendants released by citation, broken down by charge and by police department and/or sheriff's office.
- Percent of defendants for whom an actuarial risk assessment was scored prior to the release-or-detain decision by the magistrate, broken down by county or judicial district.
- Percent of cases reviewed by an experienced prosecutor prior to the initial appearance before a magistrate, broken down by county or judicial district.
- Percent of initial appearances before the magistrate in which the prosecution and defense participate, broken down by county or judicial district.
- Percent of cases in which the magistrate's decision matches that suggestion of the pretrial matrix, broken down by county and by magistrate.
- Percent of detained defendants who were detained as a result of a detention hearing, broken down by county or judicial district.
- Percent of detained defendants who were held on a secured bond, broken down by risk level and by county or other appropriate jurisdiction.
- Length of stay in jail for detained defendants who were held on a secured bond, broken down by risk level, bond amount, and county or other appropriate jurisdiction.

IV. PRETRIAL JUSTICE IN NORTH CAROLINA: THE LEGAL STRUCTURE

Prerequisites to Understanding the Legal Analysis

Understanding any legal analysis designed to guide decision makers toward implementing legal and evidence-based practices requires first knowing three broad concepts. First, every jurisdiction in America already has many essential elements of a pretrial system, even if that system does not function optimally. For example, each jurisdiction does a version of risk assessment. In some jurisdictions, however, risk assessment is done simply by glancing at a defendant's top charge. Other jurisdictions use empirically-derived risk assessment instruments, validated to their populations, which help predict the chances of a defendant's pretrial misbehavior. Likewise, all jurisdictions do some sort of risk management, from merely hoping that a defendant will come back to court and stay out of trouble during the pretrial phase to using dedicated professional pretrial services agencies designed to further the lawful purposes of release and detention. In the same way, every state has a legal structure to effectuate pretrial release and detention that works at some level. Nevertheless, sometimes that structure can actually hinder what we know today are "best-practices" in pretrial release and detention. Understanding this allows us to acknowledge that "bail reform" is not necessarily a daunting task; indeed, it often means merely improving existing systems, even if those improvements are comprehensive.

Second, we are learning that a great deal of education is necessary to fully understand what those improvements should be. Pretrial release and detention is deceptively complex, and yet suffers from decades of neglect in our colleges, universities, and law schools. It is simply not enough to take on a topic like pretrial release and detention with the traditional and existing knowledge of criminal justice stakeholders. Some specialized education must take place. Fortunately, to help jurisdictions obtain the knowledge necessary to advance pretrial justice, there are numerous documents and programs available today through the Pretrial Justice Institute and other leading organizations that can provide education, advice, and assistance. Even though decision-makers in particular jurisdictions may believe that they lack data and information, in this generation of bail reform we have virtually every answer to the significant questions that have nagged America over the past 100 years – answers that can lead to substantial progress toward pretrial justice. Due to time and space limitations given for this report, it will be up to North Carolina criminal justice leaders to read beyond this report to fully learn the additional material that points to those answers.[77]

[77] North Carolina stakeholders should begin by reading *Fundamentals of Bail, supra* note 1, and Timothy R. Schnacke, *Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial,* Nat'l Inst. Corr. (2014), and references cited therein. By doing so, stakeholders will learn that broad reports (such as this one) concerning the state of pretrial release and detention in any particular state can often only provide the impetus for continued conversations over legal and evidence-based practices based on research, which, in turn, is being published at an increasingly rapid pace.

Third, the knowledge gained from deep bail education often illustrates that certain assumptions underlying a state's existing release and detention laws, policies, and practices are flawed, and that the solutions to perceived issues at bail are counterintuitive in our current culture. For example, for over 100 years, courts in America have assumed that defendants pose higher pretrial risks when facing higher charges, and our laws and practices are set up to effectuate release based on that assumption. However, the pretrial research is demonstrating that certain misdemeanor defendants often pose higher risk than felony defendants and that many felony defendants pose little risk at all. Likewise, jurisdictions often assume that money helps to keep citizens safe, but the research, the history, and the law all tell us that this is not so. Understanding the somewhat counterintuitive nature of certain pretrial justice change efforts helps us to understand and possibly change the current culture surrounding pretrial release and detention.

The History of Bail and the Fundamental Legal Principles

Understanding any legal analysis also requires having at least some familiarity with the history of bail (release) and no bail (detention) – considered to be a "fundamental" or "core" element that jurisdictions must understand to make improvements in pretrial justice. Generally speaking, the history of bail shows that in roughly 1900, America moved from a system of pretrial release using personal sureties administering unsecured bonds to a system relying on commercial sureties administering mostly secured bonds. Justice system professionals and researchers in America very quickly learned that the infusion of profit, indemnification, and security into bail led to continued and, indeed, increased unnecessary detention of bailable defendants,[78] but not before states had already adopted the "charge-and-secured money" legal systems we still see today.

At the time, many courts in America believed that using commercial sureties and secured bonds would help get most defendants out of jail pretrial, but it only made things worse. Today, after two generations of bail reform in America designed to fix the problems with the charge-and-secured money release system, we find ourselves in yet another generation of reform hoping to fix it once again because secured money bonds continue to interfere with rational release and detention.

Moreover, understanding any legal analysis requires knowing how the fundamental legal principles underlying American pretrial release and detention have been molded by history and have, in many ways and until very recently, failed in fixing the problems brought on by the changes in 1900. Knowing the law for bail and no bail means knowing that the law has been largely ignored for decades, allowing states to craft legal schemes that are now being successfully challenged in the courts. Generally speaking, many state bail laws are simply unlawful when measured against the larger American legal principles, such as procedural due process and equal protection, and this

[78] *See, e.g.,* Roscoe Pound & Felix Frankfurter (Eds.), *Criminal Justice in Cleveland* (Cleveland Found. 1922); Arthur L. Beeley, *The Bail System in Chicago*, at 160 (Univ. of Chicago Press, 1927).

alone is causing many states to make substantial changes to those laws to allow for legal and evidence-based practices in pretrial release and detention.[79]

Current North Carolina Legal Structure

Unlike many states, North Carolina has a detailed recitation of existing laws, and that recitation has served as a useful tool for the instant report.[80] This analysis seeks to go beyond that recitation to assess whether the legal structure helps or hinders best pretrial practices. Due to time limits, this overview of the North Carolina legal structure must be viewed only as the beginning of a conversation about holding up the state's laws to the broader legal principles, the history of bail, the pretrial research, and the national standards on best practices to assess every element affecting pretrial justice. Pretrial reform often involves making improvements to *all* decisions and practices from the initial police stop to sentencing. Reviewing those decisions and practices, looking at the associated legal and evidence-based literature for each, holding them up to some model and to existing laws while comparing those laws to other sources, and making recommendations for possible changes, while fruitful, would be laborious and lead to an overwhelmingly lengthy document. Accordingly, this report will examine in detail only the most crucial issues facing North Carolina at this time, which mostly deal with the judicial official's decision to release or detain a defendant pretrial.[81]

Nevertheless, the people of North Carolina should see the benefits of looking at other decision points or practices in the process. For example, a crucial element in pretrial justice is diversion, and while the author saw references to a variety of local diversion programs, such as "jail diversion," mental health courts, and public and private diversion for certain first offenders in North Carolina, other state's statutes provide many more opportunities for structured pretrial diversion, and base those programs on their own literatures concerning best practices. Likewise, even though there did not appear to be anything legally hindering defense counsel providing assistance at initial appearances, this does not appear to be the practice in North Carolina even though at the initial appearance defendants are facing significant deprivations of liberty.[82] By briefly reviewing the North Carolina laws, the author also saw potential issues concerning: (1) police issuing citations versus arresting persons and courts issuing summonses versus warrants for arrests (laws can be amended to encourage or even require the use of citations and summonses so that arrest is only

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[79] As only one example, the Ninth Circuit Court of Appeals recently struck down as unconstitutional an Arizona "no bail" provision enacted in its constitution. *See Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (2014). Until very recently, people have mistakenly inferred the lawfulness of certain bail practices due simply to the lack of opinions expressly declaring them to be unlawful.

[80] *See Criminal Proceedings, supra* note 37.

[81] A more detailed legal analysis would also look deeply into North Carolina case law, which was not done for purposes of this report.

[82] Defense counsel at the initial appearance has spun off into its own reform effort, with multiple groups working on the issue simultaneously. Reasons for including defense counsel at initial appearance include empirical evidence in addition to fairness. *See Early Appointment of Counsel: The Law, Implementation, and Benefits* (Sixth Amend. Ctr./PJI 2014); *Do Attorneys Really Matter?, supra* note 70.

reserved as a last resort):[83] (2) practices such as requiring fingerprinting and DNA testing that might lead to unnecessary arrests; (3) the potentially inefficient practice surrounding the use of appearance bonds for infractions; (4) certain laws that allow for delays in holding the initial appearance (such as tasks required of officers arresting defendants on implied consent offenses) or that hinder the immediate release of low and medium defendants present at that appearance (the pretrial research, which follows the law, would point to dealing with the vast majority of defendants rapidly, and especially low and medium risk defendants because keeping those defendants unnecessarily detained can actually lead to more crime and failures to appear for court); (5) speedy trial for detained defendants; (6) potential problems with implementing risk assessment into a legal scheme already containing various untested risk factors that judicial officials "must" consider;[84] and (7) collecting data and performance measures (data collection is crucial to understanding the efficacy of any pretrial system, and many states are now enacting requirements for such things into their laws).

Moreover, when considering changes to the release and detention decision, most jurisdictions recognize that empirically-derived risk assessment and evidence-based risk management are crucial elements, if not prerequisites, to those changes. Only by knowing defendants' risk can courts follow the law and the evidence by immediately releasing the majority of pretrial defendants under varying levels of research-supported supervision to both protect the public and bring people back to court, while providing for extreme public safety risk management through the ability to detain certain defendants in a fair and transparent procedure. The laws must allow for these elements, and if they do not, they must be changed.

The largest issue facing North Carolina, however, deals with the laws surrounding the judicial official's decision to release or detain a defendant pretrial. North Carolina currently has a legal scheme with elements based firmly in a charge-and-secured money bond system and with somewhat faulty assumptions about both money and charge.

To assess North Carolina's laws for how it deals with the release and detention decision, this section examines the following: (1) how the North Carolina laws operate broadly as compared to other states, focusing primarily on its statutory release/detention eligibility framework; (2) certain assumptions that seem to buttress

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[83] Current North Carolina law appears to allow an officer to issue a citation for a misdemeanor or infraction, but there is no preference or mandatory language. G.S. § 15A-302. The law concerning summonses apparently allows the issuance of a summons for felonies in addition to misdemeanors and infractions (also with no preference), but because the AOC criminal summons form has been drafted not to charge a felony, persons have apparently been advised not to issue one for felonies. *See id.* §15A-303(a); *Criminal Proceedings, supra* note 37, at 4. Other jurisdictions have shown that requiring the arrest of felony defendants is not always necessary, and the trend across America appears to be the use of mechanisms that gradually ratchet up criminal process and that incorporate every means possible to compel court appearance before resorting to arrest. To the extent that warrants (or OFA's in North Carolina) use financial conditions of release on their face, that practice should be made part of any discussion to reduce or eliminate secured financial conditions generally. To the extent that North Carolina can discuss the appropriate use of arrests for violations of release conditions, it should do so also. Finally, to the extent that North Carolina can adopt the evidence-based practice of court date notification in all of its courts, it should do so.

[84] *See* G.S. § 15A-534(c).

existing laws and that might make change difficult; (3) provisions setting out the detention process; (4) provisions setting out the release process; and (5) issues gleaned from a reading of various local pretrial release policies.

North Carolina Laws: The Right to Release and Authority to Preventively Detain High Risk Defendants Generally

Current North Carolina law does not expressly provide for a right to actual pretrial release or articulate a procedure for preventive detention of high risk defendants. As discussed below, both omissions create barriers to pretrial reform.

North Carolina eliminated the right to bail provision in its constitution of 1868.[85] North Carolina is thus like eight other states and the federal system, all of which operate without a constitutional right to bail, which means that certain changes to the system of release and detention will not be hindered by constitutional right to bail hurdles.[86] From a legal standpoint, states with no constitutional right to bail can more easily implement both release and detention provisions that follow legal and evidence-based practices than states with such a constitutional right.

This is not to say that North Carolina does not have a right to release pretrial, and, indeed, there are good arguments for why a state could never completely eliminate any right to pretrial release. But in North Carolina, it appears that the right is somewhat confused. Unlike in other states' laws, there is no explicit delineation of precisely who should actually be released or detained. Although Section 15A-533 is entitled, "Right to pretrial release in capital and noncapital cases,"[87] the body of the statute is crafted only in terms of setting or not setting conditions. Various local pretrial release policies quote cases articulating a right to pretrial release,[88] and even interpreting § 15A-533 to provide for a "right to release,"[89] but while the statute's title speaks of a right to release, the statute both generally and specifically points only to a "right to have one's conditions set," which is far from actual release.[90]

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[85] The previous constitution stated: "All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident, or the presumption great." N.C. Const. art. 39 (1776).

[86] Of course, as in other states, North Carolina has other constitutional provisions that are relevant to bail, and that will form the boundaries over potential reforms. For example, some states have issues with constitutional victim's rights provisions when those provisions require a victim's presence at initial appearance, thus causing delay. The relevant North Carolina provision articulates a "right as prescribed by law [for victims] to present their views and concerns to the Governor or agency considering any action that could result in the release of the accused, prior to such action becoming effective." N.C. Const. art 1, § 37(1)(g). Because this provision speaks of the "accused," it has clear implications for pretrial release; nevertheless, the right appears to hinge on how it is "prescribed by law," and in the time allotted for this analysis, the author was unable to find any statutory provision that might delay or hinder the release or detention decision.

[87] G.S. § 15A-533.

[88] *See, e.g., In the Matter of Promulgating Local Rules Relating to Bail and Pretrial Release for Judicial District 8A,* at 5-6 (quoting *Stack v. Boyle,* 342 U.S. 1 (1951)).

[89] *See, e.g., Policies Relating to Bail and Pre-Trial Release Second Judicial District,* at 2.

[90] G.S. §§ 15A-533(b) (stating that "[a] defendant charged with a noncapital offense must have conditions or pretrial release determined"). The relevant treatise also speaks only of a right to have conditions set,

Moreover, the statute has no discernable process for detention of the sort approved in the U.S. Supreme Court's opinion in *United States v. Salerno,*[91] which guides states in crafting such provisions. Existing North Carolina law creates rebuttable presumptions that "no conditions or combination of conditions" will provide reasonable assurance of public safety and court appearance for defendants charged with certain offenses with certain preconditions,[92] but those provisions only testify to the notion that other cases, even without the presumptions, are potentially cases in which "no condition or combination of conditions" would suffice; obviously, presumptions toward a certain result in some cases means that there should be a broader set of cases allowing the presumptive subset to exist, yet the statute has no provisions to deal with them. There are simply no statutory provisions setting forth exactly what to do in a typical case where a defendant is deemed extremely high risk and unmanageable outside of secure detention and falls outside of the rebuttable presumption cases.

As discussed below, a right merely to have conditions set, coupled with the statutory provisions discussing those conditions as well as no decent process for risk-based detention, naturally moves North Carolina judicial officials toward using secured money conditions to address risk for both court appearance and public safety, and toward attempting to use unattainable money conditions to detain defendants posing extremely high pretrial risk. By contrast, "model" release and detention schemes would expressly articulate who is releasable, who potentially is not, and provide mechanisms to make sure that the in-or-out decision is made purposefully, transparently, and fairly, and with nothing (such as money) interfering with the decision.[93]

In addition to not being entirely clear on what right North Carolina defendants actually enjoy as well as not providing for a due-process laden detention process, North Carolina law overall illustrates the same issues facing virtually every other state in America: the legal scheme is based on a charge and secured-money model, and this core issue can hinder attempts to improve the system without statutory changes. Specifically, although the statute speaks of pretrial risk (something other state statutes often do not do), it makes determinations of who is entitled to having release conditions set based primarily on charge as a proxy for risk, and subtly points judicial officials toward using

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and provides as exceptions those cases in which defendants don't enjoy a right to have conditions set. *Criminal Proceedings, supra* note 74, at 27.

[91] To pass constitutional muster, a preventive detention provision would have to comply with the requirements discussed in *United States v. Salerno,* 481 U.S. 739 (1987) (finding the Bail Reform Act of 1984 constitutional against facial due process and excessive bail claims).

[92] *See, e.g.,* G.S. § 15A-533(d) (rebuttable presumption for persons accused of drug trafficking). These provisions are also fairly limited, requiring judicial officers in most cases to find facts concerning the offense as well as certain preconditions such as already being on pretrial release at the time of the current offense along with some delineated previous conviction. *See generally Criminal Proceedings, supra* note 74, at 27-30.

[93] There are few exemplary statutes that currently do this. However, the D.C. bail statute, D.C. Code Ann. §§ 23-1301-09, 1321-33, which reflects principles articulated in the American Bar Association Standards on Pretrial Release, has been used by many jurisdictions as a model to begin conversations about statutory reform.

the money condition to address risk.[94] The better practice would be to set forth a right to release for all except extremely high risk defendants (or defendants who are not as risky but who also face extremely serious charges, or both), provide for a lawful and transparent detention provision based on risk to allow pretrial detention with no conditions, and then create mechanisms so that persons released pretrial are released immediately. Rebuttable presumptions, though perhaps not made entirely unnecessary by the move toward infusing risk into charge-based systems, can be crafted to use both risk and charge in ways that support the law and the research.

North Carolina Law: Underlying Assumptions

Many jurisdictions have learned that overcoming flawed assumptions concerning pretrial release and detention is necessary before making improvements to the process. In addition to the flawed assumption that the right to bail is merely a right to have one's conditions set, or the equally flawed assumption that higher charge necessarily equals higher risk, there are two additional significant assumptions that should be addressed. These assumptions are not unique to North Carolina; indeed, they are seen across the country and illustrate a much more pressing problem with bail reform in America, which is that many pretrial improvements involve thinking about release and detention in an entirely different way. This means that bail reform involves "adaptive change," which involves overcoming faulty assumptions driving the way we think about any particular topic.[95]

One assumption found throughout the North Carolina laws appears to be that money at bail affects public safety. It is found either explicitly, as in G.S. §15A-534(d2)(1), which requires judicial officials to impose a secured bond or house arrest (which includes a secured bond) "[i]f the judicial official determines that the defendant poses a danger to the public," or implicitly, as in G.S. § 15A-534(d3), which allows a judicial official to double the amount of money condition for defendants who commit crimes while on pretrial release, presumably to better protect the public from future crimes. Money does not protect the public, however, unless it is used unlawfully to detain an otherwise releasable defendant.[96]

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[94] For example, although the statute includes an express presumption for non-secured releases, G.S. § 15A-534 (b), later provisions do not mandate and also place significant limitations on pretrial services supervision, which might lead judicial officials to set more secured bonds. Likewise, various provisions throughout the statute equating secured money amounts with public safety might nudge any particular judicial official toward setting a secured bond since a finding of "a danger of injury to any person" is one reason for overcoming the presumption of non-secured release. The fact that the statute requires judicial officials to set conditions for high risk defendants falling outside of the "no conditions" exceptions, also necessarily moves those officials toward using secured money bonds to at least respond to extremely high risk.

[95] Bail reform has only recently begun to understand that the improvements involved require system changes as well as changes in people's beliefs and core understandings of certain concepts. For information on how adaptive change can be addressed at bail, go to http://transformingcorrections.com/about/.

[96] Using money to detain defendants pretrial would obviously implicate a state's right to bail or release provision, but the practice can also lead to claims concerning both substantive and procedural due process, equal protection, and excessive bail.

In many states, using money to protect the public is expressly unlawful, but even in a state like North Carolina, it is irrational and thus implicitly unlawful. North Carolina G.S. § 15A-544.3 makes failure to appear for court the only event that can lead to forfeiture of money on a bail bond. Thus, when a defendant commits a new crime while on pretrial release, the money is not forfeited. Accordingly, it is irrational to set money to motivate defendant behavior concerning criminal activity because the money cannot lawfully act as a motivator. Setting a condition of release that cannot lawfully do what one intends it to do is irrational, and thus likely unlawful based on any legal theory that requires courts to use rationality or reason in its actions.[97] Likewise, no research has ever shown money to protect the public. In fact, the research on secured money bail shows that setting secured bonds leading to the detention of low and medium risk defendants actually causes them to become *higher* risk for both new criminal activity and failure to appear for court.[98] Setting a condition of release that leads to the *opposite* of what a court intends is even more irrational than setting one that simply doesn't work.

Finally, no matter how high the amount, any particular extremely dangerous defendant might still be able to pay it, leading to the potential for some horrific yet avoidable crime during the pretrial period. This public safety problem is exacerbated by North Carolina law, which appears to limit a judicial officer's ability to set a "cash only" bond.[99] Because commercial sureties cannot lose money due to new criminal activity, in many states those sureties help extremely high risk defendants obtain easy release by using no-money-down and payment plan options.

Another assumption found in North Carolina law (including the local pretrial release policies) that potentially hinders the adoption of legal and evidence-based practices appears to be an assumption that release to pretrial services agency supervision should be reserved only for low level crimes or low risk defendants.[100] In fact, the use of pretrial services functions are part of a high functioning pretrial system, and such agencies are often best when overseeing defendants posing high risk or charged with more serious crimes.

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[97] For example, even using its lowest level of scrutiny, due process analysis requires the means of government action to be rationally related to some legitimate end. There should be no doubt that all government action must be rational and non-arbitrary.

[98] *See, e.g., Hidden Costs*, *supra* note 12.

[99] *See Criminal Proceedings, supra* note 37, at 39.

[100] *See* G.S. § 15A-535(b) (allowing, but not requiring pretrial services programs, requiring defendant consent before they are used, and allowing them only in lieu of release under condition options (1), (2), or (3) of G.S. §15A-434(a). Apparently, very few North Carolina judicial districts have pretrial services agency programs, and at least one that does puts a wide variety of further restrictions on using them, including a long list of exclusionary criteria and excluded offenses that most people would describe as "serious." *See Bail Policy for Twenty Sixth Judicial District* at 5, 23-33. Together, these factors suggest an assumption that pretrial services supervision is only inappropriate for certain low level crimes or low risk defendants. This assumption is often tied to the first concerning money and public safety; jurisdictions that believe money is the best way to manage pretrial risk often believe that pretrial services supervision should be reserved only for those cases in which money is unnecessary.

North Carolina Law: Preventive Detention of High Risk Defendants

As noted above, North Carolina law does not expressly establish a procedure for the preventive detention of high risk defendants. Moreover, the rebuttable presumption provisions allowing for "no conditions" are, in most cases, quite narrow, and there appears to be some confusion as to whether persons other than those statutorily separated out for no conditions can be detained, even if, in their particular cases, no conditions or combination of conditions would suffice to provide reasonable assurance of public safety or court appearance. Combined with the assumption that money protects the public and the various statutory provisions subtly leading judicial officials to use money to respond to risk, the lack of a risk-based detention process likely means that many – if not most – defendants who are perceived to be high risk are being detained purposefully through the unwise and potentially unlawful[101] process of using unattainable secured money bonds. Indeed, an Internet search reveals numerous North Carolina cases of defendants being held bonds in amounts of millions or even tens of millions of dollars, at least suggesting judicial intent to detain. Moreover, one local pretrial release policy reported a "modification" of recommended bond amounts because, "Those who pose the greatest threat [to the community] must not be allowed to roam free while keeping in mind the presumption of innocence."[102] This statement clearly indicates the use of money to detain.

While it is unclear whether individual judicial districts would, or even could, create a lawful and transparent detention process like the one reviewed by the U.S. Supreme Court in *United States v. Salerno,*[103] such a process could be fairly easily created in the North Carolina statutes. Because detaining someone pretrial involves jailing someone for something the person may or may not do in the future, the Supreme Court has cautioned that pretrial detention provisions must be carefully limited and fair by incorporating numerous procedural due process elements.[104] Detention through the use of money – a practice apparently used widely throughout North Carolina – simply does not measure up to that standard.

The closest North Carolina law comes to providing the required due process fairness elements to its detention procedure is through the fairly limited findings necessary for its rebuttable presumption cases, and the mandate in G.S. § 15A-434 (b) that judicial officials record in writing the reasons for imposing a secured bond, but only to the extent required by local pretrial release policies. Thus, while G.S. § 15A-535(a) requires the creation of such local policies, it merely allows districts to decide whether to include a further requirement that judicial officials make written records.[105] None of the

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[101] As mentioned previously, using the release process to detain defendants by using money potentially violates both substantive and procedural due process, equal protection notions, and the prohibition against excessive bail.
[102] *In the Matter of Promulgating Local Rules Relating to Bail, Judicial District 8A,* at 1.
[103] 481 U.S. 739 (1987).
[104] *See id.* at 747-52.
[105] *See* G.S. § 15A-535(a) (directing that policies "*may* include . . . a requirement that each judicial official who imposes condition (4) or (5) in G.S. 15A-434(a) must record the reasons for doing so in writing." (emphasis added)).

local pretrial release policies reviewed by this author contain detention provisions remotely similar to the provisions favorably reviewed in *Salerno,* which were described by the Court as a "full blown adversary hearing."[106] Moreover, at least one local pretrial release policy requires judicial officials to provide reasons only for secured amounts falling above those provided in the schedule of recommended amounts.[107] Others provide check-box forms for the required reasons.[108] Still others appear to have no record requirement at all.

North Carolina Law: The Release Process

Looking at the release processes broadly, North Carolina's law is like most other states' bail laws, in that it is charge-based, overly reliant upon financial conditions, does not include provisions for empirical risk assessment, has limits upon pretrial services agency supervision, and tends naturally to point to the use of mostly secured money bonds administered by commercial sureties. The North Carolina statute does not have the feel of a statute cobbled together over the decades; indeed, it appears to have much more direction and cohesive intent than most other state's bail laws. Nevertheless, it also appears to have grown over time simply to respond to the various crimes separated out for different pretrial treatment.[109] Like most states, there are some good provisions, such as an express presumption for release on recognizance or unsecured bond,[110] but there are also some bad ones, such as those requiring money to address public safety and permitting "bond doubling."[111]

As previously noted, believing that the legal right that defendants enjoy pretrial is a right merely to have "conditions set" can lead to significant hindrances when secured money remains one of those conditions. Quite broadly, secured money conditions cause the two most significant problems we see in the field of pretrial justice: (1) the unnecessary and often unlawful detention of low and medium risk defendants for failure to pay the security necessary for release; and (2) the unwise release of extremely high risk defendants who have the money necessary to obtain release. People often equate the first problem as one representing a lack of fairness, but North Carolina should realize that detaining low and medium risk persons unnecessarily for even short periods of time also causes increases in new criminal activity and failures to appear for court both short- and long-term. Thus, the more that the North Carolina release process can be improved to quickly assess and release all eligible defendants, but especially low and medium risk defendants, the more public safety will be enhanced.

The statute currently attempts to do this through its presumption of release under either a written promise to appear or an unsecured bond,[112] but because there

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[106] *Salerno,* 481 U.S. at 750.
[107] *See, e.g., Bail Policies for the Judicial District Twenty-Nine-B,* at 3.
[108] *See, e.g., In the Matter of Promulgating Local Rules Relating to Bail and Pretrial Release for Judicial District 30A*, at 17-18.
[109] *See, e.g.*, G.S. 15A-534(d2) (special procedure for probationer charged with a felony).
[110] G.S. § 15A-534(b).
[111] *See, e.g.,* G.S. 15A-534(d1) (requiring bond doubling after failure to appear).
[112] G.S. § 15A-534(b).

exist no provisions concerning the use of empirically-derived risk assessment instruments, North Carolina judicial officials must attempt to assess risk mostly clinically – that is, based on their experience, with untested and unweighted statutory factors and with a series of possibly faulty assumptions about the pretrial process.[113] Accordingly, the presumption of release on a written promise or unsecured bond[114] can be easily and possibly incorrectly overcome with little evidence.

Empirically-derived risk assessment is considered to be a prerequisite to effective reform because knowing pretrial risk is the first step toward placing the right defendants in the right places during the pretrial phase of a criminal case. A second prerequisite is risk management. In many jurisdictions, risk management is done most effectively through the use of pretrial services agencies, which assess defendants for pretrial risk, make recommendations to courts, and then supervise defendants using minimal to intensive supervision techniques. In North Carolina, the statute mentions such programs,[115] but places severe limitations on their use by requiring both the pretrial entity to accept defendants into the program and the defendants to consent to be placed under supervision. The far better practice using both of these prerequisites is for judicial officials to base their release and detention decisions on empirically-derived risk assessment, and then to order released defendants to pretrial supervision, which might range from a simple phone call reminder to more intensive supervision, depending on the risk.

The primary bail-setting provision in North Carolina involves judicial officials setting at least one of five main conditions, from a written promise to appear to house arrest with a secured bond,[116] but, again, the lack of empirical risk assessment and the proper use of pretrial services agency supervision likely pushes judicial officials toward the more restrictive of these conditions to address mostly subjective notions of pretrial risk.

Making sure that the release or detention decision is structured properly and done right in the first instance can virtually eliminate any acute need for review of *unattainable* conditions. Nevertheless, there is often still some need for a failsafe to make sure the decision is effectuated, and it is absolutely crucial in any system that has not yet made improvements reducing the need for later review. In North Carolina, magistrates may modify a pretrial release order at any time prior to the first appearance

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[113] *See* § i*d.,* § 15A-534(c). These types of factors were included in most state statutes in the wake of the United States Supreme Court's opinion in *Stack v. Boyle,* 342 U.S. 1 (1951), as a way to avoid arbitrary bail setting by incorporating individualizing elements. Nevertheless, without statistically-derived risk assessment, judicial officials are likely to look at a statutory factor such as the "nature and circumstances of the offense charged," G.S. § 15A-534(c), incorrectly assume that a higher charge would lead to a higher risk of pretrial misbehavior, and thus be moved toward using more restrictive conditions, such as secured bonds.

[114] The presumption also includes release on option number three, release to the custody of a designated person or organization, but if a judicial official chooses this option, defendants are allowed to choose to post a secured bond instead. *See* G.S. § 15A-534(a).

[115] G.S. *§* 15A-534(b).

[116] *Id.* §§15A-534(a)(1)-(5).

before a judge,[117] but it appears that there is no formal process for subsequent mandatory review of bonds for misdemeanor defendants who are not released in the first instance.[118] This appears to be a significant gap in the North Carolina statute that must be fixed regardless of any additional improvements.

North Carolina Law: The Role of Local Pretrial Release Policies

North Carolina G.S. § 15A-535(a) requires senior resident superior court judges to create and issue local pretrial release policies to help in "determining whether, and upon what conditions, a defendant may be released before trial." This statutory language indicates that policies might be drafted to potentially supplement various elements missing from the statute, including important elements as a process to detain extremely high risk defendants. Overall, however, the various local pretrial release policies reviewed for this report illustrate mostly varying re-statements of the current statutory requirements along with the inclusion of money-based bail schedules. The policies vary widely in length, in age, in amounts included in the schedules, and, unfortunately, even in articulation of what should be uniform statements of the purposes of pretrial release and detention. Some local pretrial release policies would be rated as very good when held up to legal and evidence-based practices, but others most certainly would not. One frequent problem observed throughout the policies is an articulation of assumptions or rationales based primarily on experience rather than research or the law, and thus policies seeking only to follow the law and the pretrial research would likely look significantly different than the policies this author reviewed. Indeed, even elements within the various policies incorporated without any rationale (indicating, perhaps, universal acceptance), such as monetary bail bond schedules, would likely be eliminated after a review of the law and the evidence.

While there may be a place in pretrial justice for local determination of various details surrounding release and detention, the mechanism incorporated in North Carolina to do so could be improved. This notion should not be read merely to suggest the need for uniformity among the various bail schedules because the use of a traditional money bail schedule is simply not a legal or evidence-based practice. Instead, it should be read to indicate recognition that some local control could be built into a statewide pretrial justice system, but only after statewide issues are fully understood and addressed. Only after a thorough study of bail and no bail in North Carolina can the state likely assess which elements must be addressed in the statute and which can be left to individual judicial districts.[119]

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[117] *Id.* § 15A-534(e).
[118] *See id.* §15A-601(a) (limiting the first appearance provisions to felony defendants); § 15A-614 (requiring release eligibility review for felony defendants).
[119] As one example, a state might allow local flexibility in determining the "cut-offs" on a particular risk instrument, but only after that state determines broadly who should be released and detained pretrial, decides to use an empirical risk instrument, determines which instrument to use, and then decides that cut-off flexibility within a given range is even desirable.

Legal Framework Needed to Implement Legal and Evidence-Based Practices in North Carolina

Incorporating legal and evidence-based practices into a state's pretrial release laws typically requires substantial revision to those laws. Knowledge of legal and evidence-based practices often leads to a series of discreet changes, which quickly add up to large-scale revisions. Moreover, simply trying to incorporate a single element of bail reform – such as, for example, risk assessment – can lead to the need to address multiple statutory sections using charge as its primary proxy for risk. Thus, even targeted reforms can require significant statutory changes. Rather than attempting to re-write North Carolina's pretrial statutes, this report recommends broad statutory changes that will need to be fine-tuned by the people of North Carolina. For example, while this report recommends creating a preventive detention provision based on risk, it leaves to North Carolina the determination of who, exactly, should be detained and how best to make that happen.[120]

North Carolina officials likely wish to know both what they can accomplish with little or no changes to the law as well as what changes are absolutely necessary to create a legal and evidence-based system of release and detention. To determine this, we look primarily at the two crucial elements of legal and evidence-based pretrial practices: (1) risk assessment; and (2) risk management surrounding both release and detention, including the elimination of a secured money bond's potential to interfere with either release or detention.

Risk Assessment: Without any statutory alteration, local pretrial release policies could incorporate empirically-derived risk assessment into their decision-making framework.[121] This change would serve to better inform judicial officials as to which defendants should be released and which should be detained pretrial. However, it would also likely further highlight deficiencies in the current statutory release and detention scheme based, in large part, on criminal charge and secured-money bail (especially to purposefully detain high risk defendants).

Incorporating empirically-derived assessment could also be done without altering the current statutory risk factors that are neither tested nor weighted for prediction of pretrial risk.[122] However, it can cause confusion to have two sets of factors to assess risk. Moreover, having two sources for risk assessment can lead to an unacceptable number of unnecessary overrides to the empirical instrument, and can also lead to decisions that are actually less accurate than when based on the empirical set alone.

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[120] General recommendations can, however, be quite useful as a starting point. In Colorado, for example, the State Crime Commission released three broad recommendations concerning pretrial release (increase the use of evidence-based practices including empirical risk assessment, increase the use of pretrial services agencies, and reduce the use of money), and those three recommendations led to a comprehensive, line-by-line overhaul of the bail statute.

[121] Indeed, this has apparently already been done to some extent in Judicial District 26, which has adopted the Arnold Foundation's PSA-Court tool.

[122] *See* G.S. § 15A-534(c).

For these reasons, in addition to empirical risk assessment's importance as a prerequisite to pretrial improvements, North Carolina should consider ways to encourage (if not mandate) and optimize, through its laws, the use of empirically-derived risk assessment instruments statewide.

Risk Management – Release: Without statutory amendment, judicial officials could also initially release virtually all (in the aggregate) low and medium risk defendants (as well as some high risk defendants deemed safe enough to manage outside of secure detention) on a written promise to appear or an unsecured bond, which would eliminate the tendency for secured bonds to interfere with the release of defendants deemed suitable for supervision in the community. Like risk assessment, however, there are strong reasons (including various assumptions surrounding the efficacy of money) for North Carolina to enact proactive statutory changes to dramatically reduce, if not eliminate, the use of secured money at bail.

Moreover, a key element of risk management for released defendants is pretrial supervision using differential supervision techniques based on the risk principle for both public safety and court appearance. However, the statute currently places restrictions on that supervision by not mandating such programs and by not making such supervision mandatory when the judicial official believes it necessary.[123] Thus, even if judicial districts created their own pretrial release programs, the various limitations might make it likely that few defendants would participate. Accordingly, while judicial districts might make progress on their own, statutory guidance and/or mandates are likely necessary.

Risk Management – Detention: Judicial officials must also have the ability to detain pretrial extremely high risk defendants through a due process-laden procedure complying with the principles articulated in *United States v. Salerno*.[124] Because North Carolina law does not currently allow this (instead, it requires conditions of release to be set for all defendants except for those not entitled to conditions pursuant to statute based primarily on charge), the law must be changed.

Pretrial detention using unattainable money amounts is likely unlawful under multiple legal theories. Accordingly, even if a judicial district incorporates significant procedural due process protections before setting an unattainable money bond, that bond might still be challenged under other theories, such as substantive due process, excessive bail, or equal protection grounds.[125] As noted previously, money at bail can also pose significant public safety problems, and when money is used to detain, its use tends also to bleed into cases with defendants posing lower risk, leading to additional issues of fairness. Moreover, even states having robust preventive detention provisions

[123] *See* G.S. § 15A-534(b).
[124] 481 U.S. 739 (1987).
[125] For example, recent federal lawsuits challenging the use of unattainable financial conditions on equal protection grounds have led to settlements practically eliminating the use of secured financial conditions. Any jurisdiction looking into pretrial justice must always consider the possibility that secured money bonds as a condition of release might one day be simply removed as a lawful alternative.

often see those provisions ignored when secured money is left in the process.[126] The only way to leave money in the system and yet make sure that it does nothing to hinder either release or detention of defendants pretrial is to incorporate a mandate that the amount not lead to detention,[127] which, in turn, highlights the importance of creating a proper risk-based detention provision to begin with.

Accordingly, there is much that can be done without legislation, but it would require massively coordinated efforts by all judicial districts (and judicial officials within those districts) and an almost inconceivable change in current judicial and public culture. For example, under current law, judicial districts could incorporate risk instruments into their decision-making frameworks, create pretrial services programs to perform evidence-based risk management functions, systematically release all low and medium risk defendants on written promises to appear or unsecured bonds, convince those defendants to agree to pretrial services agency supervision, and use unattainable secured bonds, albeit likely unlawfully, to detain defendants with unmanageable risk and who fall outside of the categories of cases eligible for "no conditions." Such a system would resemble a "model" pretrial release and detention system, but having such as system arise organically across North Carolina is highly unlikely to happen. And even if it did, the option of using money to detain might be challenged and curtailed or eliminated, forcing North Carolina to once again revisit its laws concerning release and detention. The better option is for North Carolina to instead consider comprehensive changes to its laws now, prior to potentially being forced.

[126] For example, numerous officials from Wisconsin have report privately that their preventive detention provision is not used primarily because it is cumbersome compared to using secured money bail. In Colorado, judges routinely avoid using a much less robust provision and rely, instead, on secured money bonds to detain high risk defendants.

[127] The relevant American Bar Association Pretrial Release Standard states: "The judicial officer should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay." *American Bar Association Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007) Std. 10-5.3 (a) at 110. The federal and the District of Columbia statutes each have provisions prohibiting judges from ordering financial conditions that result in the pretrial detention of the defendant. *See* 18 U.S.C. § 3142 (c)(2); D.C. Stat. § 23-1321(c)(3).

V. RECOMMENDATIONS

North Carolina should implement the following recommendations for achieving a 21st Century legal and evidence-based pretrial release system that will allow for the simultaneous movement toward all three goals of the pretrial release decision – public safety, court appearance, and release for bailable defendants.[128] The recommendations are presented as short-term (to be accomplished in the next 18 months), mid-term (to be accomplished within three years), and long-term (to be accomplished within the next five years.)

Short-Term Recommendations

Judicial officials should immediately begin issuing unsecured bonds for pretrial release instead of secured bonds.

Current law allows for a number of pretrial release options, including the issuance of unsecured bonds—those that require payment only upon a defendant's failure to appear in court. As noted in this report, judicial officials have relied on secured bonds more out of habit than evidence.[129] But as noted earlier, research has demonstrated that unsecured bonds are equally as effective at assuring public safety and appearance as secured bonds.[130] Unsecured bonds offer the additional benefit of resulting in substantially less pretrial detention than secured bonds.[131] Given that research, plus the North Carolina statute requiring that judicial officials select the least restrictive release option,[132] there is no reason why unsecured bonds could not immediately begin replacing secured bonds. The expanded use of unsecured bonds will go a long way to eliminating poverty-based incarceration in the state.

Appoint a Legal and Evidence-Based Practices Implementation Team to oversee the implementation of the recommendations of this report.

The purpose of the Implementation Team would be to collaboratively identify and guide a data-driven approach to pretrial justice that works for North Carolina, incorporating the law and the best empirical research to best achieve the three goals of the pretrial release decision. Team members should be well-respected leaders of their stakeholder groups, capable getting buy-in from their colleagues, and fully committed to implementing legal and evidence-based pretrial release practices in the state. The Team should be comprised of representatives of the judiciary, court administration, prosecution, defense, law enforcement, jail administrators, victims, state legislators, and county elected officials.

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[128] See Section I (discussing the importance of a balanced approach to pretrial justice).
[129] *Supra*, p. 1.
[130] *Supra*, note 16.
[131] Id.
[132] G.S. 15A-534(b).

The Implementation Team should be authorized to appoint sub-committees, and members to those subcommittees, to help implement these recommendations.

The Implementation Team should develop a vision statement for a state-wide, data-driven pretrial justice system in North Carolina.

Guided by the information and recommendations in this report, the Implementation Team should create a vision statement that describes a legal and evidence-based pretrial justice system for North Carolina that encompasses the three goals of the pretrial release decision. (See Appendix D for examples of vision statements of jurisdictions working to implement legal and evidence-based pretrial justice practices.)

The Implementation Team should develop an Implementation Plan based upon the vision statement with a focus on initially implementing the plan in 5 to 7 pilot counties.

Achieving the vision in a timely manner will require an implementation plan that will serve as a roadmap and timeline for putting vision components into practice. In keeping with recognized implementation science and strategy, it is recommended that the Implementation Team focus on implementing this plan in 5 to 7 of the state's counties (i.e., a mix of urban, suburban and rural). This will allow for "pilot" testing of the tools and policies and procedures, so that wrinkles in implementation can be ironed out before a statewide roll-out of the plan.

The Implementation Team should incorporate the following elements in its plan:

The use of an empirically-derived pretrial risk assessment tool by every magistrate in every criminal case at the initial appearance.

Given the benefits of the Arnold Foundation's PSA–Court tool, as described earlier,[133] this tool should be the first choice for North Carolina. As noted earlier, the tool is not publicly available yet, but the Implementation Team should work with the Arnold Foundation to try to approximate a time when it might be available to the state. If the tool will not be available when the team is otherwise ready to begin implementing this plan in the pilot counties, then the Virginia Pretrial Risk Assessment Instrument (VPRAI) should offer a workable alternative.[134] The VPRAI was empirically tested in multiple jurisdictions in a state that borders North Carolina, which should provide some confidence that it would perform well in North Carolina. Whatever tool is selected should be subjected to a validation study.

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[133] *Supra*, p. 22.

[134] The Committee received information about the VPRAI at its February 12, 2016 Committee meeting from Kenneth Rose, Pretrial Coordinator, VA Department of Criminal Justice Studies. Information presented by Mr. Rose is posted on the NCCALJ's website (http://nccalj.org/wp-content/uploads/2016/02/Commission-Presentation-1.pdf).

The use of a release/detention matrix that factors risk level and charge type.

The Implementation Team should seek consensus on a matrix that would provide guidance to magistrates and judges in pretrial release decision-making.[135]

The development of differentiated risk management procedures that match the identified risk to the appropriate supervision level.

As noted in the report, about 60% of North Carolina counties are not served by pretrial services programs.[136] Even in many of those counties that have such programs, supervision capacity is limited. With 100 counties in the state, many that are rural, implementing legal and evidence-based pretrial risk management practices in every part of the state is a challenge that the Implementation Team must address. There are two different approaches that the Team should explore.

The first approach would be establishing a statewide pretrial services program, with the capacity to supervise defendants released by the court with conditions in every part of the state. Kentucky has had statewide pretrial services since the 1970s, and New Jersey is in the process of implementing statewide pretrial services. A statewide pretrial services would offer several benefits: (1) it would assure supervision services are provided uniformly throughout the state; (2) it would assure standardized supervision practices; and (3) it would require a standardized data system for recording supervision activities and outcomes.

The second approach would be for the counties to run but the states to fully or substantially fund pretrial services programs in the state. This approach is used in Virginia, where the Virginia Department of Criminal Justice Services provides funding for 29 pretrial services programs that serve 97 of Virginia's 133 localities.[137] This arrangement is authorized by statute.[138]

Regardless of the approach used, the Implementation Team should remember that supervision services should be reserved only for those defendants who need them, given their risk levels. As noted earlier, supervising low risk defendants has no beneficial impact on increasing their already high rates of success.[139]

One intervention that all defendants, regardless of their risk level, should receive is a court date reminder. The research, cited earlier, has made clear that the simple act of reminding defendants of their upcoming court dates has a significant impact on improving court appearance rates.[140] The technology is available, and is becoming

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[135] *See supra* p. 23 (discussing the use of such matrices).
[136] *Supra*, p. 17.
[137] *Comprehensive Community Corrections Act and Pretrial Services Act Annual Report, July 1, 2013 – June 30, 2014,* Virginia Department of Criminal Justice Services (2014), at 1.
[138] Va. Code Ann. § 19.2-152.2.
[139] *Pretrial Risk Assessment in Federal* Court*, supra* note 54.
[140] *Supra* notes 62 and 63.

increasingly affordable, to establish automated systems that can call or text such reminder notices.

The expanded use of citations by law enforcement

As discussed above, expanding the use of citations in lieu of arrest in appropriate cases is an important strategy for achieving a balanced approach to pretrial justice, and it already has been successfully implemented in at least one state.[141] North Carolina law already allows law enforcement to issue a citation for any misdemeanor or infraction.[142] The Implementation Team should work with law enforcement agencies throughout the state to identify the opportunities for expanding the use of citations, and to see if the obstacles that exist to doing so can be addressed.

Early involvement of prosecutor and defense counsel

Given the benefits, described in Section III, of having a prosecutor screen cases before the initial pretrial release decision and for both prosecution and defense to be present at that hearing, the Implementation Team should identify how to make this happen. The State of Delaware, which, like North Carolina, has a 24/7 magistrate system, already is seeking to do this. Officials have set up special procedures for persons charged with certain felony offenses in that state's largest jurisdiction – Wilmington. Instead of having Magistrate Court 24/7 for those defendants, one court session is held at 8am and another at 8pm. This makes it easier for prosecution and defense to be present and making appropriate representations to the magistrate on the issue of pretrial release. Officials will take what they learn from this pilot effort to see if they can overcome the challenges presented by staffing initial appearances with prosecutors and defenders for indigent defendants.

The institution of automatic bond review procedures for misdemeanor defendants.

As discussed above, some in-custody defendants do not receive timely review of their release conditions.[143] Misdemeanor defendants who are in custody on secured bonds set by the magistrate should have an automatic review of that decision at the next regular session of district court. The Implementation Team should assess whether making this happen will require a statutory change, a change in court rules, a policy directive, or some other action.

Uniform data reporting standards

Collecting the data elements listed in Section IV and required for an effective pretrial justice system would involve every state law enforcement agency, and jail and the court system. To achieve the purposes of data collection for implementing this plan, it would be ideal if there was a uniform data system among all law enforcement agencies

[141] *Supra* pp. 24-25.
[142] G.S. 15A-302(a).
[143] *Supra* p. 26.

and a uniform system among all jails. This may or may not be a practical option. Another approach may be to develop data reporting standards that the appropriate entities would follow. For example, every law enforcement agency would report to a central entity every month how many citations were issued, and for what charges. Every jail would report monthly on the percent of the total population that is held on secured bonds, and the length of stay of those persons, by their risk level.[144] The Implementation Team should work with the state's law enforcement agencies and jails to assess the best ways to implement such data reporting standards.

The Implementation Team should draft language for bills or proposed court rules that incorporate the changes in law needed to implement the plan in the pilot counties.

The Implementation Team should develop a preventive detention framework for defendants who present unacceptably high risk.

As noted above, North Carolina does not have a preventive detention statute that allows for the detention of defendants who present unacceptably high risk.[145] As a result, very risky defendants with resources can buy their way out jail, even when very high bonds are set. The Implementation Team should draft proposed legislation and court rules to establish a preventive detention provision similar to the provision reviewed by the U.S. Supreme Court in *United States v. Salerno*[146] (albeit incorporating risk).

The Implementation Team should develop a release framework for defendants who are not detained.

For releasable defendants, the Implementation Team should draft and North Carolina should enact legislation and court rules to give North Carolina judicial officials broad discretion to use legal and evidence-based practices to: (1) effectuate release quickly; (2) successfully manage defendants in the community though conditions and supervision techniques shown by research to be effective at achieving the purposes of pretrial release and; and (3) respond to pretrial failure that does not lead to detention. If money is to be left in such a system, the state should enact a provision mandating that no condition of release lead to the detention of an otherwise releasable defendant. The law should expressly articulate the use of "least restrictive" conditions, and encourage courts to monitor defendants to increase or decrease the use of conditions to respond to changes in risk. Moreover, the law should be changed to provide that no otherwise releasable defendant may be detained for failure to meet a release condition.

The Implementation Team should draft other legislation and/or court rules needed to implement the recommendations in this report.

The Implementation Team should draft and the state should enact provisions mandating the use of the chosen empirically-derived risk assessment instrument, the adoption of a decision-making framework (possibly statewide) designed to guide release

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[144] *See supra* pp. 26-27 (listing other data needs).
[145] See *supra* pp. 36-37 (discussing this).
[146] See *supra* note 89.

and detention decision-making, and the creation of pretrial services programs to use differential supervision methods on all defendants for both public safety and court appearance.[147] It should eliminate the use of traditional money bail bond schedules based on charge. It should enact provisions for the speedy review of pretrial conditions in all cases. It should amend or repeal those provisions in North Carolina law not compatible with these recommendations. And finally, it should actively oppose any future legislation that runs counter to these recommendations.

Mid-Term Recommendations

The Implementation Team should fully implement the plan in the pilot counties.

While some aspects of the plan may be implemented during the short-term period, the Implementation Team should make every effort to implement the full plan in the pilot sites during this period.

The Implementation Team should ensure that all staff with a role in implementing the plan are fully informed of its purpose and rationale and trained for successful implementation.

One of the most important keys to successful implementation of any plan is fidelity by those responsible for carrying out the plan day-to-day. If the plan is not executed as intended, the intended results will not be achieved.

Training should be included as a key part in the implementation plan. At a minimum, information and training sessions should be directed to bail-setting judicial officials, law enforcement officers, assistant district attorneys, assistant public defenders, and pretrial services staff or others who have a role in pretrial supervision.

The Implementation Team should establish a data dashboard to monitor outcomes and regularly review the data and make appropriate adjustments to the plan

The team should assess what changes need to be made to the data infrastructure in place in county jails and the courts to be able to gather the data elements listed in Section III of this report.

Long-Term Recommendations

The Implementation Team should begin implementing the plan in the remaining counties of the state.

[147] Although it is perhaps ideal, pretrial services functions do not necessarily have to be performed by government entities. For example, in Colorado, two entities – one for-profit and one nonprofit – help jurisdictions with release using methods that are similar, if not identical to, public pretrial agency functions. It bears repeating, however, that legal and evidence based pretrial supervision does not include supervision through a commercial surety using a financially-based contract.

Based on the experiences of the pilot projects, the Team should start implementing the plan throughout the state.

The Implementation Team should develop a plan for sustaining changes that have been made and holding accountable those that make the changes.

Sustaining change can be very difficult, particularly as those who pushed for the changes move on. North Carolina leaders and stakeholders should be mindful of this and develop a plan for sustaining reforms. This involves ensuring that statutes and court rules codify these policies. It also involves robust reporting systems and transparency for the public about the risk profile of North Carolina's arrestee population, how risk assessments are used, and how risk-based supervision strategies are being employed and the results they are producing regarding public safety and appearance in court.

North Carolina officials should consider what role, if any, secured bonds should continue to play in the state's pretrial system, and draft appropriate proposals for statutory or court rule amendments.

As North Carolina's plan for a legal and evidence-based approach to pretrial justice unfolds, it should become increasingly clear that the continued use of secured bonds is incompatible with that approach, and it will be much easier to make the case for completely replacing secured bonds with recognizance or unsecured-bond releases.

APPENDIX A. VIRGINIA PRETRIAL RISK ASSESSMENT INSTRUMENT

Risk Factor	Criteria	Assigned Points
Charge Type	If most serious charge for the current offense is a felony	1
Pending Charge(s)	If the defendant has one or more charges pending in court at the time of the arrest	1
Criminal History	If the defendant has one or more misdemeanor or felony convictions	1
Failure to Appear	If the defendant has two or more failure to appears	2
Violent Convictions	If the defendant has two or more violent convictions	1
Current Residence	If the defendant has lived at the current residence for less than one year prior to the arrest	1
Employed/Child Caregiver	If the defendant has not been employed continuously for the previous two years and was not the primary caregiver for a child at the time of arrest	1
History of Drug Abuse	If the defendant has a history of drug abuse	1

Risk Level	Risk Score
Low	0,1 points
Below Average	2 points
Average	3 points
Above Average	4 points
High	5 – 9 points

APPENDIX B. VIRGINIA PRETRIAL PRAXIS

Risk Level/ Charge Category	Traffic: Non-DUI	Non-violent misd.	Theft/ Fraud	Traffic: DUI	Drug	Failure To Appear	Firearm	Violent
Low Risk								
PR or UA Bond	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Pretrial Supervision	No	No	No	No	No	Yes	Yes	Yes
Supervision Level	N/A	N/A	N/A	N/A	N/A	I	II	II
Below Average Risk								
PR or UA Bond	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Pretrial Supervision	No	No	Yes	Yes	Yes	Yes	Yes	Yes
Supervision Level	N/A	N/A	I	I	I	II	II	II
Average Risk								
PR or UA Bond	Yes	Yes	Yes	Yes	Yes	Yes	No	No
Pretrial Supervision	Yes	Yes	Yes	Yes	Yes	Yes	No	No
Supervision Level	I	I	II	II	II	III	N/A	N/A
Above Average Risk								
PR or UA Bond	Yes	Yes	Yes	Yes	Yes	No	No	No
Pretrial Supervision	Yes	Yes	Yes	Yes	Yes	No	No	No
Supervision Level	I	I	II	III	III	N/A	N/A	N/A
High Risk								
PR or UA Bond	Yes	Yes	Yes	No	No	No	No	No
Pretrial Supervision	Yes	Yes	Yes	No	No	No	No	No
Supervision Level	II	II	III	N/A	N/A	N/A	N/A	N/A

PR or UA Bond – Yes = Recommended for Personal Recognizance or Unsecured Appearance Bond, No = Not Recommended

Pretrial Supervision – Yes = Recommended for Pretrial Supervision, No = Not Recommended

Supervision Level – [I, II and III] = Recommended Level of Supervision, N/A = Supervision not recommended (level not applicable)

APPENDIX C. VIRGINIA DIFFERENTIAL PRETRIAL SUPERVISION

Condition	Level I	Level II	Level III
Court date reminder for every court date	√	√	√
Criminal history check before court date	√	√	√
Face-to-face contact once a month	√		
Face-to-face contact every other week		√	
Face-to-face contact every week			√
Alternative contact once a month (telephone, email, text, as approved locally)	√		
Alternative contact every other week (telephone, email, text, as approved locally)		√	
Special condition compliance verification	√	√	√

APPENDIX D. EXAMPLES OF VISION STATEMENTS

Vision Statement of the Delaware Smart Pretrial Policy Team

We envision a fair pretrial system that relies on individualized decisions based on risk and the effective use of resources to honor individual rights, protect public safety and promote the administration of justice.

Ten things we know to be true…

1. We can work well together.
2. Delaware's small size is an asset.
3. Reliable data driven decisions lead to a more objective and reliable system.
4. Meaningful options for supervision will make a better pretrial system.
5. We want to live in a safe community.
6. We must move forward with a risk-based system.
7. More information for bail decisions is better than less.
8. Lack of community-based mental health and substance abuse services contribute to our pretrial detentioner population.
9. Innovation does not have to come at a cost.
10. Sustainability requires commitment.

In our ideal system we would…

Work together,
Protect an individual's right to liberty,
Protect the safety of our community,
Use resources efficiently,
Make risk informed choices,
Utilize meaningful evidence based supervision options for our pretrial system, and
Recognize the impact that pretrial decisions have on individuals, the community, and the judicial process.

Vision Statement of the Denver, Colorado Smart Pretrial Policy Team

Pretrial decisions are equitable, fiscally responsible, and data informed; they recognize the presumption of release and reasonably ensure appearance in court with a commitment to public safety.

Guiding Principles

1) Release and detain decisions for all defendants should be risk based, individualized, and consider the safety and needs of the community. Release decisions shall be informed by an empirical pretrial risk assessment.
2) Pretrial processes shall maintain the presumption of release, equality, justice, and due process.
3) Pretrial risk can be lessened for some risk levels with the use of appropriate pretrial supervision conditions.

4) Pretrial system decisions should be research based and evaluated based on continuing data outcome evaluation.
5) The collaboration of the stakeholders in the pretrial justice process is essential to establish system best practices.

Vision Statement of the Yakima County, Washington Smart Pretrial Policy Team

The vision of Yakima County is to operate a pretrial system that is safe, fair, and effective and which maximizes public safety, court appearance, and appropriate use of release, supervision, and detention.

APPENDIX E. FACTORS INCLUDED IN THE ARNOLD FOUNDATION PSA COURT RISK ASSESSMENT TOOL

- Whether the current offense is violent
- Whether the person had a pending charge at the time of the current offense
- Whether the person has a prior misdemeanor conviction
- Whether the person has a prior felony conviction
- Whether the person has prior convictions for violent crimes
- The person's age at the time of arrest
- How many times the person failed to appear at a pretrial hearing in the last two years
- Whether the person failed to appear at a pretrial hearing more than two years ago
- Whether the person has previously been sentenced to incarceration.

Mani Dexter

From: Pretrial Justice Institute <pji=pretrial.org@mail49.suw15.mcsv.net> on behalf of Pretrial Justice Institute <pji@pretrial.org>
Sent: Friday, May 25, 2018 1:02 PM
To: Mani Dexter
Subject: Special Edition: North Carolina

North Carolina Pretrial Update: May 2018

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PRETRIAL JUSTICE INSTITUTE

North Carolina Update

North Carolina: Tar Heels Are Getting Unstuck on Pretrial Justice Reform

North Carolina earned a D in the Pretrial Justice Institute's 2017 State of Pretrial Justice in America report, which graded states on three measures: the rate of unconvicted people in local jails (15.5% per 10,000 residents in North Carolina); the percentage of people living in a jurisdiction that uses evidence-based pretrial assessments to inform pretrial decisions (10.4% in NC); and the percentage of the state's population living in a jurisdiction that has functionally eliminated secured money bail (0% in NC).

Since the report was issued, the Tar Heel State has been working hard to position itself for real change.

Reporter Joe Killian of NC Policy Watch, a project of the North Carolina Justice Center, has been writing a terrific series of articles about the state's troubled money bail system. (See links below.) One article, "National pretrial expert: Reform is coming to the broken cash bail system" (April 24, 2018), featured PJI CEO Cherise Fanno Burdeen noting that a demand for change was gaining traction in North Carolina, as it has been elsewhere across the country.

Particularly gratifying, Burdeen said, were reform efforts initiated by the judiciary.

In 2015, the chief justice of North Carolina's Supreme Court called for a commission to review the state court system and to recommend improvements to the administration of justice. Pretrial justice – a move away from the cash bail system – was a primary area of inquiry.

The following year, a report—which included an appendix, "Upgrading North Carolina's Bail System: A Balanced Approach to Pretrial Justice Using Legal and Evidence-Based Practices," by PJI's John Clark and Sue Ferrere and Timothy Schnacke of the Center for Legal and Evidence-Based Practices—called for a pilot project to implement and assess legal- and evidence-based pretrial justice practices in North Carolina (see pp. 45-46 of the final report).

The ACLU of North Carolina in late May launched a campaign to end money bail. See "It's Time to End Cash Bail in North Carolina."

Here are some other recent pretrial justice developments in North Carolina:

- Mecklenburg County is one of six sites participating in PJI's continuing technical assistance, funded by the Bureau of Justice Assistance, which is testing pretrial innovations in procedural justice, reducing racial disparity, and better responses to technical violations.
- Buncombe, Durham and Mecklenburg counties are among 40 national jurisdictions selected to take part in the Safety and Justice Challenge, a five-year, $100 million pretrial justice reform initiative of the John D. and Catherine T. MacArthur Foundation.

SAFETY+JUSTICE CHALLENGE
Supported by the John D. and Catherine T. MacArthur Foundation

- Following the recommendation of the commission convened by the state judiciary, with support from the State Justice Institute PJI's John Clark and Will Cash are preparing to visit Jackson and Haywood counties to explore the establishment of a pilot site.
- Orange County is a 3DaysCount Resolution site. 3DaysCount is a nationwide campaign to reduce unnecessary arrests, replace cash bail with evidence-based assessments, restrict detention only to those few people who would pose a danger to the community if released, and raise equity within the system. Learn about becoming a 3DaysCount Resolution site here.

3DAYS COUNT™ Commonsense Pretrial

- Three participants in PJI's PI-Lead (Pretrial Innovation Leaders) program, which seeks to develop the next generation of pretrial justice leaders, are working in North Carolina: Jessica Ireland in Mecklenburg County and Rachael Nygaard and Shannon Christy in Buncombe County.

PI-Lead … breaking more eggs in 2018 …

More news about North Carolina's pretrial justice system:

- Deberry defeats incumbent to win race for Durham County district attorney (The Herald-Sun, May 8, 2018).

- "Why are state legislators forcing judges to jail people for being poor?" (The Progressive, blog of NC Policy Watch, May 15, 2018).
- "North Carolina Law Makes It Harder for Judges to Waive Fees and Fines" (NPR, Dec. 4, 2017).
- "It's time to end cash bail that leads unfairly to time in jail" (op-ed, Raleigh News & Observer, June 28, 2017).

Other articles in Joe Killian's NC Policy Watch series include:

- "Experts: We already know how to reform the state's flawed cash bail system" (April 12, 2018).
- "Is North Carolina's cash bail system just? Advocates, reforms in other states raise serious doubts" (March 29, 2018).
- "Arrests, convictions, predatory behavior plague North Carolina's bail bond industry" (March 22, 2018).
- "Owners of bail bond outfits admit industry abuses and shortcomings, call for reforms" (March 7, 2018).
- "North Carolina's bail industry draws severe criticism from criminal justice experts" (March 1, 2018).

If you've enjoyed this roundup of pretrial news from North Carolina, please share it with your friends and invite them to sign up to receive PJI's newsletter and to follow us on Facebook and Twitter.

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The Hidden Costs of Pretrial Detention

Christopher T. Lowenkamp, Ph.D.

Marie VanNostrand, Ph.D.

Alexander Holsinger, Ph.D.

November, 2013

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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

Appendix B: References

Ares, C.E., Rankin, A. & Sturz, H. (1963). *The Manhattan Bail Project: An interim report on the use of pre-*

trial parole. 38 New York University Law Review. 67-92.

Beeley, A. (1927). *The Bail System in Chicago.* Chicago: University of Chicago Press. (Reprinted, 1966).

Cadigan, T. P., & Lowenkamp, C. T. (2011). Implementing risk assessment in the federal pretrial services system. *Federal Probation*, 75 (2), 30-34.

Foote, C. (1954). Compelling appearance in court: Administration of bail in Philadelphia. 102 *University of Pennsylvania Law Review* 1031-1079.

Foote, C. (1958). A study of the administration of bail in New York City. 106 *University of Pennsylvania Law Review.*

Freed, D.J. & Wald, P.M. (1964). *Bail in the United States.* Working paper for the National Conference on Bail and Criminal Justice.

Frase, R. (2009) What explains persistent racial disproportionality in Minnesota's prison and jail populations? *Crime and Justice: A Review of Research*, 38:201-280.

Leipold, A.D. (2005). How the pretrial process contributes to wrongful convictions. *The American Criminal Law Review*, 42(4):1123-1165.

Schlesinger, T. (2005). Racial and ethnic disparity in pretrial criminal processing. *Justice Quarterly*, 22(2):170-192.

Schlesinger, T. (2007). The cumulative effects of racial disparities in criminal processing. *Journal of the Institute of Justice & International Studies*, 7:261-278.

Ulmer, J. T. 2012 Recent Developments and New Directions in Sentencing Research. *Justice Quarterly*, 29(1):1-40.

Wice, P.B. (1974). *Freedom for Sale: A national study of pretrial release.* Lanham, MD: Lexington Books.

Wooldredge, J. (2012). Distinguishing race effects on pre-trial release and sentencing decisions. *Justice Quarterly*, 29(1):41-75.

THE DOWNSTREAM CONSEQUENCES OF MISDEMEANOR PRETRIAL DETENTION

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Abstract: In misdemeanor cases, pretrial detention poses a particular problem because it may induce otherwise innocent defendants to plead guilty in order to exit jail, potentially creating widespread error in case adjudication. While practitioners have long recognized this possibility, empirical evidence on the downstream impacts of pretrial detention on misdemeanor defendants and their cases remains limited. This Article uses detailed data on hundreds of thousands of misdemeanor cases resolved in Harris County, Texas—the third largest county in the U.S.—to measure the effects of pretrial detention on case outcomes and future crime. We find that detained defendants are 25% more likely than similarly situated releasees to plead guilty, 43% more likely to be sentenced to jail, and receive jail sentences that are more than twice as long on average. Furthermore, those detained pretrial are more likely to commit future crime, suggesting that detention may have a criminogenic effect. These differences persist even after fully controlling for the initial bail amount as well as detailed offense, demographic, and criminal history characteristics. Use of more limited sets of controls, as in prior research, overstates the adverse impacts of detention. A quasi-experimental analysis based upon case timing confirms that these differences likely reflect the causal effect of detention. These results raise important constitutional questions, and suggest that Harris County could save millions of dollars a year, increase public safety, and reduce wrongful convictions with better pretrial release policy.

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INTRODUCTION

The United States likely detains millions of people each year for inability to post modest bail. There are approximately eleven million admissions into local jails annually.[1] Many of those admitted remain jailed pending trial. At midyear 2014 there were an estimated 467,500 people awaiting trial in local jails, up from 349,800 in 2000 and 298,100 in 1996.[2] Available evidence suggests that the vast majority of pretrial detainees are detained because they cannot afford their bail, and that even bail of a few thousand dollars or less results in systemic detention.[3]

This expansive system of pretrial detention has profound consequences, within and beyond the criminal justice system. A person detained for even a few days may lose her job, her housing, or custody of her children. There is also substantial reason to believe that detention affects case outcomes. A detained defendant "is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense."[4] This is thought to increase the likelihood of conviction, either by trial or by plea, and may also increase the severity of any sanctions imposed. More directly, a detained person may plead guilty—even if innocent—simply to get out of jail. Not least important, a money bail system that selectively detains the poor violates basic constitutional protections.[5]

These problems are particularly extreme in the misdemeanor context. "Misdemeanor" may sound synonymous with "trivial," but that connotation is misleading. Misdemeanors matter. Misdemeanor convictions can result in jail time, heavy fines, invasive probation requirements, and collateral consequences that include deportation, loss of child custody, ineligibility for public

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[1] TODD D. MINTON AND ZHEN ZENG, JAIL INMATES AT MIDYEAR 2014, 1 (Bureau of Justice Statistics, 2015).

[2] *Id.* at 3; DARRELL K. GILLIARD AND ALLEN J. BECK, PRISON AND JAIL INMATES AT MIDYEAR 1996, 7 (Bureau of Justice Statistics, 1997). Pretrial detention rates rose steadily between 1980 and 2007, accompanying a shift away from release on recognizance and toward reliance on cash bail. Whereas between the years 1990 and 1994, 41% of pretrial releases were on recognizance and 24% were by cash bail, between 2002 and 2004 the relation was reversed: 23% of releases were on recognizance and 42% were by cash bail. BUREAU OF JUSTICE STATISTICS, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 1990-2004, 2 (2007); JUSTICE POLICY INSTITUTE, FOR BETTER OR FOR PROFIT, at 5 (2012); BRENNAN CENTER FOR JUSTICE, REDUCING RACIAL AND ETHNIC DISPARITIES IN JAILS 9 (June 2015); RAM SUBRAMANIAN, ET AL., VERA INST. OF JUSTICE, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 8-10 (2015). As of 2015, financial conditions of release were imposed in 61% of all criminal cases and 70% of felony cases nationwide. BRENNAN CENTER, *supra*, at 9.

[3] *See* BRIAN A. REAVES, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009-STATISTICAL TABLES (Bureau of Justice Statistics, 2013) (reporting that nine in ten felony defendants detained until disposition had bail set); THOMAS H. COHEN & BRIAN A. REAVES, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 1 (Bureau of Justice Statistics, 2007) (reporting that five in six felony defendants detained until disposition had bail set, and that approximately 30% of felony defendants with bail set at $5000 or less were detained); NEW YORK CITY CRIMINAL JUSTICE AGENCY, ANNUAL REPORT 2013, 22 (2014) (documenting bail less than $500 in 33% of non-felony cases and 3% of felony cases in New York City, and reporting that 30% of felony defendants and 46% of non-felony defendants whose bail was $500 or less were detained until the disposition of their case). What is unclear is how many of the defendants detained despite bail are there for inability to pay, and how many may have elected not to post bail for reasons other than financial inability (for instance, because they have a probation detainer, or plan to plead guilty and expect a custodial sentence). *See also infra*, Tbl.1 and accompanying text (discussing rates of misdemeanor pretrial detention in Harris County).

[4] Barker v. Wingo, 407 U.S. 514, 533 (1972).

[5] *See infra* note 123 and accompanying text. Note that wealth-based detention also exacerbates racial inequality. *See* BESIKI LUKA KUTATELADZE & NANCY R. ANDILORO, PROSECUTION AND RACIAL JUSTICE IN NEW YORK COUNTY – TECHNICAL REPORT FOR THE NATIONAL INSTITUTE OF JUSTICE ii–iii (2014), www.ncjrs.gov/pdffiles1/ nij/grants/247227.pdf (finding that, controlling for other relevant variables, racial minorities are disproportionately detained).

services and barriers to finding employment and housing.[6] Beyond the consequences of misdemeanor convictions for individuals, the misdemeanor system has a profound impact as a whole, because it is enormous; it represents the majority of criminal prosecutions in the United States. While national data on misdemeanors are lacking, one analysis finds that misdemeanors represent more than three quarters of the criminal caseload in state courts.[7]

Existing data suggest that a substantial percentage of misdemeanor defendants are detained pretrial for inability to post bail.[8] For this group, the worst punishment may come before conviction.[9] Conviction generally means getting out of jail; people detained on misdemeanor charges are routinely offered sentences for "time served" or probation in exchange for tendering a guilty plea. The incentives to take the deal are overwhelming. For defendants with a job or apartment on the line, the chance to get out of jail may be impossible to pass up. Misdemeanor pretrial detention therefore seems especially likely to induce guilty pleas, including wrongful ones.[10] This is also, perversely, the realm where the utility of cash bail or pretrial detention is most attenuated, because these defendants' incentives to abscond should be relatively weak, and the public-safety benefit of detention is dubious.[11]

Despite these structural problems, money-bail practices that result in systemic misdemeanor pretrial detention have persisted nationwide. In Harris County, the site of our

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[6] Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1090-91 (2013) (noting that misdemeanor convictions "can affect future employment, housing, and many other basic facets of daily life"); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1316-17 (2012) (reporting that a misdemeanor conviction can limit a person's access to "employment, as well as educational and social opportunities;" can limit eligibility for "professional licenses, child custody, food stamps, student loans, health care" or public housing; can "lead to deportation;" and "heightens the chances of subsequent arrest, and can ensure a longer felony sentence later on").

[7] *See* Roberts, *supra* (reporting that a "2010 analysis of seventeen state courts revealed that misdemeanors comprised 77.5% of the total criminal caseload in those courts"); Natapoff, *supra*, at 1315 ("Most U.S. convictions are misdemeanors, and they are generated in ways that baldly contradict the standard due process model of criminal adjudication.").

[8] *See, e.g.*, Charlie Gerstein, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513, 1534 (2013) ("In New York . . . 25 percent of nonfelony defendants are held on bail. In Baltimore, that number is closer to 50 percent."); Natapoff, *Misdemeanors*, *supra* note 6, at 1321-22 ("In New York, the vast majority of such defendants cannot pay their bail."); ROBERT C. BORUCHOWITZ ET AL., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (Nat'l Ass'n of Criminal Def. Lawyers, 2009), www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf (estimating based on a sample of twelve states) ("If the whole country behaves about as well as New York State does, approximately 2.5 million people nationwide are held on bail they cannot pay for misdemeanor charges each year.").

[9] *Cf.* MALCOLM FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979); Stack v. Boyle, 342 U.S. 1, 4 (1951) (noting that the "traditional right to freedom before conviction . . . serves to prevent the infliction of punishment prior to conviction").

[10] *See, e.g.*, Natapoff, *supra* note 6 at 1315 ("[E]very year the criminal system punishes thousands of petty offenders who are not guilty."); *id.* at 1347-50 (cataloging pressures that lead innocent misdemeanor defendants to plead guilty); Samuel Gross, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 930-31 (2008) (noting that it is "entirely possible" that most wrongful convictions are "based on negotiated guilty pleas to comparatively light charges" to avoid "prolonged pretrial detention"); Alexandra Natapoff, *Negotiating Accuracy: DNA in the Age of Plea Bargaining*, http://papers.ssrn.com/sol3 /papers.cfm?abstract_id=2693218 (asserting that, "[b]ecause most of those arrested [for public-order offenses pursuant to aggressive broken-windows policing in New York City] pled out to avoid pretrial detention, that police policy resulted in numerous wrongful convictions").

[11] That is both because people accused of misdemeanors are likely to pose much less of a threat than people charged with more serious offenses, and because detention for the life of a misdemeanor case constitutes only very short-term incapacitation—which may be outweighed by criminogenic effects. *See infra* Part III(C).

study, more than 50% of misdemeanor defendants are detained.[12] Other jurisdictions also detain people accused of misdemeanors at surprising rates.[13] There are several possible reasons. A money-bail system may be easier to operate than a system of broad release with effective pretrial services. The bail bondsman lobby is a potent political force. In some jurisdictions, the local sheriff or jail administrator is paid on the basis of jail beds occupied, and so has a financial incentive to support policies that keep jails full. The individual judges or magistrates who make pretrial custody decisions, finally, suffer political blowback if they release a person (either directly or via affordable bail) who subsequently commits a violent crime, but few consequences, if any, for setting unaffordable bail that keeps misdemeanor defendants detained. In short, institutional actors in the misdemeanor system have had strong incentives to rely on money-bail practices that result in systemic pretrial detention.[14]

Given the inertia, misdemeanor bail policy is unlikely to shift in the absence of compelling empirical evidence that the status quo does more harm than good. Policymakers may be particularly attuned to whether misdemeanor pretrial detention produces wrongful convictions, and how it affects future crime. The evidence, however, has so far been thin. There is ample documentation that those detained pretrial are convicted more frequently, receive longer sentences, and commit more future crimes than those who are not (on average). But this is precisely what one would expect if the system detained those who pose the greatest flight or public safety risk. The key question for pretrial law and policy is whether detention actually *causes* the adverse outcomes with which is linked, independently of other factors. On this question, prior empirical work is not conclusive. The literature has produced suggestive evidence of the causal effects of detention. Nearly all prior studies, however, have been limited by the data available and by the number of variables for which they have been able to control. Only one study, a report published by the New York Criminal Justice Agency, has focused on misdemeanor cases specifically.[15]

This Article presents original evidence that misdemeanor pretrial detention causally affects case outcomes and the commission of future crimes. We offer new evidence from an empirical analysis of a large dataset from Harris County, Texas, the third-most-populous county in the United States. The data include uniquely detailed information about hundreds of thousands of misdemeanor cases. Our regression analysis controls for a wide range of confounding factors: defendant demographics, extensive criminal history variables, wealth measures (ZIP code and claims of indigence), judge effects, and 121 different categories of charged offense. In addition, we undertake a quasi-experimental analysis that leverages random variation in the access that

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[12] *Infra* Tbl.1.

[13] In Philadelphia and New York City around 25% of misdemeanor defendants are detained pretrial. See Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* (May 2, 2016), https://www.law.upenn.edu/cf/faculty/mstevens/workingpapers/Distortion-of-Justice-April-2016.pdf and MARY T. PHILLIPS, PRETRIAL DETENTION AND CASE OUTCOMES, PART I: NONFELONY CASES (NYC Criminal Justice Agency, 2007)

[14] Although that may be changing in some places, thanks to recent reform efforts. *See, e.g.*, *Ending the American Money Bail System*, http://equaljusticeunderlaw.org/wp/current-cases/ending-the-american-money-bail-system (last visited July 7, 2016) (describing litigation campaign).

[15] PHILLIPS, *supra* note 13.

defendants have to bail money based on the timing of arrest. These quasi-experimental results are very similar to those produced through regression analysis with detailed controls.

We find that detained defendants are much more likely than similarly situated releasees to plead guilty and serve jail time. Compared to similarly situated releases, detained defendants are 14 percentage points (25%) more likely to be convicted and 17 percentage points (43%) more likely to be sentenced to jail. On average, their incarceration sentences are 9 days longer, more than double that of similar releasees. Furthermore, we find that pretrial detainees are more likely than similarly situated releases to commit future crime. Although detention exerts an incapacitative effect in the short term, by 18 months post-hearing, detention is associated with a 30% increase in felonies and a 20% increase in misdemeanors, a finding consistent with other research suggesting that even short-term detention has criminogenic effects. These results raise important constitutional questions, and suggest that, with modest changes to misdemeanor pretrial policy, Harris County could save millions of dollars a year, increase public safety, and reduce wrongful convictions.

The Article proceeds in four parts. Part I provides background on pretrial detention and surveys the existing empirical literature assessing its effects. Part II outlines the pretrial process in Harris County, which has much in common with the process in other large jurisdictions, and describes our dataset. Part II also reports the result of an empirical analysis on the relationship between wealth and detention rates. Part III presents the results from a series of empirical analyses designed to measure the effect of pretrial detention on case and crime outcomes. Part IV, finally, explores the implications of the results for ongoing constitutional and policy debates.

I. THE PRETRIAL PROCESS AND PRIOR EMPIRICAL LITERATURE

A. On Bail and Pretrial Detention

The pretrial process begins with arrest and ends with the disposition of the criminal case. Since its founding, the United States has relied heavily on a money bail system adapted from the English model to ensure the appearance of the accused at trial.[16] Bail is deposited with the court and serves as security. If the accused appears in court when ordered to do so, his bail is returned at the conclusion of the case; if not, it is forfeited. But whereas in eighteenth-century England many offenses were "unbailable," the American colonies guaranteed a broad right to bail, with a narrow exception for capital cases.[17] In 1951, the Supreme Court held that the Excessive Bail Clause prohibits bail "set at a figure higher than an amount reasonably calculated" to ensure the

[16] *See, e.g.*, Hermine Herta Meyer, *Constitutionality of Pretrial Detention*, 60 GEO. L. J. 1139, 1146 (1971-1972) (chronicling history of U.S. bail system); TIMOTHY R. SCHNACKE, FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM 21-45 (2014).

[17] *See* Meyer, *supra*; SCHNACKE, *supra*; Judiciary Act of 1789, ch. 20, 1 Stat. 91 (repealed by 18 U.S.C. §§ 3141 to 3151 (1982) (guaranteeing a right to bail in noncapital cases); JOHN S. GOLDKAMP, TWO CLASSES OF THE ACCUSED: A STUDY OF BAIL AND DETENTION IN AMERICAN JUSTICE 55-60 (1979) (explaining "classic" state constitutional bail clause).

appearance of the accused.[18] The Court ruminated that "[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[19]

The second half of the twentieth century brought major changes to America's pretrial system. In the 1960s, the realization that many people were detained pretrial for inability to post bail led to a national reform movement that limited the use of money bail in favor of simple release on recognizance ("ROR") for many defendants, as well as non-financial conditions of release.[20] In the 1970s and 80s, concerns about rising rates of pretrial crime led to a second wave of reform, this time directed at identifying and managing defendants who posed a threat to public safety.[21] The federal government and many states enacted pretrial preventive detention statutes, and almost every jurisdiction in the country amended its pretrial laws to direct courts to consider "public safety" when setting bail or conditions of release.[22]

As of this writing, most U.S. jurisdictions have reverted to a heavy reliance on money bail as the central mechanism of the pretrial system.[23] Despite the Supreme Court's admonition that "the function of bail is limited" to ensuring appearance, so that "the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant," taking into account his or her financial status, many jurisdictions do not adhere to that mandate.[24] Bail hearings are typically just a few minutes long, often conducted over videoconference and without defense representation. Some jurisdictions employ bail "schedules" with predetermined bail amounts for each offense, which do not consider individual circumstances relevant to flight risk or ability to pay.[25] In many jurisdictions, judges set higher bail for defendants they perceive as dangerous, either as directed by statute or on their own initiative, despite the Supreme Court's statement that money bail is not an appropriate tool for controlling crime risk.[26]

Those who can post bail are released. Often a bail bondsman serves as a middleman; the bondsman posts the refundable bail deposit in exchange for a non-refundable fee (usually about ten percent of the total). Those who cannot post bail are detained pending trial. The length of pretrial detention various tremendously by jurisdiction and by the particulars of a given case. In most places, the state must institute formal charges and arraign the defendant within a few days

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[18] Stack v. Boyle, 342 U.S. 1, 5 (1951).

[19] *Id.* at 4.

[20] *See* GOLDKAMP, *supra* note 17, at 23-25, 84; Bail Reform Act, Pub. L. No. 98-473, 98 Stat. 1985 (1966) (codified at 18 U.S.C. §§ 3141-51) (repealed 1984), at Sec. 2 ("The purpose of this Act is to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance . . . .").

[21] *See generally* John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1 (1985).

[22] *Id.* at 15-30.

[23] *See supra* note 2.

[24] Stack v. Boyle, 342 U.S. 1, 5 (1951).

[25] *Cf.* Standard 10-5.3(f), ABA STANDARDS ON PRETRIAL RELEASE (3rd ed. 2002) ("Financial conditions . . . should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge.").

[26] *Cf. id.*, Standard 10-5.3(b) ("Financial conditions of release should not be set to prevent future criminal conduct during the pretrial period or to protect the safety of the community or any person.").

of arrest, and misdemeanor cases may be resolved within a few weeks. In other places the timeline is longer, so that a misdemeanor defendant may be detained for weeks or months before she is even arraigned.[27]

It has long been conventional wisdom that pretrial detention has an adverse effect on case outcomes (from the perspective of the accused). If this is true, there are at least six possible mechanisms. Most obviously, detention alters the incentives for fighting a charge. A detained defendant generally has less to lose by pleading guilty; detention may have already caused major disruption to her life. And whereas for a released defendant the prospect of a criminal sentence—custodial or otherwise—represents a serious loss of liberty, for a detainee it is, at worst, an extension of the status quo. For misdemeanor detainees, as noted above, pleading guilty usually means an *increase* in liberty, while fighting the charge means staying in jail. A second possible mechanism is that detention may limit the ability of the accused to develop a defense by working with his attorney or collecting relevant evidence. Relatedly, detention might limit the financial resources a person has to dedicate to her defense (if, for instance, it results in loss of wages). Fourth, detention prevents an accused person from engaging in commendable behavior that might mitigate her sentence or increase the likelihood of acquittal, dismissal or diversion, like paying restitution, seeking drug or mental health treatment, or demonstrating commitment to educational or professional advancement. Fifth, detention might prevent accused persons from engaging in reprehensible behaviors that have similar effects, like intimidating witnesses, destroying evidence, or engaging in bad-faith delay tactics. Finally, even if released defendants do not actively seek to delay adjudication, it may be the case that they have better outcomes simply because their cases move more slowly, which entails some inevitable degradation of evidence.

B. Challenges for Empirical Study

For policymakers and the public to properly consider changes to bail policy, such as reduction of cash bail or liberalization of ROR, they would ideally have estimates of the causal effects of pretrial detention on various outcomes of interest. The causal effect of pretrial detention represents the difference in outcomes between a representative defendant who is released pretrial as compared to an otherwise identical individual who is detained. There is, in fact, a tradition of empirical scholarship seeking to measure this effect.

As a practical matter, however, testing whether detention has a causal impact on case outcomes is complicated by the fact that those detained are systematically different from those released. Because those who are detained pretrial are likely to have committed more serious crimes, have a longer criminal history, or have less wealth, one might expect to observe differences in case outcomes between detainees and releasees even absent any causal effect of

[27] In Louisiana, people may be detained on misdemeanor arrest charges for up to 75 days without being arraigned. *See* La. C. Cr. P. § 701(B)(1)(a) (requiring that formal charges be instituted within 45 days of arrest); § 701(C) (requiring arraignment within 30 days of filing of formal charges).

pretrial custody status. To take a simple example, if crime is correlated over time, such that more frequent offenders in one period are more likely to offend in future periods, and a bail process detains defendants with more past convictions, then one would expect the future recidivism of those detained (who are high-frequency offenders) to be greater than that of those who are released even when pretrial release does not affect behavior at all. Thus, estimates of the causal effect of bail must properly account for any sorting effect of bail that occurs in the real world.

The sorting is further complicated by the fact that defendants themselves may have information about their guilt or innocence that is unobserved by the court or by researchers, but that also may alter the relative desirability of release versus detention. A defendant who is factually guilty and who plans to plead guilty may wish to forego bail simply to get the punishment over with, anticipating that she will receive credit for time served. On the other hand, a defendant who believes she has a strong case for innocence may have greater incentive to try to post bail in order to avoid being detained when innocent.

Because case-level factors such as the quality of evidence and underlying culpability of the defendant can generally not be observed in empirical studies of bail settings, all existing studies are subject to the potential for bias in measuring causal effects. The degree of bias depends on not only how significantly the unobserved factors affect the outcome of interest, but how closely correlated they are with pretrial detention. A final difficulty for measuring the effect of pretrial detention is that data on those factors known to be relevant for determining outcomes tends to be limited.

C. Prior Empirical Literature

Notwithstanding these challenges, there is a body of prior empirical work dedicated to assessing the effects of pretrial detention on criminal justice outcomes. To varying degrees, prior studies have attempted to control for underlying differences between detainees and releasees in order to estimate the true causal effect of detention. Earlier studies, which preceded the advent of computers and digitized data systems, could only control for a few variables at a time. More recent studies have been able to control for a wider variety of variables, coming closer to a causal estimate.

The first major empirical study addressed to the causal effect of detention was an innovative study conducted by the Vera Foundation in 1961, which was known as the Manhattan Bail Project.[28] The researchers conducted pretrial interviews and verifications designed to assess flight risk on the basis of community ties. They recommended release on recognizance (ROR) for all cases that met certain criteria for low flight risk. They only communicated this recommendation to the responsible judge, however, for a randomly selected subset of the cases. To a modern researcher, this experimental approach is an ideal way of determining the causal impact of pretrial detention: those for whom the ROR recommendation was communicated

[28] Charles E. Ares et al., *The Manhattan Bail Project*, 38 N.Y.U. L. REV 67 (1963).

should be statistically identical to those for whom it was not, the only difference being a higher pretrial release rate among the former. If the two groups also had differing case outcomes, one could infer that the difference was due to pretrial detention. Disappointingly, the researchers did not report overall outcomes for these two groups. They only compared case outcomes among those in the reporting group who were released versus those in the non-reporting group who were detained. They found that those detained were dramatically more likely to be found guilty and sentenced to prison. This study made a profound contribution, but was limited by its design. Because the two groups actually compared were subject to the additional filter of a release decision, they cannot be considered statistically identical. Comparing their outcomes might therefore provide a biased view of the causal impact of pretrial detention.[29]

Another important early paper came to different conclusions. John Goldkamp examined whether pretrial detention affected case outcomes at three separate stages in the criminal proceedings: whether the case was dismissed at the outset, whether the defendant entered a diversion program, and whether the defendant was ultimately adjudicated guilty.[30] Focusing on about 8000 Philadelphia court cases, Goldkamp found that after controlling for five factors – charge seriousness, detainers/warrants, number of prior arrests, open cases and number of charges – pretrial detention had no discernible impact on any of these phases. The only outcome where Goldkamp found some support for a causal channel of influence was on the likelihood of being sentenced to incarceration.

Empirical scholarship evaluating pretrial detention waned in the 1980s and 90s, but the new millennium brought new research. Since 2000, nearly a dozen correlational studies have been published on the subject. Although most of these studies have evaluated relatively small samples, they have taken advantage of improvements in data to control for a wider variety of underlying differences in characteristics. Most of these studies have found that pretrial detention was correlated with unfavorable case outcomes.[31]

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[29] A follow-up study using data on 700 of the Manhattan Bail Project cases used some basic cross-tabulations which suggest that the correlation between detention and unfavorable case outcomes is not explained away by prior record, bail amount, type of counsel, family integration or employment stability. Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641 (1964).

[30] John S. Goldkamp, "The Effects of Detention on Judicial Decisions: A Closer Look," 5 JUST. SYSTEM J. 234 (1980).

[31] Oleson et al., *The Effect of Pretrial Detention on Sentencing in Two Federal Districts*, JUST. Q. 16 (May 2014) (showing that pretrial detention was associated with an increased prison sentence in federal courts); Marvin D. Free Jr., *Bail and Pretrial Release Decisions*, 2 J. ETHNICITY IN CRIM. JUST. 23 (2004) (providing a review of studies looking at race and pretrial release); Christine Tartaro; Christopher M. Sedelmaier, *A Tale of Two Counties: The Impact of Pretrial Release, Race, and Ethnicity upon Sentencing Decisions*, 22 CRIM. JUST. STUD. 203 (2009) (examining heterogeneity in the effects of pretrial detention on sentences of incarceration for minority defendants in different Florida counties); Michael J. Leiber & Kristan C. Fox, *Race and the Impact of Detention on Juvenile Justice Decision Making*, 51 CRIME & DELINQ. 470 (2005) (assessing how the interaction between race and detention status affects juvenile delinquency case outcomes); Marian R. Williams, *The Effect of Pretrial Detention on Imprisonment Decisions*, 28 CRIM. JUST. REV. 299 (2003) (showing that pretrial detention is correlated with increased incarceration sentences using a small sample of Florida felony cases); Gail Kellough & Scot Wortley, *Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions*, 42 BRIT. J. CRIMINOLOGY 186 (2002) (finding that a negative personality assessment by police increases the likelihood of detention in Canada, and that those detained are more likely to plead guilty).

The new millennium also brought the publication of several important research studies funded by nonprofit organizations. Although not published in peer-reviewed or academic journals, these papers represented an advance because of their large sample sizes. In 2007 and 2008, the New York Criminal Justice Agency published two reports that assessed the impact of pretrial detention on case outcomes for non-felony and felony cases respectively.[32] Several years later, the Laura and John Arnold Foundation funded a pair of studies that assessed the impact of pretrial detention on case outcomes and on future crime. [33] With sample sizes in the tens to hundreds of thousands, the CJA and Arnold Foundation studies controlled for offense type within eight main classifications along with gender, race, age, and criminal history. These studies still found substantial correlations between pretrial detention and conviction rates, sentences of incarceration and post-disposition crime. One Arnold Foundation study in particular found large effects: low-risk defendants detained throughout the pretrial period were 5.41 times more likely to be sentenced to jail and 3.76 times more likely to be sentenced to prison than similarly situated defendants who were released at some point in their detention status.[34] These large effects, however, are unlikely to represent the true causal effect of pretrial detention. The researchers did not control for the particular offense charged, only broad offense categories such as "violent offenses". Those released on a violent offense are more likely to be facing minor charges like simple assault, and those detained on a violent offense are more likely to be facing serious charges like murder or rape. Given that likely variation, the study does not necessarily compare outcomes across similarly situated individuals, and differences in outcomes would be expected even in the absence of a causal effect.

In general, then, despite major improvements in data and analysis, this prior research has controlled for only a limited set of confounding variables, making it difficult to distinguish the effect of detention from the effects of underlying differences between detainees and releasees. Prior studies have typically controlled for limited measures of prior criminal involvement, and grouped cases into a limited number of offense categories. They have also tended to lack controls for defendants' wealth, which clearly affects pretrial release in cash bail systems, and which is likely to also affect defendant access to high-quality defense counsel and services such as counseling or drug treatment that might encourage the courts to impose a more lenient sentence. It is difficult, in other words, to exclude the possibility of "omitted-variable bias."

The newest empirical work on pretrial detention effects seeks to avoid the problem of omitted-variable bias by deploying quasi-experimental design. A working paper by Megan Stevenson, one of this paper's authors, uses a natural experiment in Philadelphia to estimate the causal effect of pretrial detention on case outcomes.[35] She exploits the fact that defendants have their bail set by different bail magistrates with broad discretion. Some magistrates tend to set bail

[32] MARY PHILIPS, PRETRIAL DETENTION AND CASE OUTCOMES, PART 1: NONFELONY CASES (2007); MARY PHILIPS, BAIL, DETENTION AND FELONY CASE OUTCOMES (2008).

[33] CHRISTOPHER T. LOWENKAMP ET AL., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES (2013); CHRISTOPHER T. LOWENKAMP ET AL., THE HIDDEN COSTS OF PRETRIAL DETENTION (2013).

[34] LOWENKAMP ET AL., THE HIDDEN COSTS OF PRETRIAL DETENTION, *supra.*

[35] Stevenson, *supra* note 13.

at unaffordable levels, while others set bail more leniently. The group of defendants randomly assigned to a high-bail magistrate are detained pretrial at higher rates than the group assigned to the more lenient magistrate. In all other respects, however, the two groups should be similar. Stevenson finds that defendants who receive the strict magistrate are also more likely to plead guilty and receive harsher sentences. Since this quasi-experimental method eliminates the bias that results from comparing individuals with different underlying characteristics, it produces a causal estimate of the effect of pretrial detention. Stevenson also performs a standard regression analysis (controlling for a detailed set of variables) that yields very similar results, suggesting that with enough controls, researchers can produce reasonable estimates of the causal effects of pretrial detention even in the absence of a natural experiment.

This Article offers several contributions to the field. First, like Stevenson, we offer both a quasi-experimental analysis and a regression analysis with a large set of highly detailed controls. Secondly, we focus on misdemeanor defendants, and assess the effect of pretrial detention both on case outcomes and on future crime. Third, we offer the first large-scale empirical study of misdemeanor pretrial detention in Harris County—which, because its pretrial process is representative of many jurisdictions, and because of the sheer number of people it affects, presents a particularly illuminating location of study.

II. MISDEMEANOR PRETRIAL DETENTION IN HARRIS COUNTY

A. The Misdemeanor Pretrial Process

The present analysis focuses on Harris County, Texas, the third largest county in the United States, which includes Houston, the nation's fourth largest city. Harris County contains a diverse population of 4.5 million residents, 20% of whom are African-American, 42% Hispanic/Latino, 25% foreign born, and 17% living below the federal poverty line.[36] In Houston, which comprises about half of the county by population, the 2014 FBI index crime rate was 1 per 100 residents for violent crime and 5.7 per 100 residents overall, placing Houston 30th among the 111 U.S. cities with population above 200,000.[37] Countywide, around 70,000 misdemeanors are processed each year, and these cases are adjudicated by the Harris County Criminal Courts at Law.[38] Historically, indigent defense in the county was provided though an appointed private counsel system, but a public defender office was established in 2010 and has gradually expanded, although it handles only a small subset misdemeanor cases.[39]

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[36] U.S. Census Bureau, *Quick Facts, Harris County, Texas*, https://www.census.gov/quickfacts/table/PST045214/48201.

[37] Authors' calculations from FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES (2014).

[38] We report this total misdemeanor count on the basis of the data (on file with authors).

[39] The Public Defender's office represents only those misdemeanor defendants who are severely mentally ill, as identified by a computer algorithm on the basis of three criteria: (1) they have taken prescribed psychoactive drugs in the last 90 days, (2) they have a diagnosis of Schizophrenia, Bipolar Disorder or Major Depression, or (3) they are assigned to the jail's specialty mental health housing. In total, this totals approximately 2500 persons annually. *Personal correspondence with* Alex Bunin, Harris County Public Defender (June 16, 2016).

After arrest and booking, misdemeanants are held at the county jail complex located in downtown Houston until a bail hearing occurs.[40] Bail hearings are held continuously every day during the year, and nearly always occur within 24 hours of the initial booking. To manage the large volume of new defendants that arrive each day, the county has developed a videoconferencing process for bail hearings, whereby defendants are taken to a conferencing facility within the jail, and participate in the hearing by speaking toward a split video screen that shows a prosecutor and the magistrate handling the hearing. Bail hearings are typically handled in an assembly-line fashion, with some hearings lasting under a minute. Unless they have somehow managed to retain counsel, which is very rare, defendants are not represented at the bail hearings, and although the hearings begin with a basic advisory of rights, defendants may self-incriminate or otherwise take actions that might affect their future case.

Magistrates making bail determinations have access to information from a pretrial services report that includes prior criminal record, and can also direct questions towards the defendant during the bail hearing. Texas statutory law defines bail as "the security given by the accused that he will appear and answer before the proper court the accusation brought against him."[41] Notwithstanding this unitary focus on ensuring appearance, the law also directs the officer who sets bail to consider public safety in determining the bail amount.[42] In Harris County, bail is typically set according to a bail schedule promulgated by the county courts. The schedule proposes bail of $500 for a first-time low-level misdemeanor with no prior criminal record and escalates bail in $500 increments according to the seriousness of the charged offense and the number of prior felony and misdemeanor convictions, up to a maximum of $5,000.[43] Although release without bail—referred to as a "personal bond" in Harris County—is allowed, it is not included on the schedule and occurs infrequently.[44] Prosecutors have an opportunity during the bail hearing to argue for departures form the schedule.

Nearly all misdemeanor offenders in Harris County are theoretically eligible for appointed counsel in the event of indigence, and indigent defense in misdemeanor cases is provided almost exclusively through appointed private counsel.[45] To apply for appointed counsel, defendants complete a form that asks about income and other assets and judges may also direct questions regarding defendants' financial circumstances from the bench either during

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[40] Some of the processes detailed here are described in Harris County Criminal Courts at Law, *Rules of Court* (Sept. 6, 2012), available at http://www.ccl.hctx.net/criminal/Rules%20of%20Court.pdf. The others are reported as described in personal communications with Alex Bunin, Harris County Public Defender (June 16 and July 27, 2016).

[41] Tex. Crim. Proc. Code Ann. § 17.01.

[42] Tex. Crim. Proc. Code Ann. § 17.15(5).

[43] Harris County Criminal Courts at Law, *Rule 9, Setting and Modifying Bail Schedule* (July 5, 2016), available at http://www.ccl.hctx.net/attorneys/BailSchedule.pdf. A non-profit advocacy organization, Equal Justice Under Law, recently filed a civil rights lawsuit against Harris County on behalf of misdemeanor pretrial detainees, alleging that reliance on the bail schedule violates due process and equal protection. *See, e.g.*, Lise Olsen, *Harris County's Pretrial Detention Practices Challenged as Unlawful in Federal Court*, HOUSTON CHRONICLE (May 19, 2016).

[44] *See* Tex. Crim. Proc. Code Ann. § 17.03 (defining "personal bond" and judicial authority to order it).

[45] *See supra* note 39. In the analysis that follows we control for public defender representation on the theory that these cases may be systematically different for other cases.

the bail hearing or in later proceedings.[46] In some cases, when it would facilitate a more orderly transition of court business, particularly when defendants appear *pro se* (without a lawyer), the judge may appoint indigent counsel without a formal request.[47] Although Texas law and the County's written policy prohibits judges from considering whether a defendant made bail in deciding whether she qualifies for appointed counsel (except to the extent that it reflects her financial circumstances),[48] there is considerable anecdotal evidence suggesting that this rule is violated in practice.[49] Thus, under the current system one potential impact of posting bail may be to alter one's chances of receiving an appointed attorney.

B. Data Description

Study data are derived from the court docket sheets maintained by the Harris County District Clerk.[50] These docket sheets include the universe of unsealed criminal cases adjudicated in the county, and include considerable detail regarding each case. We focus attention on 380,689 misdemeanor cases filed between 2008 and 2013. For each case, we observe the defendant name, address, and demographic information; prior criminal history; and top charge. We also observe the time of the bail hearing, bail amount, whether and when bail was posted, judge and courtroom assignment, motions and other metrics of procedural progress, and final case outcome, including whether the case was resolved through a plea. In the discussion below, we focus on the bail amount set at the initial hearing, which is likely to have a disproportionate impact on detention both because it is the operative bail during the early period when most defendants who post bail do so, and because it serves as a reference point for any further negotiations over bail. However, in Harris County, as in other jurisdictions, judges can exercise discretion to adjust bail as additional facts about a particular defendant or case come to light. To obtain information about the neighborhood environment for each defendant, we linked the court data by defendant ZIP code of residence—which was available for 85% of defendants—to ZIP code level demographic data from the 2008-2012 American Community Survey.

The court data have a few important limitations. Only a single most serious charge is recorded in each misdemeanor case, so it is not possible to clearly differentiate defendants with large numbers of charges. Although court personnel have access to criminal history information

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[46] Harris County District Courts, *Standards and Procedures: Appointment of Counsel for Indigent Defendants* (Sept. 2, 2009), available at https://www.justex.net/JustexDocuments/0/FDAMS/standards.pdf.

[47] This is apparent on the basis of the data, which sometimes shows counsel appointed without a motion (often on the day of final adjudication), and was confirmed in personal correspondence with Alex Bunin, Harris County Public Defender (July 27, 2016).

[48] Tex. Crim. Proc. Code Ann. § 26.04; Harris County District Courts, *Standards and Procedures* 15 (Sept. 2, 2009), available at https://www.justex.net/JustexDocuments/0/FDAMS/standards.pdf.

[49] See, for example, Emily DePrang, *Poor Judgment*, TEXASOBSERVER.ORG (Oct. 12, 2015), https://www.texasobserver.org/poor-judgment and Paul B. Kennedy, *Who is indigent in Harris County?*, THE DEFENSE RESTS BLOG (Jan. 25, 2010), http://kennedy-law.blogspot.com/2010/01/who-is-indigent-in-harris-county.html.

[50] These are available at CHRIS DANIEL, HARRIS COUNTY DISCRICT CLERK WEBSITE, http://www.hcdistrictclerk.com/edocs/public/search.aspx.

from across the state, these data only include criminal history data covering offenses within Harris County, not other jurisdictions. A further limitation is that the data do not in all cases provide clear indications of failure to appear, an obvious outcome of interest in a comprehensive evaluation of bail. The attorney information is also less than complete—although the data do indicate the identity of court-appointed counsel, as well as the fact that they are court-appointed, the identity of counsel is not observed when privately retained, nor can we distinguish between those who proceed *pro se* and those who hire a private attorney. Race and citizenship data are not carefully verified, so they may not be fully reliable.[51] Finally, although these data represent the near universe of criminal cases in the county, a small fraction of criminal court records are sealed or otherwise unavailable on the online court docket database. Additionally, arrestees who successfully complete diversion programs through which they avoid having charges filed are not included in the data.[52]

Table 1: Characteristics of Defendants by Pretrial Release Status

	Overall	Detained	Released
Convicted	68.3%	79.4%	55.7%
Guilty plea	65.6%	76.8%	52.8%
Any jail sentence	58.7%	75.0%	40.2%
Jail sentence days	17.0	25.4	7.4
Any probation sentence	14.0%	6.2%	22.9%
Probation sentence days	49.4	22.5	79.9
Requested appointed counsel	53.2%	71.3%	32.6%
Amount of bail	$2,225	$2,786	$1,624
Level A misdemeanor	30.7%	33.5%	27.4%
Male	76.8%	79.8%	73.5%
Age (years)	30.8	31.6	30.0
Black	38.9%	45.6%	31.3%
Citizen	74.1%	71.5%	77.0%
Prior misdemeanors	1.51	2.08	0.85
Prior felonies	0.74	1.11	0.31
Sample size	380,689	202,386	178,303

Table 1 presents summary statistics describing the sample of misdemeanor defendants examined in the study. We categorize as detained any individual who did not post bond with the first 7 days following the bail hearing. The data reveal stark differences in plea rates, conviction

[51] Anecdotal reports from Harris County criminal justice system actors suggest that this is the case.

[52] An example of one such program operating in Harris County is the First Chance Intervention Program, which diverts first-time, low-level marijuana offenders and is described at https://app.dao.hctx.net/OurOffice/FirstChanceIntervention.aspx.

rates, and jail sentences for detainees as compared to those who are able to make bail. However, detainees are also different from releasees across a number of pre-existing characteristics that seem likely to be related to case outcomes. For example, detainees are much more likely to request appointed counsel due to indigence (71% vs. 33%), disproportionately commit more serious Class A misdemeanors (34% vs. 24%), and have more extensive prior criminal records. Thus, it remains unclear to what extent the differences in case outcomes reflect the effect of detention versus other pre-existing differences across the two groups.

C. Pretrial Detention and Wealth

Not listed in Table 1, because it is unobserved in our data—but probably the most obvious characteristic that would likely differ between the detained and released—is wealth. A clear concern with a predominantly cash-based bail system as exists in Harris County is that individuals with money or other liquid assets will be most able to make bail, skewing the system in favor of the wealthy. Although the individual wealth of each defendant is unobserved, we can proxy for defendant wealth based upon median income in each defendant's ZIP code of residence. To illustrate the prominent role of wealth in the system, Figure 1 calculates the pretrial detention rate for defendants residing in each of the 217 ZIP codes observed in the data that contain at least 50 defendants, and plots this against the median household income in the ZIP.

The pattern is striking. Those who come from poorer neighborhoods are substantially more likely to be detained than those coming from wealthier neighborhoods. Only about 30% of defendants coming from the wealthiest ZIP codes are detained pretrial, versus around 60-70% in the poorest ZIP codes.

Although Figure 1 suggests that wealth may be an important determinant of pretrial release, it is possible that the patterns in Figure 1 reflect differential offending by defendants from lower-income ZIP codes. If, for example, lower-income misdemeanor defendants commit more serious offenses or tend to have more extensive criminal histories, one might expect them to be assigned higher bail amounts and be more likely to be detained for legally appropriate reasons. However, Figure 2, which shows the average seriousness of the offense, demonstrates that there is no relationship between wealth and offense seriousness.[53] Figure 3, moreover, demonstrates that the strongly negative wealth/detention relationship persists when focusing attention on the pool of defendants who have no prior charges in Harris County. Thus, the wealth gradient does not seem to be explainable simply as a matter of more extensive or more serious offending by low-income defendants.

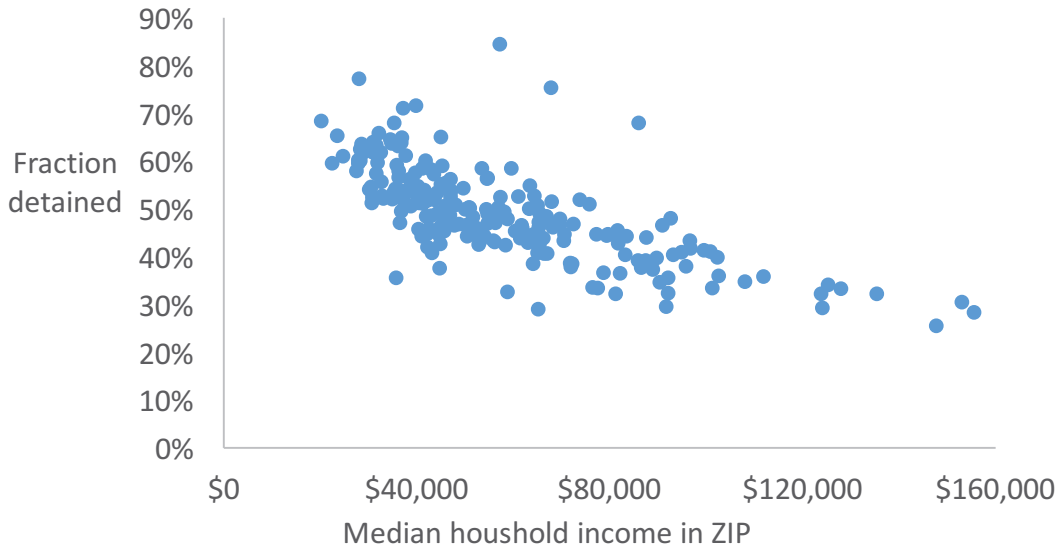
Would wealthier defendants still be detained less frequently if we could perfectly account for evidence and other factors relevant to flight or public-safety risk? To assess this question, for each defendant, we constructed an expected probability of detention by looking at the actual

[53] In a ZIP-code level regression of average seriousness on median household income, the estimated coefficient on income is practically small and not statistically significant.

detention rates of all other defendants in the sample who were assigned identical bail amounts at the initial hearing. This measure captures the average custody outcome for all defendants who were considered by the court as representing the same degree of risk, at least as expressed through the bail amount. For defendants falling within each decile of the ZIP code income distribution, we then compared this expected detention measure to the true rates of detention. The results of this analysis are reported in Figure 4.

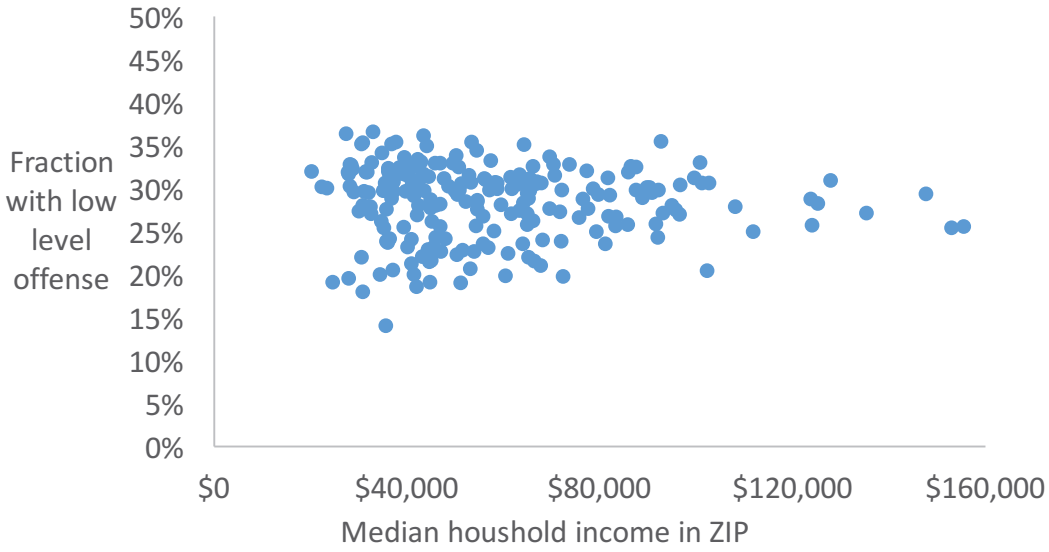
We see a striking pattern in which, for the poorest defendants, the actual detention rates are substantially above those that would be predicted based upon their assigned bail, whereas the reverse is true for the wealthiest defendants. Defendants in the lowest-income decile are about 15% (8 percentage points) more likely to be detained than would be expected based on their court assigned bail, and those in the top decile are 19% (9 percentage points) less likely to be detained. Because these comparisons already account for the bail amount, the differences cannot be plausibly attributed to anything in the court record that might implicate worthiness for bail. Thus, it appears that wealthier defendants are advantaged in their ability to obtain pretrial release beyond what would be expected simply based on the merits of their case.

Figure 1: Relationship Between Wealth and Detention Rates Among Misdemeanor Defendants in Harris County, TX



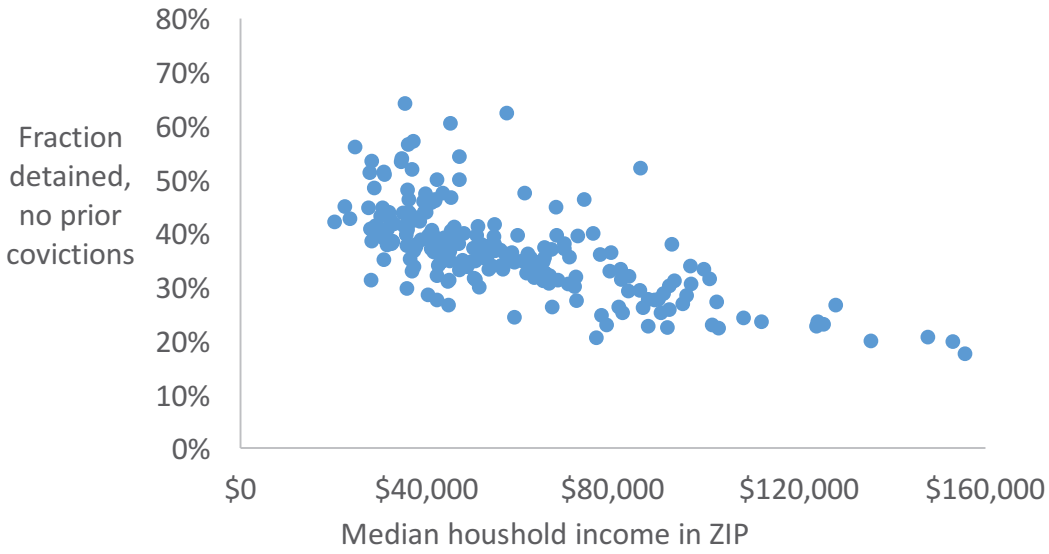
Note: This figure reports detention rates versus median income by ZIP code. Each dot in the chart represents defendants residing within a particular ZIP code.

Figure 2: Relationship Between Wealth and Offense Seriousness Among Misdemeanor Defendants in Harris County, TX



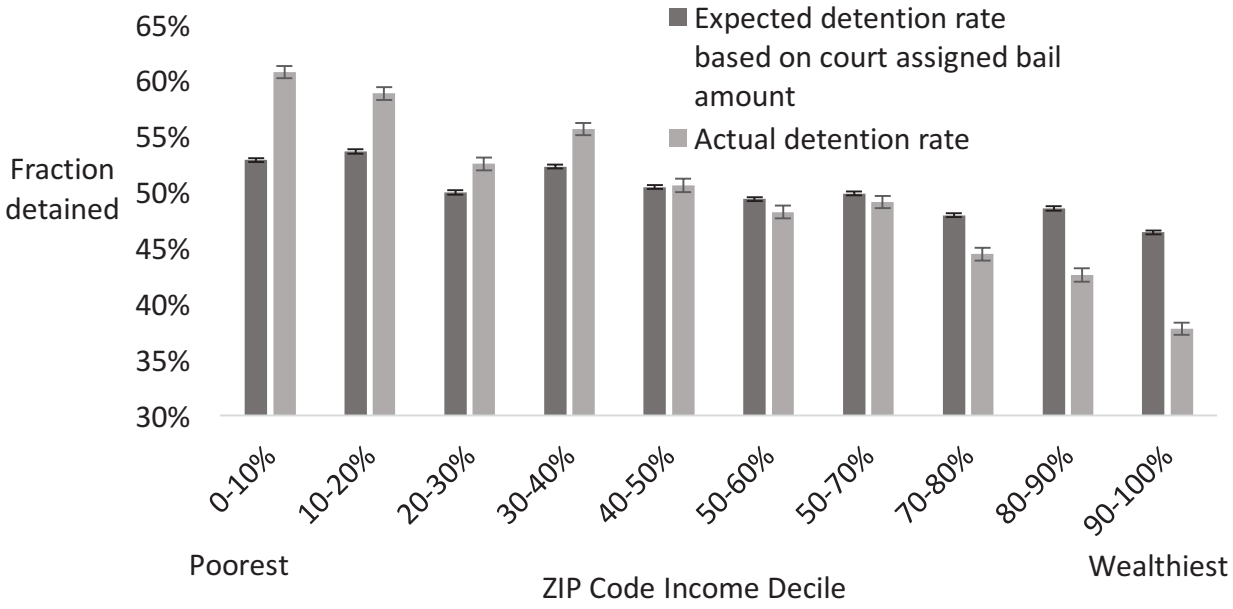
Note: This figure reports the fraction of defendants charged with a Class A misdemeanor versus median income by ZIP code. Each dot in the chart represents defendants residing within a particular ZIP code.

Figure 3: Relationship Between Wealth and Detention Rates Among Misdemeanor Defendants with No Prior Criminal Record in Harris County, TX



Note: This figure reports detention rates versus median income by ZIP code. Each dot in the chart represents defendants residing within a particular ZIP code.

Figure 4: Expected Detention Rates Versus Actual Detention Rates by Income Decline



Note: Expected detention rates are calculated by comparing defendants to all other defendants with equal bail amounts. Whiskers represent 95% confidence intervals.

III. ANALYSIS OF THE EFFECTS OF PRETRIAL DETENTION

A. Regression Analysis

Does this apparent unequal access to release have implications for the outcomes of cases? To begin to assess the impacts of bail, we estimate a series of regression models where the unit of observation is a case, the outcome is whether the case resulted in conviction, and the primary explanatory variable is a 0/1 indicator for whether a particular defendant was detained pretrial. We progressively introduce richer and richer sets of control variables to assess the extent to which the measured "effects" of detention might simply be attributable to uncontrolled factors other than detention.[54] As we progressively add additional controls we may get closer to the true causal estimate, but these estimates are all subject to the limitation that there may be uncontrolled, unobserved factors such as defendant wealth or quality of evidence that bias these as estimates of the causal effect of detention.

[54] We do not seek, by this methodology, to measure the effect of any of the variables we progressively introduce. For that purpose, this methodology would be flawed. *See* Jonah Gelbach, *When Do Covariates Matter? And Which Ones, and How Much?* 34 J. LABOR ECON. 509 (2016). We simply seek to assess the impact of detention under various specifications of increasing complexity.

Table 2 reports the regression estimates. The first specification reports a coefficient from a bivariate regression with no controls. The baseline conviction rate for those not detained is 56%, so detainees are 23.6 percentage points, or 42% more likely to be convicted. In Specification 2, we add controls for the charged offense along with the age, race, gender, and citizenship status of the defendant. In contrast to prior research, which tends to group crimes into a small number of general categories (e.g. "sex offense" or "minor public order offense"), in our regression we control for 121 different offense categories representing a wide range of different types and severities of offending. These additional controls do not dramatically alter the measured relationship between detention and conviction.

In Specification 3, we add controls for defendant build, skin color, and nativity and also include a full set of fixed effects for the ZIP code of residence. One clear drawback of attempting to measure the effects of pretrial detention through regression modeling is that wealth and SES are strong predictors of case outcomes, and seem likely to also be correlated with pretrial detention, but are rarely observed in court data. By including ZIP code controls, we are in essence comparing two individuals who come from the same neighborhood but who differ in pretrial detention status. While wealth and SES can vary within a ZIP code, the high degree of segregation by socioeconomic status that exists in Harris County (as in many urban areas in the United States) suggests that the ZIP codes can be a reasonable proxy for SES and education. Once again, the additional controls do not dramatically alter the results.

In Specification 4, we include indicators for the number of prior misdemeanor and felony charges and convictions as additional controls. Controlling for prior criminal history is important because prior offenses enter directly into the bail schedule, thus having a direct influence on detention. Prior criminal history may also factor into the outcome of the current case, particularly with reference to sentencing. As noted previously, our criminal history data only captures criminal justice contacts within Harris County. After conditioning on factors such as citizenship status, nativity, and residence location, however, it seems less likely that patterns of out-of-county offending would differ systematically between those who are detained and those who are released, suggesting the available controls may be adequate for capturing prior criminal activity. Somewhat surprisingly, controlling for prior criminal activity only modestly reduces the estimated relationship between detention and conviction.

Although we don't directly observe individual wealth, we can further proxy for wealth by whether a particular defendant requested appointed counsel, claiming indigence. Specification 5 adds an indigence indicator to the set of control variables. Controlling for this proxy for wealth appreciably reduces the coefficient estimate on detention, but it remains statistically significant and practically large.

In Specification 6 we add a full set of indicators for the actual bail amount set. In this specification, we are comparing individuals who have the same bail set at their hearing—and who are also equivalent across all variables enumerated in prior specifications—but who differ in their detention status. Since the amount of cash bail is, at least in theory, supposed to adjust to reflect the risk of flight and threat to public safety, conditioning precisely to the bail amount is

akin to comparing individuals only to others whom the court has deemed to be equally risky to one another. On a conceptual level, comparing individuals with similar court-determined risk seems attractive because it means that any subsequent difference in outcomes cannot result from the sorting function of the bail process, because the controls completely account for the instrumentality of sorting, which is the bail amount. In this, our preferred specification, pretrial detention is associated with a14 percentage point, or 25%, increase in the likelihood of conviction.

Table 2: Regression Estimates of the Effect of Pretrial Detention on Conviction

Specification	
1. No controls	0.236**
	(0.001)
2. Add controls for offense and basic demographics	0.266**
	(0.002)
3. Add controls for ZIP code of residence other characteristics	0.255**
	(0.002)
4. Add controls for prior criminal history	0.220**
	(0.002)
5. Add control for a claim of indigence	0.151**
	(0.002)
6. Add control for bail amount	0.140**
	(0.002)

Note: This table reports coefficient estimates from linear probability regressions estimating the relationship between pretrial detention and whether or not a misdemeanor defendant is convicted. The unit of observation is a case, and the sample size is 380,689. The dependent variable is an indicator for whether or not a particular defendant in a case was convicted, and the primary explanatory variable of interest is an indicator for whether the defendant in the case was released pretrial. Each table entry reports a coefficient from a separate regression, coefficients on other control variables are unreported. The mean conviction probability among those not detained was .557. Specification 1 is a simple bivariate regression. Specification 2 adds controls for defendant age (85 categories), gender, race (6 categories), citizenship status (3 categories), charged offense (121 categories), and week of case filing (289 categories). Specification 3 adds controls for the defendant's skin tone (14 categories), build (5 categories), whether they were born in Texas, and ZIP code of residence (223 categories). Specification 4 adds controls for the number of prior misdemeanor and felony charges (10 misdemeanor and 10 felony categories) and convictions (10 misdemeanor and 10 felony categories). Specification 5 adds an indicator for whether a defendant requested appointed counsel due to indigence. Specification 6 adds a full set of initial bail amount fixed effects (315 categories) as additional controls. Because the public defender handles a non-random subset of misdemeanors, all regressions with controls include an indicator for cases handled by the public defender. Robust standard errors are reported in parentheses. * denotes an estimate that is statistically significant at the .05 level in a two-sided test, and ** at the .01 level.

One variable not included in our specifications, and which might be important, is the type of defense representation actually provided (hired private counsel, public defender, appointed private counsel or no counsel (*pro se*)). We have not included it for two reasons. First, we cannot fully control for representation type, because our data do not allow us to distinguish between those who hire a private attorney and those who choose to represent themselves.[55] While we can control for whether or not the defendant receives a court-appointed attorney, this specification is difficult to interpret, as it essentially places those with a hired attorney and those representing themselves in the same category. Second, it might not be optimal to control for counsel type even if the data were available. The type of counsel may itself be an outcome of whether or not the defendant is detained pretrial; to control for it is thus to ignore one important effect of detention.[56] Changes to detention policy would likely also alter the type of representation received by defendants.

Finally, controlling for counsel type might actually introduce a new source of bias. In general, statistical practice cautions against controlling for variables that are not predetermined (*i.e.* variables that are influenced by the main variable of interest). The evidence suggests that judges are more likely to approve a request for counsel if the defendant is detained.[57] This suggests at releasees who receive court-appointed attorneys may be poorer and have more challenging cases than detainees with appointed counsel. Thus controlling for attorney status would tend to bias the results towards zero, since instead of comparing similarly situated individuals we would be comparing relatively wealthy detainees with relatively poor releasees.

Nonetheless, for the sake of completeness we did estimate a specification that controls for whether or not the defendant received a court-appointed attorney. The estimated coefficient was .042 with a p-value <.01—a smaller bail/conviction relationship, but one that remains statistically significant and relevant for policy purposes. This is not our preferred specification, however, due both to the data limitations and to the difficulties of interpreting the results of a regression that controls for one of the outcomes of pretrial detention.

The basic message from the analysis of conviction is that accounting for pre-existing differences in detainees and releasees is important, but even after controlling for a fairly wide range of relevant characteristics, pretrial detention remains a sizeable predictor of outcomes.

In Table 3, we extend the analysis to consider a range of additional case outcomes. The first row of the table replicates the previously reported results for conviction. The columns of the table report results from regressions with no controls, with a limited set of controls (basic offense

[55] In Harris County, judges will as a rule not proceed in misdemeanor cases without eventually assigning counsel, but in rare cases defendants will insist on representing themselves. *Personal correspondence with* Alex Bunin, Harris County Public Defender (June 16, 2016).

[56] There is some evidence that judges see the posting of bail as an indication that a defendant is not indigent enough to merit public defense. *See supra* note 47. In Harris County, 90% of detainee requests for counsel are granted, versus 44% of releasee requests. Detention may also affect attorney type through other channels. Those who have lost their job as a result of detention may be less able to afford a private attorney, for instance.

[57] In Harris County, 90% of detainee requests for counsel are granted, versus 44% of release requests. This could be because the act of paying bail is interpreted as evidence that the defendant has funds, or because detainees are unable to work while detained.

and demographics, similar to much of the past research measuring the effects of detention), and from our preferred specification that controls for a rich set of defendant and case characteristics and the bail amount (equivalent to Specification 6 in Table 2). Although there is a sizable impact of detention on all outcomes, estimated effects become smaller as one controls for a richer set of defendant and case characteristics. Prior research, which controlled for a limited set of variables, may indeed have overestimated the causal effect of detention.

The table demonstrates that nearly all of the difference in convictions can be explained by higher plea rates among those who are detained, with detainees pleading at a 25% higher rate than similarly situated releasees. We also find that those detained are more likely to receive jail sentences instead of probation. In our preferred specification, those detained are 43% (17 percentage points) more likely to receive a jail sentence, and will receive jail sentences that are nine days longer, more than double that of non-detainees. This estimate of the impact of pretrial detention includes in the sample those without a jail sentence, so it incorporates both the extensive effect on jail time (those detainees who, but for detention, would not have received a jail sentence at all) and the intensive effect on jail time (those who would have received a jail sentence regardless, but whose sentence may be longer as a result of detention). Those detained are less likely to receive sentences of probation, and receive fewer days of probation (including, once again, both the extensive and intensive margin).

Do these results shed light on which of the various potential mechanisms linking detention to case outcomes operate in Harris County? Although we cannot answer definitively, the overall patterns in Table 3 are consistent with an environment in which released defendants are able to engage in prophylactic measures—such as maintaining a clean record, engaging in substance abuse or anger management treatment, or providing restitution—that lead to charges being dismissed or encourage more lenient treatment. Detained defendants, in contrast, have essentially accumulated credits towards a final sentence of jail as a result of their detention, and therefore are more likely to accede to and receive sentences of imprisonment.

Are some defendants affected more dramatically by detention than others? For example, if one mechanism through which detention induces guilty pleas is by causing some defendants to "pre-serve" their expected sentences, so that contesting guilt has little ultimate effect on the amount of punishment, we might expect to see larger effects of detention for offenses where the expected punishment is low. To address this question, we constructed estimates of the effects of detention analogous to those presented in Tables 2 and 3, but limiting the sample to various subsets of the defendant population. Comparing the estimated impact of detention across different subgroups offers a means of assessing whether certain types of defendants are more or less disadvantaged by detention.

Table 3: Regression Estimates of the Effect of Pretrial Detention on Other Case Outcomes

		Estimated effect of pre-trail detention		
Outcome	Average for those released	No controls	Limited controls	Preferred specification
Conviction	.557	.236**	.266**	.140**
		(.001)	(.002)	(.002)
Guilty plea	.528	.240**	.264**	.133**
		(.002)	(.002)	(.002)
Received jail sentence	.402	.348**	.317**	.172**
		(.002)	(.002)	(.002)
Jail sentence days	7.38	18.0**	15.85**	8.67**
		(.10)	(.10)	(.12)
Received probation	.229	-.167**	-.125**	-.076**
		(.001)	(.001)	(.001)
Probation days	79.9	-57.5**	-41.2**	-25.3**
		(0.45)	(0.46)	(0.55)

Note: This table reports coefficient estimates from linear regressions estimating the relationship between case outcomes and whether a defendant was detained pretrial. Each entry represents results from a unique regression. The "Limited Controls" column reports regressions with controls as in Specification 2 of Table 2, and the "Preferred Specification" column reports regressions with controls as in Specification 6 of Table 2. See notes for Table 2. The jail and probation days outcomes include defendants assigned no jail or probation.

Table 4 reports the subgroup analysis. We first consider differences by prior criminal history, comparing defendants with no prior charges in Harris County to those with prior charges. We categorize by charges rather than convictions to account for the possibility that some individuals who are charged but later acquitted may have nonetheless accumulated experience with pretrial detention. Several mechanisms suggest that there may be different effects of detention for someone who has never been previously detained. First, those with prior experience in detention may experience less psychological or emotional discomfort because they have a clearer idea of what detention entails, a sort of acclimation effect. Second, these defendants may experience fewer collateral consequences of detention, either because they have already been labeled as offenders due to their prior acts, or because they have accumulated experience in dealing with collateral consequences. A third possibility is that those with a prior record face different types of potential punishments that change their calculus regarding the benefits and drawbacks of a plea. Finally, those with no prior record may be more likely to receive plea offers that involve low sanctions, increasing the incentives to accept the plea even if innocent.

Table 4 reveals that defendants without prior records are disproportionately affected by detention. Detention has more than twice the effect on conviction for first-time offenders, and appreciably increases their likelihood of being given a custodial sentence. Although other explanations are possible, this pattern is consistent with a scenario in which defendants detained for the first time are particularly eager to cut a deal to escape custody as quickly as possible; more experienced defendants, who perhaps have become acclimated to the jail environment or who face more serious consequences of conviction, are less influenced by their detention status. It appears that one consequence of pretrial detention, at least as practiced in Harris County, is that it causes large numbers of first-time alleged misdemeanants to be convicted and sentenced to jail time, rather than receiving intermediate sanctions or avoiding a criminal conviction altogether.

Table 4 demonstrates few differences in outcomes between "Whites" and "non-Whites," or between U.S. citizens and non-citizens.[58] Incentives to post bail may be different for non-citizens with immigration detainers, who would be held in custody for immigration purposes even after posting bail. However, the fact that we obtain similar results for citizens and non-citizens suggests that detainers may not be an important omitted variable here.

We do observe some important heterogeneity in the effects of custody by the primary offense of record. For DWI, for example, detention has little effect on adjudication of guilt—presumably because there is sufficient evidence from alcohol tests in most cases to convict—but there is evidence that those who are not detained are much more readily able to substitute probation for a custodial sentence. The largest effects on conviction accrue for assault and trespassing, two crimes for which physical evidence may be lacking, and the ability to obtain statements from witnesses in court may play an important role.[59]

Consistent with the evidence for defendants of varying criminal history, when we examine subsets of the defendant population based upon assigned bail, the most substantial effects are observed for those with low bail, at least for conviction and type of sentence. Effects on sentence length are largest in absolute terms for those with higher bail amounts, but this is perhaps unsurprising, since these defendants will also face more serious sentences overall. Detention has a greater *relative* effect on sentence length for people with low bail, given the shorter average sentence lengths of that group. One implication of these patterns is that Harris County could potentially achieve much of the benefit of liberalizing access to pretrial release by focusing on those with the lowest bail amounts, which may make a course of reform more politically feasible. This may be true in other jurisdictions with features similar to Harris County as well.

Finally, we analyzed the effects of bail by ZIP code quartile, examining whether those detained from wealthier neighborhoods fare as badly in their case outcomes as those from poorer neighborhoods. Although Table 4 shows that those from the poorest areas of the county are much

[58] As noted above, the race and citizenship designations in our data may not be wholly reliable.

[59] Stevenson observes similar patterns in her Philadelphia data. *See* Stevenson, *supra* note 13, at 19.

more likely to be detained, the effects of detention itself are fairly uniform across the wealth distribution. Thus, those who cannot post bond suffer higher conviction rates and a lowered likelihood of probation versus jail even when they come from more affluent parts of the county.

Table 4: Estimated Effects of Pretrial Detention for Population Subgroups

		Estimated effect of pre-trail detention on:				
Group	Group detention rate	Conviction	Sentenced to jail?	Jail sentence (days)	Sentenced to probation?	Probation sentence (days)
Criminal History						
No prior charges	.384	.195**	.213**	7.07**	-.084**	-23.6**
		(.003)	(.003)	(.126)	(.003)	(.909)
Prior charges	.634	.092**	.128**	9.44**	-.057**	-23.0**
		(.002)	(.002)	(.177)	(.001)	(.677)
Citizenship						
U.S. citizen	.514	.145**	.163**	8.24**	-.064**	-19.9**
		(.002)	(.002)	(.137)	(.002)	(.630)
Non-citizen	.586	.114**	.178**	9.50**	-.099**	-36.4**
		(.004)	(.004)	(.219)	(.003)	(1.12)
Race						
White	.481	.143**	.184**	9.63**	-.085**	-29.6**
		(.002)	(.002)	(.156)	(.002)	(.784)
Non-white	.603	.132**	.148**	7.12**	-.058**	-16.5**
		(.003)	(.003)	(.173)	(.002)	(.728)
Offense						
Drug	.464	.150**	.143**	5.31**	-.033**	-7.34**
		(.004)	(.004)	(.142)	(.003)	(.868)
DWI	.309	.034**	.224**	13.22**	-.190**	-82.8**
		(.004)	(.005)	(.331)	(.005)	(2.35)
Assault	.597	.215**	.210**	15.51**	-.046**	-12.3**
		(.007)	(.007)	(.528)	(.005)	(2.11)
Theft	.592	.151**	.132**	5.26**	-.094**	-23.1**
		(.005)	(.005)	(.245)	(.004)	(1.48)
Trespassing	.809	.196**	.229**	8.04**	-.047**	-12.5**
		(.008)	(.008)	(.409)	(.004)	(1.30)
Bond Amount						
$0-$500	.353	.179**	.198**	5.75**	-.082**	-2.88**
		(.003)	(.003)	(.109)	(.003)	(1.02)
$501-$2,500	.464	.146**	.173**	8.42**	-.075**	-24.2**
		(.003)	(.003)	(.180)	(.002)	(.975)
$2,501+	.704	.085**	.128**	10.92**	-.053**	-25.3**
		(.003)	(.003)	(.265)	(.002)	(.855)

ZIP Code Income Quartile						
1st Quartile (Lowest)	.597	.131**	.175**	9.13**	-.087**	-29.6**
		(.004)	(.004)	(.267)	(.003)	(1.07)
2nd Quartile	.550	.127**	.166**	8.61**	-.084**	-27.8**
		(.004)	(.004)	(.261)	(.003)	(1.14)
3rd Quartile	.495	.148**	.170**	8.25**	-.069**	-21.9**
		(.004)	(.004)	(.230)	(.003)	(1.17)
4th Quartile (Highest)	.423	.158**	.168**	8.32**	-.053**	-16.9**
		(.004)	(.004)	(.238)	(.003)	(1.37)

Note: This table reports coefficient estimates from linear regressions estimating the relationship between case outcomes and whether a defendant was detained pretrial for subgroups of the defendant population. Each entry represents results from a unique regression. Controls are as in Specification 6 of Table 2. See notes for Tables 2 and 3.

B. Natural Experiment

The preceding analysis indicates that even after controlling for a wide range of defendant and case characteristics, including bail amount (which should capture the information observed by the court when making bail decisions), there remains a large gap in case outcomes between those who are detained and observationally similar defendants who make bail. Nevertheless, it remains possible that some of the differences in outcomes revealed thus far reflect unobserved factors other than pretrial detention that were not controlled for in the regression analysis.

From a purely research perspective, the ideal approach to estimating the causal effect of pretrial detention would be to randomly select a subset of defendants and detain them, and then compare their downstream outcomes with those who were not detained. Random assignment to detention status would help to ensure that the two groups were otherwise comparable on other factors that might influence outcomes, including culpability. As a practical matter, however, implementing such an experiment would be ethically dubious.

Absent the ability to run a true experiment, one might seek to identify a naturally occurring "experiment", or some situation that causes pretrial detention to vary across different defendants for reasons unrelated to their underlying characteristics or culpability. Comparing outcomes among those more likely to be detained for such idiosyncratic reasons to those less likely to be detained could offer another way to measure the effects of detention.

Here we propose comparing defendants with bail hearings earlier in the week to those with hearings later in the week as a sort of natural experiment, under the theory that those with bail set later in the week are more likely to actually make bail. We limit attention to bail hearings that occur Tuesday through Thursday so as to focus on a set of days with fairly uniform crime patterns, and avoid comparisons between crime occurring on the weekends—which tends to involve different types of actors and activities—and crime occurring on weekdays.

Table 5 helps to illustrate the logic behind this natural experiment, reporting the amount of time elapsed between the bail hearing and posting of bond for those who successfully make

bail. The first 48 hours following the bail hearing appear to be a fairly critical period for making bail, as 77% of all those who eventually make bail do so during this period. Put differently, at the time of the bail hearing, a representative defendant has a 44% chance of being detained until judgement, but after two days have elapsed without yet making bail, the chances of never making bail have risen to 75%.

Typically, defendants rely on friends or family members to either post cash bail at a predetermined facility[60] or to visit a bail bonding company, which then posts a surety bond. The premise behind the natural experiment is that it is easier get ahold of someone who is willing to show up to post bail on the weekend than during the week. As an example, consider a defendant with a Tuesday bail hearing, who then must get in contact with someone to post bail. Family members or friends may be reluctant to disrupt school or work schedules to come to the bail facility and post bond, and they may be more difficult to contact if they are at work or otherwise away from home. A similarly-situated defendant with a bail hearing on a Thursday, in contrast, may have an easier time getting ahold of someone who is willing to appear to post bail, since the acquaintance could more easily do so on a Saturday.

Table 5: Time Elapsed Between Bail Bond Hearing and Release for Misdemeanor Defendants Posting Bond in Harris County, TX

	Number of defendants	Fraction of defendants
Same day	107,327	50.30%
1 day later	50,191	23.52%
2 days later	7,598	3.56%
3 days later	3,794	1.78%
4 days later	2,867	1.34%
5 days later	2,493	1.17%
6 days later	2,103	0.99%
7 days later	1,930	0.90%
>7 days later	35,088	16.44%

An additional factor that may contribute to the ability to make bail is liquidity. Because bail must be paid in cash or cash equivalents (cashiers' check or money order) in Harris County, to the extent that access to cash varies over the course of the week, this is likely to affect access to pretrial release. Many workers are paid on Friday, and so workers may have more ready access to cash on weekends immediately after being paid than at other times during the week.[61]

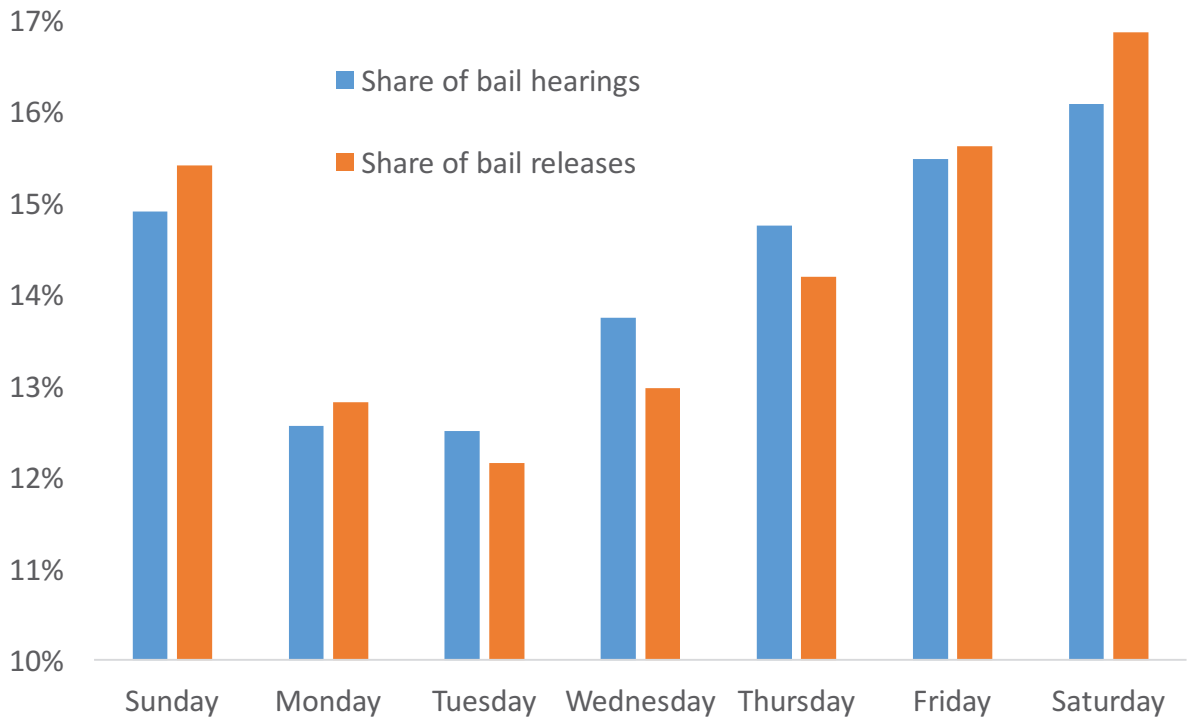
[60] In Harris County, this is the correctional complex located at 49 San Jacinto in Houston.

[61] Appendix Figure A.1 provides direct evidence on this point by plotting Google search volume for the terms "payday", "check cashing", and "payday loans" by day of week. Search volume for "payday" peaks on Friday, and demand for check cashing services is highest on Friday, Saturday, and Sunday. Searches for "payday loans", which are typically provided by

Thus, this liquidity channel might also explain why those with bail hearings closer to the weekend could be more likely to make bail.

Figure 5 provides evidence that weekend availability may indeed be a constraint affecting pretrial release by comparing the distribution of bail hearing dates over the course of the week with the dates on which defendants actually post bond. If it were equally easy to get a friend to post bond on any day of the week, we might expect the distribution of release days to closely mirror the distribution of bail hearings. In actuality, however, the figure reveals that releases are disproportionately more likely on Saturdays and Sundays, and less likely in the middle of the week. While other factors certainly influence the patterns shown in Figure 1, this simple comparison suggests that it may be easier to obtain release if the critical 48-hour period where pretrial releases most often occur overlaps with a weekend.

Figure 5: Comparison of Timing of Bail Hearings Versus Timing of Release by Day of Week



The basic premise underlying the natural experiment is that defendants with bail hearings on Thursdays should be largely similar to those with bail hearings on Tuesday or Wednesday, including in underlying culpability, but Thursday defendants may be more likely make bail

similar outlets to those offering check cashing services, and thus should be affected in similar ways by store hours, etc., but which represent negative rather than positive liquidity, show a reverse pattern, with the lowest search traffic observed on Saturdays and Sundays.

simply because there is an upcoming weekend when someone can more easily appear on their behalf with the necessary cash to post bail. Table 6 explores this possibility by comparing the average characteristics for defendants with bail hearings held on Tuesday, Wednesday, and Thursday, and reports results from tests designed to assess whether there is a statistically significant difference across the three groups of defendants in the listed characteristics. Because there is abundant evidence that the composition of offenses varies by day of the week[62], and differences in the charged offense could legitimately affect pretrial detention, the comparisons in Table 6 control for the underlying offense, which is conceptually equivalent to comparing defendants charged with the same offense who appear at bail hearings on different days.

Table 6: Average Characteristics of Defendants by Day of Bail Hearing

	Tues.	Wed.	Thurs.	P-Value
Amount of bail	$2,297	$2,300	$2,297	0.945
Pretrial release	40.6%	41.8%	44.2%	0.000
Level A misdemeanor	31.1%	31.1%	31.1%	0.916
Male	75.3%	74.9%	75.2%	0.159
Age (years)	30.7	30.7	30.7	0.809
Black	43.1%	44.0%	44.3%	0.000
Citizen	76.2%	76.0%	76.1%	0.822
Height (in.)	67.8	67.8	67.8	0.576
Weight (lbs.)	164.8	164.7	164.9	0.573
Born in TX	46.0%	46.0%	46.3%	0.495
Dark complexion	20.7%	20.8%	21.2%	0.212
Prior misdemeanor charges	1.90	1.91	1.90	0.476
Prior misdemeanor convictions	1.63	1.65	1.63	0.407
Prior felony charges	1.05	1.06	1.04	0.272
Prior felony convictions	0.83	0.84	0.82	0.109
Requested appointed counsel	55.2%	54.6%	53.6%	0.000

Note: Reported p-values are p-values from statistical tests of the null hypothesis that the characteristics listed in each row do not vary on average across all three days of the week.

[62] See for example Gerhard J. Falk, *The Influence of the Seasons on the Crime Rate*, 43 J. CRIM. L. & CRIMINOLOGY 199 (1952); THE CHIEF JUSTICE EARL WARREN INSTITUTE ON LAW AND SOCIAL POLICY, WHEN AND WHERE DOES CRIME OCCUR IN OAKLAND?: A TEMPORAL AND SPATIAL ANALYSIS, JANUARY 2008 – JULY 2013 (March 2014), available at https://www.law.berkeley.edu/files/When_and_Where_Does_Crime_Occur_in_Oakland.pdf; Marcus Felson & Erika Poulsen, *Simple Indicators of Crime by Time of Day*, 19 INT'L J. FORECASTING 595 (2003).

Table 6 suggests a remarkable degree of similarity between defendants with bail hearings on Tuesdays, Wednesday, and Thursdays across a broad range of case and offender characteristics. While for a few characteristics (race, appointed counsel request) there are statistically significant differences due to the large sample, the size of these differences are quite small. Importantly, as demonstrated in the first row of the table, the actual bail amounts set for these different groups are statistically and practically the same on average, and, as shown in Appendix Figure A.2, the entire distribution of bail amounts is in fact virtually unvarying across day of bail hearing. These patterns provide strong evidence that the courts view these three sets of defendants as identical in terms of their worthiness for pretrial release. However, the second row of the table demonstrates that, despite being assessed the same bail amounts, defendants with hearings on Thursday are about 3.6 percentage points (9%) more likely to make bail than those with hearings on Tuesday. This difference seems likely attributable to ease in producing the cash for bail, which may be greater on weekends for the reasons described above. Because the convenience/accessibility of paying bail is likely unrelated to the underlying culpability of a defendant, the weekend effect shown in Table 5 offers a plausible source of variation in pretrial detention that might be used to measure its causal effect.[63]

The main results from the analysis based upon the natural experiment are presented in Table 7. For reference in gauging the magnitude of the impacts, the first column reports the average outcome among defendants released pretrial. The second column reports coefficient estimates from ordinary regressions similar to those presented previously, where the offense, defendant demographics, ZIP code, prior criminal history, indigence status, and bail amount have been controlled. These estimates differ from those presented in Column 3 of Table 3 only because the sample for this analysis is restricted to the subset of defendants with bail hearings on Tuesday, Wednesday, or Thursday. The final column reports effects as measured by the natural experiment, which are estimated using two-stage least squares in an instrumental variables (IV) framework.[64]

Several patterns in the table are notable. The natural experiment/IV estimates are large, almost all statistically significant, and, consonant with the regression results, indicate that pretrial detention greatly influences case outcomes. As a general matter, the IV point estimates indicate larger effects of pretrial detention than the regression estimates, suggesting that the estimates

[63] One might wonder why defendants arrested on Tuesday do not simply wait until the weekend to post bail and get out, and thus have delayed but ultimately equivalent rates of release. There are several possible explanations. It may be that for those who lose jobs or suffer other major life disruptions as the result of pretrial detention, the damage is done within the first few days, such that after a few days, spending money on bail offers diminishing returns (especially if the money will go to a bail bondsmen). Moreover, for a crime with an expected punishment of a few days' imprisonment, after a few days a quick guilty plea may become relatively more attractive than posting bail.

[64] Two-stage least squares is a regression-based approach for measuring the effect of an explanatory variable (here, detention) on an outcome, controlling for other factors, that relies on an "instrument" (here, day of week of bail hearing) that shifts the explanatory variable but is thought to be otherwise unrelated to the outcome. By only exploiting variation in the explanatory variable that arises due to the instrument—which may be less prone to incorporate influences of unobserved, confounding factors—this approach is designed to deliver better causal estimates. See Joshua Angrist & Jörn-Steffen Pischke, *Mostly Harmless Econometrics: An Empiricist's Companion* 113-215 (2009).

presented earlier, to the extent that they imperfectly capture the causal effect of pretrial detention due to inability to control for all relevant factors, may in fact understate its effects. Such understatement could occur if, for example, defendants who have spent their funds on paying bail are less able to afford a high-quality private attorney than a similarly situated (i.e. from the same ZIP code, charged with the same crime, etc.) individual who did not pay bail. For all of the outcomes except jail days, however, the difference between the natural experiment and regression estimates is not statistically significant, suggesting that the regression approach yields reasonable causal estimates when sufficient controls are available.

Table 7: Effects of Pretrial Detention Based Upon the Natural Experiment

		Estimated effect of pre-trail detention	
	Average for	Regression	Natural
Outcome	those released	w/controls	experiment
Conviction	.542	.122**	.204**
		(.003)	(.077)
Guilty plea	.510	.116**	.234**
		(.003)	(.078)
Received jail sentence	.410	.142**	.227**
		(.003)	(.078)
Jail sentence days	7.5	7.33**	19.3**
		(0.18)	(5.39)
Received probation	.214	-.067**	-.124*
		(.002)	(.058)
Probation days	71.2	-2.2**	-42.3
		(0.81)	(22.1)

Note: This table reports coefficients from ordinary least squares (column II) and instrumental variables (IV) (column III) regressions measuring the effect of pretrial detention on the listed outcome. In the IV regressions, the instrument is whether the bail hearing occurred on Tuesday, Wednesday, or Thursday; the unreported first-stage effect is in the expected direction and highly significant. Controls are as in Specification 6 of Table 2; see notes for Table 2. Each reported estimated effect is from a unique regression. Sample size is 146,078 and the sample is limited to defendants with bail hearings on Tuesday, Wednesday, and Thursday.

The natural experiment is not without drawbacks. The underlying assumption of the natural experiment—that those with Thursday bail hearings would have had similar case outcomes to those with Tuesday or Wednesday bail hearings were it not for their enhanced access to pretrial release—is not directly testable. Moreover, because the absolute difference in detention rates across the Thursday, Wednesday, and Tuesday groups is relatively modest—about four percentage points—to the extent that there are remaining uncontrolled, unobserved differences across the groups, even small ones, such differences could be the true causal source

of what appear to be detention effects. Additionally, although the natural experiment still does deliver statistically significant estimates, the confidence intervals on these estimates are much larger, meaning that this approach allows us to make less definitive claims about the magnitude of the relationship between detention and outcomes. Thus, the results of this analysis are probably best interpreted as providing evidence that, after including a fairly rich set of controls, regression estimates approximate causal estimates of the effects of detention, and any remaining biases that may exist seem unlikely to fundamentally alter the conclusion that pretrial detention has significant adverse downstream consequences.

C. Future Crime

In addition to the impacts in the immediate case, pretrial detention carries the theoretical potential to affect later criminal activity. Given that a primary policy purpose of pretrial detention is to enhance public safety, such downstream effects, to the extent that they exist, should be an important component of the assessment of any particular bail system.[65] Unfortunately, rigorous estimates of the downstream crime effects of pretrial detention are relatively uncommon in the existing empirical work on bail. This section presents new estimates of the impact of misdemeanor detention in Harris County on future crime.

Downstream crime effects might occur through several mechanisms. Some would reduce future offending. Most directly, pretrial detention generates an incapacitation effect over the period of pretrial custody. Thus, at least in the immediate period following arrest, we expect detainees to commit fewer crimes than similarly situated releasees simply due to fact that they are in custody. Second, the experience of being detained might change offender perceptions of the disutility of confinement. To the extent that offenders discover that confinement is worse than expected, this could enhance the deterrent effect of the criminal law. This mechanism seems more likely to operate for first-time offenders or those with relatively little prior experience with confinement. Lastly, if pretrial detention increases the conviction rate (as our prior analysis suggests), and a prior conviction increases the possible sanctions for additional crime, pretrial detention may augment the expected sanction following a new crime, which would also enhance deterrence.

Other mechanisms would increase future offending (or arrest). If detention teaches offenders that confinement is less unpleasant than anticipated, it could reduce deterrence. Detention may also lead to job loss, disrupted interpersonal relationships, or other collateral consequences that change the relative attractiveness of crime in the future. To take a simple example: If a detained defendant loses her job, acquisitive criminal activities such as larceny or robbery might become a comparatively more attractive as a means of making up for lost income. Pretrial detainees may also make new social ties or learn new skills through their interactions

[65] For a discussion of the constitutional dimensions of this point, see *infra* Part IV.

with other jail inmates that change their propensity for crime.[66] Detention could also paradoxically lower expected sanctions for future crime if detention leads defendants to substitute custodial sentences for probation, because those on probation would face a supervision period where additional crime would trigger punishment for not only the new but also the prior offense. Finally, pretrial detention might alter the probability that future behavior is labeled by the criminal justice system as worthy of sanction. For instance, imagine that Defendant A is detained pretrial and then pleads guilty, while similar Defendant B is released, enrolls in a treatment program, and ultimately has the charge dismissed. Both are arrested in the future on allegations that the prosecutor views as presenting a marginal case. The prosecutor pursues charges against Defendant A because he has a prior conviction, but not against Defendant B, who does not.

Given that these various potential mechanisms cut in opposite directions, it is not apparent on a theoretical level whether pretrial detention should increase or decrease future crime. This is thus an empirical question of considerable import. To measure recidivism, we examined new charges for each defendant that were filed during the 18 months following his or her initial misdemeanor bail hearing. We measured future crime relative to the date that the bail hearing occurred, rather than the date the case ended, because the cases of released defendants take considerably longer to clear than those of detained defendants.[67] The recidivism analysis was conducted using conventional regression modeling and continues to adjust for offense, defendant demographics, prior criminal record, ZIP code of residence, indigence, and time and court of adjudication.[68] We separately consider misdemeanor and felony charges, and measure charges cumulatively.

An important feature of this analysis is that, as before in the preferred specification, it fully controls for the bail amount assessed at the bail hearing, which means that it compares detained defendants to similarly situated released defendants who were assigned the same bail. As a general matter, one might expect higher recidivism among those who are detained relative to those who are released simply as a result of the correct operation of the bail process. In particular, if the government is correctly assessing defendant risk, higher-risk defendants (who will ultimately commit more crime) should be detained more often. Our analysis, however, compares two defendants that the bail process has determined to be of equal risk, because their

[66] *See, e.g.*, Patrick Bayer et al., *Building Criminal Capital Behind Bars: Peer Effects in Juvenile Corrections*, 124 Q.J. ECON. 105 (2009) and Megan Stevenson, *Breaking Bad: Mechanisms of Social Influence and the Path to Criminality in Juvenile Jails* (October 12, 2015), http://ssrn.com/abstract=2627394 (presenting evidence of peer effects in juvenile incarceration).

[67] Unsurprisingly, defendants in detention tend to resolve cases much sooner. For detained defendants, the median time to first judgment is 3 days, and 80% of defendants have their cases resolved within 18 days. For those who make bond, the median time to first judgment is 125 days. Waiting until a case is resolved to start the clock would compare released defendants months or in some cases even years after their initial arrest to detained defendants in the days and weeks after their arrest.

[68] We explored applying the natural experiment to the recidivism outcomes, but the results, while not inconsistent with the results reported in the paper, were sufficiently imprecise so as to not provide useful guidance. For example, the instrumental variables estimates implied that detention increases felonies committed as of 18 months after the bail hearing by 15%, but the 95% confidence interval for this estimate was -59% to 219%.

bail was set identically. Thus, the impacts documented here already net out any effects that might reflect the differential sorting of defendants through the bail system.

Figure 6 plots results from a series of regressions where the outcome is the number of new misdemeanors recorded between the bail hearing and some number of days post-hearing. The actual average number of offenses for the non-detained population is depicted in the figure along with the adjusted rate for the detained population; this adjusted rate is calculated by estimating regressions similar to those in Specification 6 of Table 2, but with new offenses as the outcome, and then adding the resultant estimate for the effect of pretrial detention to the actual offending rate for non-detainees. This, in essence, depicts what the expected misdemeanor offending rate would be for the detainees if they were similar in demographics, case characteristics, prior criminal history, etc. to the released population. Figure 6 includes bars denoting the 95% confidence intervals for the adjusted rates, and shows impacts through the first 30 days post-hearing.

The figure demonstrates a steady rise in the number of new charges for both groups over time; this increase over time is a direct consequence of the choice to define the outcome as the cumulative number of new charges. For the first 19 days post bail hearing, the incidence of misdemeanors for detainees is below that of releasees, which likely reflects the incapacitative effect of being in jail. These differences are statistically significant through day 13. By day 30, however, there is a statistically significantly higher incidence of misdemeanors among the detained population. Thus, despite the initial incapacitation, by one month after the hearing those who were detained have exceeded their similarly situated counterparts who were released. To the extent that the rich set of controls allow us to construe these differences as causal, they suggest that pretrial detention has a greater criminogenic than deterrent effect.

Figure 7 plots similar differences between releasees and detainees in misdemeanor crime, but expands the time window to a full 18 months post-bail hearing. Throughout this later period the disparity between detainees and releasees remains statistically significant and practically large. Appendix Table A1, which reports the numeric estimates underlying the figure, shows that the gap between detainees and those released stabilizes at about one year post-hearing, and represents a roughly 22% increase in misdemeanor crime associated with detention.
Figure 8 depicts similar estimates but this time focusing on felonies and considering the time window from 0 to 100 days post-hearing. For felony offending, the incapacitative effect of detention appears somewhat longer lasting, with detainees overtaking releasees only after several months. By three months post-hearing, however, there is a statistically significant positive effect of detention on felony offending.

Figure 6: New Misdemeanor Charges by Pretrial Release Status During the First 30 Days After the Bail Hearing

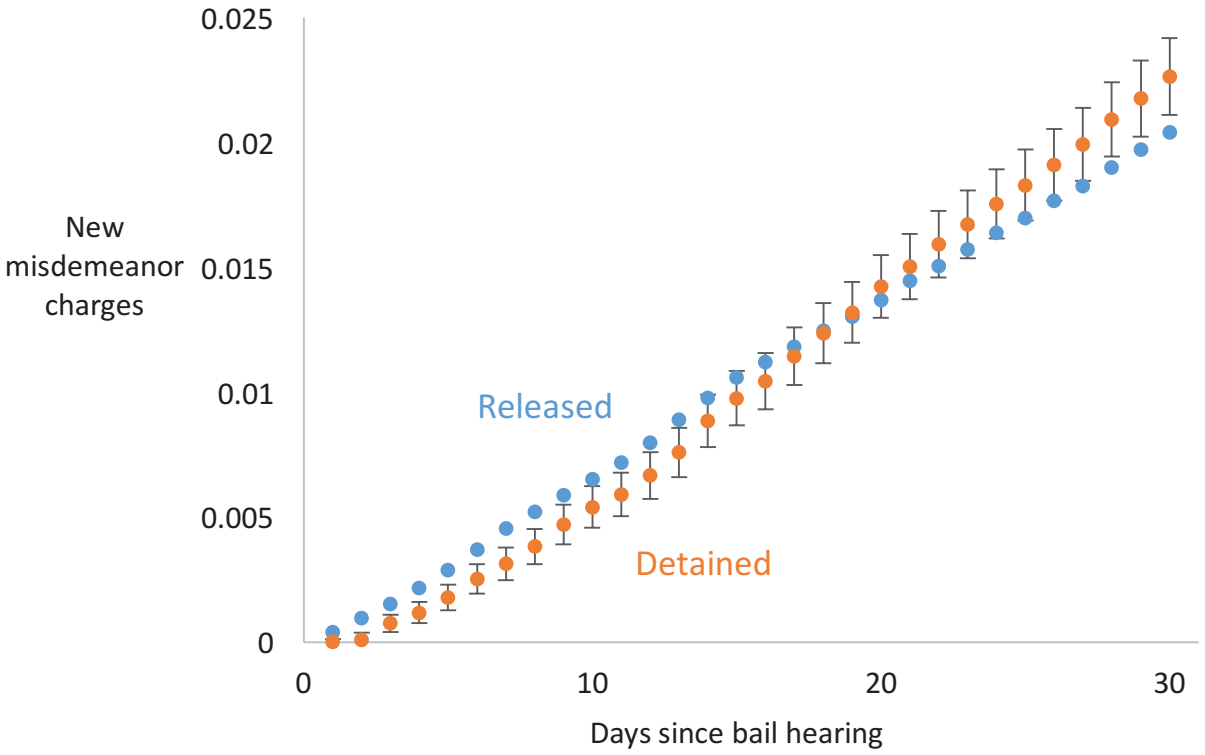


Figure 7: New Misdemeanor Charges by Pretrial Release Status During the First 18 Months After the Bail Hearing

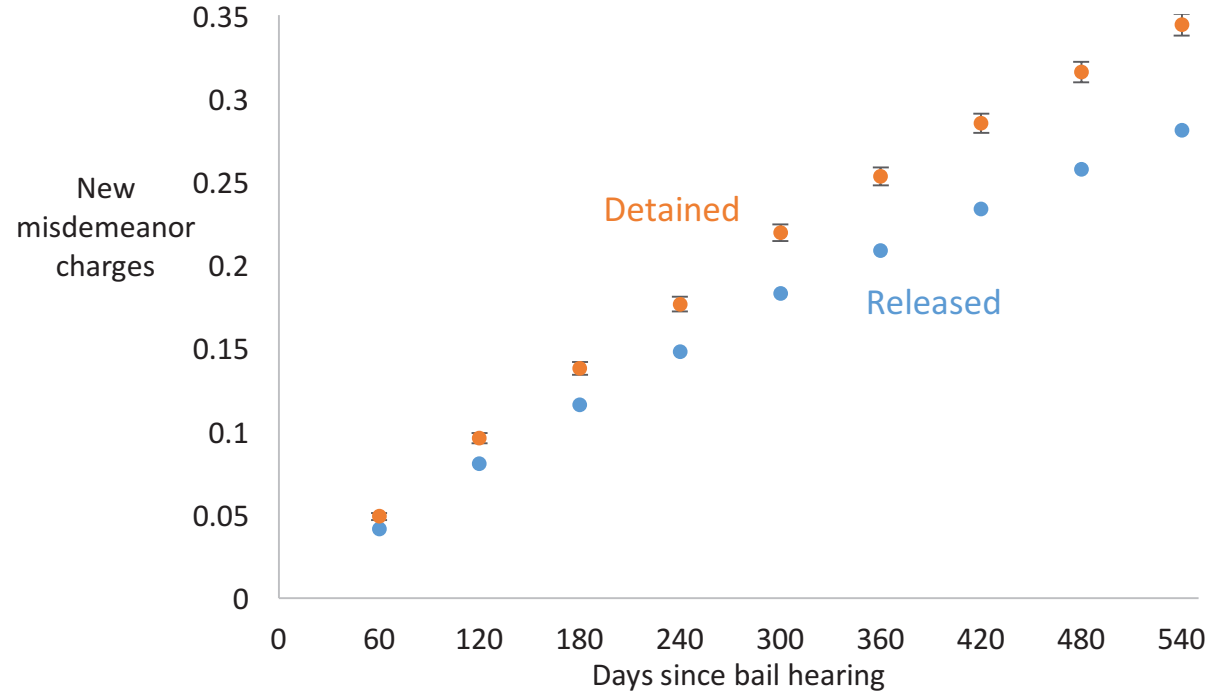


Figure 9, which extends the analysis to a full 18 months after the hearing, demonstrates continued heightened felony offending for those who are detained compared to similarly situated releasees. Appendix Table A2, which reports the estimates used to construct Figures 8 and 9, demonstrates that the offending gap appears to stabilize towards the end of our sample period, with detainees committing nearly a third more felonies. By 18 months after the conviction, a group of 100 detained defendants would be expected to have committed about 4 additional felonies as compared to an observationally similar group of 100 released defendants.

The notion that pretrial detention might actually increase future crime is consistent with recent research that suggests that incarceration might itself be criminogenic. A working paper by Michael Mueller-Smith, also set in Harris County, uses a research design that leverages random assignment to judges to estimate the causal effect of incarceration on future crime.[69] He finds that incarceration for misdemeanor defendants – who are in jail for a median of 10 days following the filing of charges – leads to a 6 percentage point increase in the likelihood of being charged with a new misdemeanor and a 6.7 percentage point increase in the likelihood of being charged with a new felony.[70] These estimates are not dissimilar to ours, although the timing of the effects is somewhat different. Mueller-Smith finds most of the effect within the first three months after charges are filed, while ours find a larger effect somewhat further out.[71]

These differences in recidivism are important from a policy perspective. To the extent that our estimates can be construed as causal, they suggest that a representative group of 10,000 misdemeanor offenders who are released pretrial would accumulate an additional 2,800 misdemeanor charges in Harris County over the next 18 months, and roughly 1,300 new felony charges. If this same group were instead detained they would accumulate 3,400 new misdemeanors and 1,700 felonies, an increase of 600 misdemeanors and 400 felonies. While pretrial detention clearly exerts a protective effect in the short run, for misdemeanor defendants it may ultimately serve to compromise public safety.

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[69] Michael Mueller-Smith, *The Criminal and Labor Market Impacts of Incarceration* (Aug. 18, 2015), http://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2015/09/incar.pdf

[70] Those incarcerated will be 4.6 percentage points more likely to be charged with a new misdemeanor and 6.4 percentage points more likely to be charged with a felony during the first quarter after charges are filed, even though a portion of that quarter will be spent in jail. After the first quarter, those incarcerated will be 1.4 percentage points more likely to be charged with a misdemeanor and 0.3 percentage points more like to be charged with a new felony, although the latter effect is not statistically significant.

[71] Anna Aizer & Joseph J. Doyle, Jr., *Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly-Assigned Judges* 130 Q. J. ECON 759 (2015) and Rafael Di Tella & Ernesto Schargrodsky, Criminal Recidivism after Prison and Electronic Monitoring (Nat'l Bureau of Econ. Research, Working Paper No. 15602, 2009), http://www.nber.org/papers/w15602.pdf also find that incarceration has a criminogenic effect. Earlier papers, however, have concluded that incarceration is not in fact criminogenic. *See* Jeffrey R. Kling, *Incarceration Length, Employment, and Earnings*, 96 AM. ECON. REV. 863 (2006) and Charles E. Loeffler, Does Imprisonment Alter the Life Course? Evidence on Crime and Employment from a Natural Experiment, 51 CRIMINOLOGY 137 (2013).

Figure 8: New Felony Charges by Pretrial Release Status During the First 100 Days After the Bail Hearing

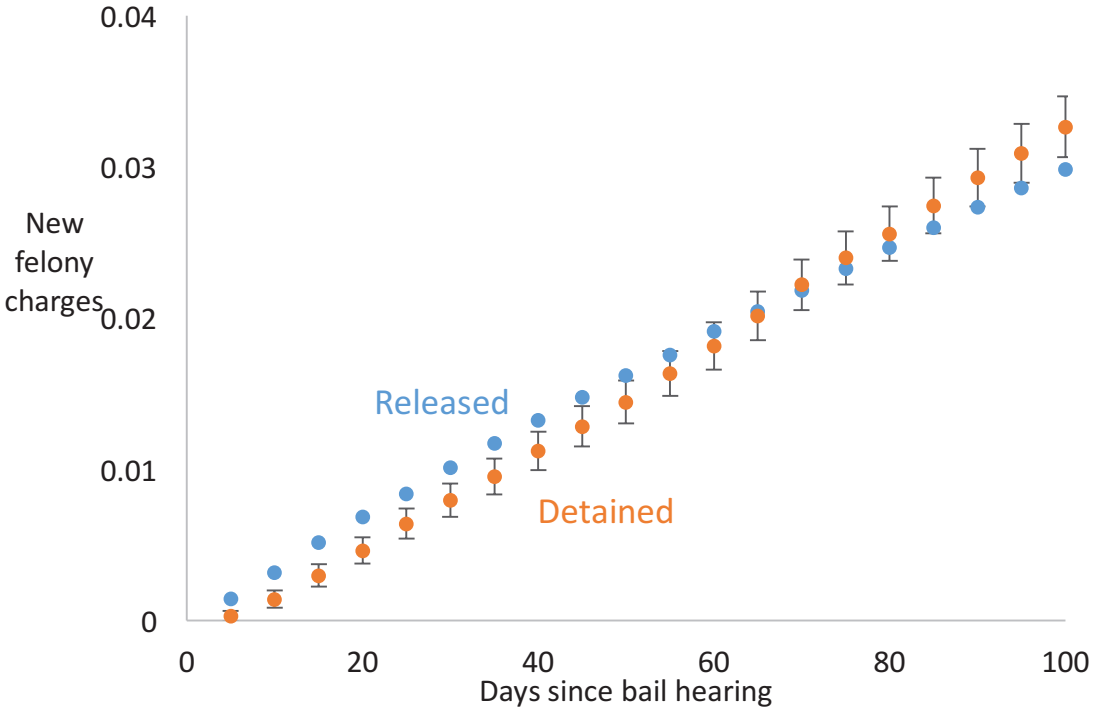
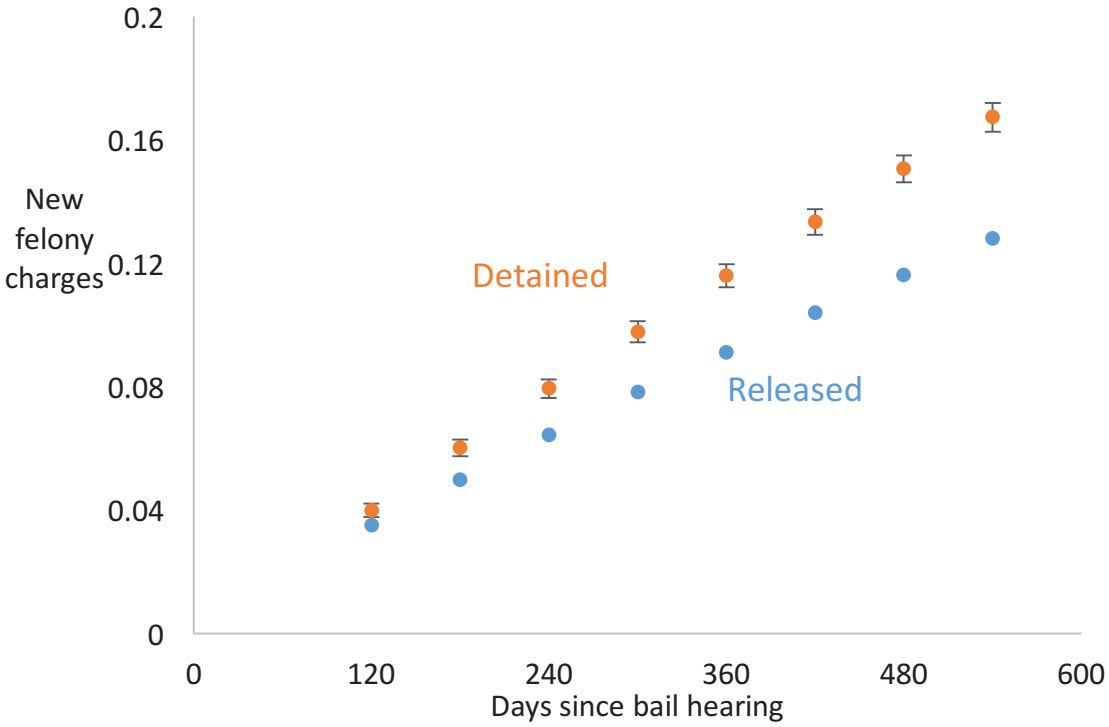


Figure 9: New Felony Charges by Pretrial Release Status During the First 18 Months After the Bail Hearing



IV. CONSTITUTIONAL IMPLICATIONS

The results reported here are relevant to an array of constitutional questions. As the Supreme Court has affirmed, "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[72] Whether or not that remains true as a descriptive matter, it remains the aspiration of the law. The constitutional provisions that serve to safeguard pretrial liberty include the Sixth Amendment, the Eighth Amendment, the Due Process Clause and the Equal Protection Clause. The effects of pretrial detention should inform constitutional analysis in each of these arenas.

Our study is limited, of course, to a particular dataset. It does not support generalization about the downstream effects of pretrial detention in all times and places and for all people. But it adds further evidence to the body of literature finding that pretrial detention causally affects conviction and future crime rates. This Part synthesizes the constitutional implications of such effects, in Harris County and wherever else they might exist.

A. Sixth Amendment Right to Counsel: Is Bail-Setting a "Critical Stage"?

The results suggest, first, that bail-setting should be deemed a "critical stage" of criminal proceedings at which accused persons have the right to the effective assistance of counsel.

Despite arguments by scholars and advocates that accused persons should benefit from the assistance of counsel at bail hearings, that has not been the practical or legal reality.[73] Some jurisdictions provide counsel at bail hearings (or "first appearances"), but many do not. Federal statutory law does not include the right to counsel at a bail hearing (although an accused person does have the right to representation in a pretrial detention hearing).[74] A 2008 survey of state practice found that only ten states guaranteed the presence of counsel at an accused's first

[72] United States v. Salerno, 481 U.S. 739, 755 (1987).

[73] *See, e.g.*, THE CONSTITUTION PROJECT'S NATIONAL RIGHT TO COUNSEL COMMITTEE, DON'T I NEED A LAWYER? PRETRIAL JUSTICE AND THE RIGHT TO COUNSEL AT FIRST JUDICIAL BAIL HEARING (2015), http://www.constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf; SIXTH AMENDMENT CENTER AND PRETRIAL JUSTICE INSTITUTE, EARLY IMPLEMENTATION OF COUNSEL: THE LAW, IMPLEMENTATION AND BENEFITS (2014), sixthamendment.org/6ac/6ACPJI_earlyappointmentofcounsel_032014.pdf; Alexander Bunin, *The Constitutional Right to Counsel at Bail Hearings*, 31 CRIM. JUST. 23 (ABA 2016); Douglas L. Colbert, *Prosecution without Representation*, 59 BUFF. L. REV. 333, 400 (2011); Douglas L. Colbert, *Coming Soon to A Court Near You—Convicting the Unrepresented at the Bail Stage: An Autopsy of A State High Court's Sua Sponte Rejection of Indigent Defendants' Right to Counsel*, 36 SETON HALL L. REV. 653 (2006); Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719 (2002); Douglas L. Colbert, *Thirty-Five Years after Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1 (1998); Charlie Gerstein, Note, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513 (2013) (arguing that, given the Supreme Court's recent holding that "the Constitution requires effective assistance of counsel to protect plea bargains," it also "requires the presence of counsel at proceedings that have the capacity to prejudice those bargains").

[74] *See* 18 U.S.C. § 3142(f).

appearance.[75] Ten states uniformly denied the right to counsel.[76] The remaining thirty assigned appointed counsel "in select counties only."[77]

It has remained an open question of constitutional law, meanwhile, whether the Sixth Amendment right to counsel extends to bail hearings. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[78] The Supreme Court has held the right to include the "effective" assistance of counsel with respect to any charge that may carry a sentence of incarceration, and the right to an appointed attorney if the accused cannot afford to hire one.[79] As a temporal matter, the right "attaches" at "the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty" (which is the nature of most bail hearings).[80] After that, "counsel must be appointed within a reasonable time . . . to allow for adequate representation at any critical stage before trial, as well as at trial itself."[81]

The question is whether the first appearance is itself a "critical stage."[82] Unfortunately, the term has no precise definition.[83] The Court most recently described critical stages as those "proceedings between an individual and agents of the State . . . that amount to trial-like confrontations, at which counsel would help the accused in coping with legal problems or . . . meeting his adversary."[84] It has also suggested that "those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel" constitute critical stages—among other formulations.[85] The Court has classified arraignments, preliminary hearings, pretrial lineups, deliberate attempts to elicit incriminating information from an accused, efforts to elicit consent to a psychiatric interview, and plea-bargaining as critical stages.[86]

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[75] Colbert, *Prosecution without Representation*, *supra* note 69 at 396.

[76] *Id.*

[77] *Id.* at 345, 400. *But see* Rothgery v. Gillespie Cty., 554 U.S. 191, 203-04 (2008) ("We are advised without contradiction that not only the Federal Government, including the District of Columbia, but 43 States take the first step toward appointing counsel "before, at, or just after initial appearance.").

[78] U.S. Const. Sixth Amendment; *see also* Gideon v. Wainwright, 372 U.S. 335 (1963) (overruling Betts v. Brady, 316 U.S. 455 (1942); holding that right to counsel is "so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the states by the Fourteenth Amendment").

[79] McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel."); Strickland v. Washington, 466 U.S. 668 (1984) (articulating test for ineffective assistance claim); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial"); *Gideon*, 372 U.S. 335 (incorporating right to counsel, including appointed counsel for indigent persons, against the states).

[80] Rothgery v. Gillespie Cnty., 554 U.S. 191, 194 (2008).

[81] *Id.* at 212.

[82] The *Rothgery* majority stopped short of deciding it. *Id.* (emphasizing that it was not deciding this question).

[83] See Van v. Jones, 475 F.3d 292, 312 (6th Cir. 2007) (noting that "[o]ne would welcome a comprehensive and final one-line definition of 'critical stage,'" and providing survey of varying Supreme Court formulations).

[84] *Rothgery*, 554 U.S. at 233 n.16 (internal quotation marks and citations omitted).

[85] Gerstein v. Pugh, 420 U.S. 103, 122 (1975).

[86] *See* Hamilton v. Alabama, 368 U.S. 52 (1961) (arraignment); White v. Maryland, 373 U.S. 59 (1963) (arraignment); Coleman v. Alabama, 399 U.S. 1, 7 (1970) (preliminary hearing); United States v. Wade, 388 U.S. 218 (1967) (pretrial lineup); Massiah v. United States, 377 U.S. 201 (1964) (attempt to elicit information from accused); Estelle v. Smith, 451 U.S. 454 (1981) (consent to psychiatric interview); Lafler v. Cooper, 132 S. Ct. 1376, 1385 (2012) (plea-bargaining).

This case law offers arguments both for and against adding bail hearings to the list. In *Coleman v. Alabama*, the Court concluded that an Alabama preliminary hearing was a critical stage for reasons that apply with almost equal force to bail hearings.[87] On the other hand, in *Gerstein v. Pugh* the Court rejected the claim that a Fourth Amendment probable cause determination is a critical stage.[88] The Court distinguished *Coleman* on the basis that a probable cause determination "is addressed only to pretrial custody."[89] The Court acknowledged that "pretrial custody may affect to some extent the defendant's ability to assist in preparation of his defense," but concluded that "this does not present the high probability of substantial harm identified as controlling in *Wade* and *Coleman*."[90]

Our study demonstrates that pretrial custody *does* present a "high probability of substantial harm," at least for Harris County misdemeanor defendants.[91] It increases the likelihood of conviction by approximately fourteen percentage points, or 25%, for no reason relevant to guilt. While there are several possible explanations for this detention effect, it is likely that for many defendants, detention essentially eliminates the possibility of pursuing a trial altogether, by obligating them the serve out a likely sentence prior to adjudication. If pleading guilty for "time served" or a non-custodial sentence is an option, many a detained person will find that it is the only one; the costs of staying in jail to fight a charge are simply overwhelming. In this sense, the bail hearing is *the* critical stage of criminal proceedings. More broadly, our results suggest that the outcome of a bail hearing can profoundly impair the accused's ability to contest the charges against him.[92] And there is reason to think that representation makes a

[87] The Court reasoned that an effective defense counsel at a preliminary hearing could (1) "expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over;" (2) examine witnesses so as to "fashion a vital impeachment tool" for trial "or preserve testimony favorable to the accused"; (3) "discover the case the State has against his client and make possible the preparation of a proper defense;" and (4) make "effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail." 399 U.S. at 9. Three of these four reasons—all except the opportunity to question witnesses—apply to bail hearings.

[88] 420 U.S. 103.

[89] *Id.* at 122-23. The Court also noted that a probable cause determination does not involve witness testimony, but given that the Court has recognized plea-bargaining as a critical stage this cannot be determinative.

[90] *Id.*

[91] *See* Colbert, *Thirty-Five Years After Gideon*, *supra* note 73 at 37 (noting that "a showing that counsel's absence at the bail hearing prejudiced the accused's fair trial rights" would provide grounds for finding that bail-setting is a critical stage); *cf.* State v. Williams, 210 S.E.2d 298, 300 (S.C. 1974) ("There is no showing in this record, nor does appellant contend, that anything occurred at the bail hearing which in any way affected or prejudiced his subsequent trial or that was likely to do so."). Also note that the Supreme Court's recent recognition of the centrality of plea-bargaining to the contemporary criminal process might support this argument. *See* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) ("In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.").

[92] This is true of any of the potential mechanisms discussed above *except* if the detention effect results from the inability of detainees to obstruct justice. It seems unlikely, however, that misdemeanor defendants released pretrial routinely engage in obstructionist tactics.

significant difference in bail and detention outcomes.[93] It is difficult to maintain, in these circumstances, that the bail hearing is not a critical stage.[94]

B. Eighth Amendment: When is Bail or Detention "Excessive"?

Our results also suggest that Harris County bail officers may be regularly setting bail that is unconstitutionally excessive. The Eighth Amendment provides that "[e]xcessive bail shall not be required."[95] This means that if money bail is set in order to ensure the appearance of the accused at trial, it must not be more than "reasonably calculated to fulfill this purpose."[96] The premise of money bail is that the prospect of some financial loss is a sufficient deterrent to prevent pretrial flight; full detention is not necessary. If money bail results in detention because a defendant cannot pay, it is thus arguably excessive *per se*.[97] Federal statutory law explicitly prohibits the setting of money bail in an amount that results in detention, as do the ABA Standards on Pretrial Release.[98] Yet in Harris County, half of misdemeanor defendants with bail set are nonetheless detained pending trial. The average bail amount for these detainees is only $2,225.

Our study also has broader implications for the question of when pretrial detention is "excessive" for purposes of the Eighth Amendment. This will become a particularly topical question as jurisdictions seeking to curtail the use of money bail adopt more explicit preventive detention regimes.[99] In *United States v. Salerno*, the Supreme Court held that the Excessive Bail Clause does not entail an absolute right to bail—that is, it does not prohibit detention without bail in some circumstances.[100] The Court also endorsed public safety as a potential basis for

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[93] *See, e.g.*, SIXTH AMENDMENT CENTER AND PRETRIAL JUSTICE INSTITUTE, EARLY IMPLEMENTATION OF COUNSEL, *supra* note 69; Colbert *et al.*, *Do Attorneys Really Matter?, supra* note 69 (reporting "convincing empirical data that the benefits of representation are measurable and that representation is crucial to the outcome of a pretrial release hearing").

[94] *Accord, e.g.*, Hurrell-Harring v. State, 930 N.E.2d 217, 223 (N.Y. Ct. App. 2010) ("There is no question that 'a bail hearing is a critical stage of the State's criminal process'") (quoting and citing Higazy v. Templeton, 505 F.3d 161, 172 (2d Cir. 2007)); *cf.* Gonzalez v. Comm'r of Correction, 68 A.3d 624, 637 (Ct. 2013), *cert. denied*, 134 S. Ct. 639 (2013) (concluding "the petitioner had a sixth amendment right to effective assistance of counsel at the arraignment stage in which proceedings pertaining to the setting of bond and credit for presentence confinement occurred").

[95] U.S. Const. Eighth amend.

[96] Stack v. Boyle, 342 U.S. 1, 4-5 (1951); *see also* United States v. Salerno, 481 U.S. 739, 754 (1987) ("[W]hen the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more.").

[97] The counterargument is that in some cases, an unaffordable bail amount is the only amount sufficient to create an adequate disincentive to flee. But if that is so, it is more accurate to say that *no* bail can reasonably assure appearance, and more honest to explicitly order detention on that basis—if no other non-financial conditions will suffice. The federal Bail Reform Act and many state statutes authorize such determinations. *See* 18 U.S.C. § 3142(e) ("If . . . the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required . . . , such judicial officer shall order the detention of the person before trial.").

[98] *See* 18 U.S.C. § 3142(c)(2) ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person."); Standard 10-1.4(e), Standards for Pretrial Release (American Bar Association, 3d ed. 2002) ("The judicial officer should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay.").

[99] *See* Sandra G. Mayson, *Dangerous Defendants: Bail Reform and Pretrial Prediction* (manuscript on file with authors).

[100] 481 U.S. 739, 754 (1987).

ordering the pretrial detention of some particularly dangerous defendants.[101] But the Court did suggest that the Bail Clause requires that "the Government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil" they are designed to address, and that, to determine whether the intrusion on pretrial liberty is excessive, courts must "compare" it "against the interest the Government seeks to protect by means of that response."[102] The analysis of Eighth Amendment "excessiveness" thus requires a kind of cost-benefit analysis. In the case of detention without bail, the analysis should turn on whether the costs of detention are excessive in relation to its benefit.[103]

The downstream effects of detention must factor into this analysis. In our sample set, it appears that detention distorts criminal adjudication. That is a significant cost, both to the people who would not have been convicted but for their detention and for the legitimacy of the system as a whole. Secondly, our study provides additional evidence that detention increases future criminal offending. To the extent that jurisdictions impose pretrial detention in order to prevent pretrial crime, its benefit—the pretrial crime averted—must be discounted by the increase in future crime it produces. If it is not clear that the pretrial crime averted is worth the increase in future crime, detention might be an excessive response to the public-safety threat. This is especially likely if less restrictive alternatives like GPS monitoring are capable of achieving the same results.[104]

C. Substantive Due Process: Is Pretrial Detention Punishment? Does it Impermissibly Infringe Liberty?

Our results might also support an argument that pretrial detention in some circumstances violates substantive due process by inflicting punishment before trial. "Under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."[105] Pretrial detainees, that is, have the right to be "free from punishment."[106] The difficult question is when a restraint on liberty amounts to punishment.

Pursuant to current doctrine, the answer turns on whether the restraint is rationally related to a non-punitive purpose, and not "excessive" for that purpose.[107] Thus far, the Court has declined to classify any pretrial restraint as punishment. In *Bell v. Wolfish*, a challenge to certain

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[101] *Id.*

[102] *Id.*

[103] For a recent effort to engage in this kind of cost-benefit analysis of pretrial detention, *see* Shima Baradaran Baughman, *Costs of Pretrial Detention*, B.U. L. REV (Forthcoming, 2017), http://papers.ssrn.com/sol3/papers.cfm? abstract_id=2757251.

[104] *See* Samuel Wiseman, *The Right to Be Monitored*, 123 YALE L.J. 1344 (2014).

[105] Bell v. Wolfish, 441 U.S. 520, 535 (1979). Note that this right against punishment is distinct from the presumption of innocence. *See id.* at 533 (holding that the presumption of innocence "is a doctrine that allocates the burden of proof in criminal trials," and "has no application to a determination of the rights of a pretrial detainee"). *But see* County of Riverside v. McLaughlin, 500 U.S. 44, 58 (1991) (alluding to the importance of minimizing "the time a presumptively innocent individual spends in jail").

[106] *Id.* at 534.

[107] *Id.* at 538; United States v. Salerno, 481 U.S. 739, 747 (1987).

conditions of pretrial confinement, the Court concluded that the conditions did not amount to punishment because they were rationally related to legitimate needs of prison administration and not excessive for those ends.[108] In *Salerno*, the Court rejected the argument that pretrial detention pursuant to the federal Bail Reform Act constituted punishment *per se*, on the basis that the detention regime was carefully tailored to the "legitimate" goal of preventing pretrial crime, and the "incidents" of detention were not "excessive in relation to the regulatory goal Congress sought to achieve."[109] In both cases, however, the Court left open the possibility that in other circumstances it might reach a different conclusion. This "punishment" analysis should also be responsive to the costs of pretrial detention, since it, like the Bail Clause analysis, is a genre of cost-benefit (or means-end) test. That is, detention that increases the likelihood of conviction and future crime might be an excessive means of preventing pretrial flight and crime, and therefore constitute impermissible pretrial "punishment."

Even if it not, pretrial detention might, in some cases, violate substantive due process as an impermissible regulatory infringement on individual liberty. "Freedom from imprisonment . . . lies at the heart of the liberty that [the Due Process] Clause protects."[110] The state must therefore meet a high burden of justification when it seeks to detain individuals for regulatory (that is, non-punitive) purposes. When challenges to regulatory detention have made their way to the Supreme Court, the Court has generally applied some type of heightened scrutiny.[111] Most relevant here, in *Salerno* the Supreme Court rejected the straight substantive-due-process challenge to the federal preventive detention regime on the ground that the regime was "narrowly focuse[d]" on the "legitimate and compelling" state interest of preventing pretrial crime by an especially dangerous subset of defendants.[112] Pursuant to the same analysis, pretrial detention might violate substantive due process if it is not carefully tailored to its goal, or if its costs vastly outweigh its benefits. Once again, the costs documented here should inform the calculation.[113]

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[108] *Bell*, 441 U.S. at 541-42.

[109] *Salerno*, 481 U.S. at 747-48.

[110] Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

[111] *See, e.g.*, *id.* at 690 (explaining that regulatory detention violates substantive due process except "in certain special and narrow nonpunitive circumstances, where a special justification, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint") (internal quotation marks and citations omitted).

[112] 481 U.S. at 750-52 (1987); *id.* at 752 ("Given the legitimate and compelling regulatory purpose of the Act and the procedural protections it offers, we conclude that the Act is not facially invalid under the Due Process Clause of the Fifth Amendment.").

[113] The tests that the Court has articulated for impermissible pretrial "punishment" and impermissible regulatory detention are quite close, and also overlap with the Eighth Amendment prohibition on "excessive" pretrial restraints on liberty. It is unclear how the doctrine will evolve in these related areas. It is also possible to frame a constitutional challenge to pretrial restraints on liberty in Fourth Amendment terms, by alleging that the restraint constitutes an unreasonable search or seizure. *See* Gerstein v. Pugh, 420 U.S. 103, 125 (1975) ("The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the 'process that is due' for seizures of person or property in criminal cases, including the detention of suspects pending trial.").

D. Procedural Due Process: Does Pretrial Detention Produce "Involuntary" Plea Bargains?

To the extent that the causal effect of detention on conviction rates reflects a reality that detained people plead guilty simply to get out of jail, it raises the question of whether such pleas are fully "voluntary," or whether they present procedural due process concerns.

The Due Process Clauses of the Fifth and Fourteenth Amendments require that guilty pleas be "voluntary" and "intelligent", which implies that a defendant must have, and make, a meaningful choice.[114] Plea-bargaining poses a dilemma because it is always coercive. This makes it extremely difficult to draw the due-process line. How much coercion is too much? The Supreme Court has confronted this question in two cases since 1970: *Brady v. United States* and *Bordenkircher v. Hayes.*[115] In *Brady*, the Court held that a plea was not rendered involuntary by the fact that it was motivated by the defendant's fear of receiving the death penalty if convicted at trial.[116] In *Bordenkircher*, the Court held that it did not violate due process for a prosecutor to threaten to re-indict the defendant on more serious charges unless he pled guilty (and then to carry out the threat).[117] The Court reasoned that "the imposition of these difficult choices is an inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas."[118]

This precedent is clearly hostile to any argument that pretrial detention might render a guilty plea involuntary, but the Supreme Court did leave the door just slightly ajar. In *Brady*, the Court qualified its expansive endorsement of bargains driven by fear: "Of course, the agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant."[119] And in *Bordenkircher*, the Court suggested that its decision was predicated on the assumption that the inducement at issue would not lead an innocent person to plead guilty. The Court reasoned that "[d]efendants advised by competent counsel and protected by other procedural safeguards are . . . unlikely to be driven to false self-condemnation."[120] It also noted that the case did not "involve the constitutional implications" of a prosecutor threatening harm or offering benefit to a third party, "which might pose a greater

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[114] Brady v. United States, 397 U.S. 742, 747-48 (1970) (holding that plea must be a "knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences"); *see also* Boykin v. Alabama, 395 U.S. 238, 241 (1969) (holding, on procedural-due-process grounds, that guilty plea must be knowing and voluntary).

[115] 397 U.S. 742, 750 (1970); 434 U.S. 357, 363 (1978).

[116] 397 U.S. at 750-52. The Court noted that "[t]he State to some degree encourages pleas of guilty at every important step in the criminal process," and rejected the idea "that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities" after trial. *Id.*; *see also id.* (""The issue we deal with is inherent in the criminal law and its administration. . . . ").

[117] 434 U.S. at 365.

[118] *Id.* at 364 (internal quotation marks and citation omitted).

[119] 397 U.S. at 750.

[120] *Id.* at 363.

danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider."[121]

These offhand caveats are hardly a firm foundation for a new jurisprudence of due-process limits to coercion in plea-bargaining, but they are suggestive. Evidence that pretrial detention leads to wrongful convictions by guilty plea might lead the Court to reconsider its due process conclusions. It is worth noting that the benefit of such a doctrinal shift is dubious. What remedy could the Court order – the chance for the accused to vacate his plea and sit in jail until trial? That problem aside, the question of the constitutional limits to coercive plea-bargaining practices is a pressing one, and our evidence that detention alone produces guilty pleas renders it all the more acute.

E. Equal Protection: Does Pretrial Detention Produce Class-Based Case Outcomes?

Finally, our data and results illustrate the extent to which the Harris County pretrial system produces disparate outcomes for the poor and for the wealthy. The principle of equal protection (as applied to the states by the Fourteenth Amendment, and to the federal government by the Fifth) prohibits invidious or irrational state discrimination.[122] Supreme Court precedent clearly establishes that incarcerating a person solely on the basis of her poverty violates equal protection.[123] Nonetheless, half of the misdemeanor defendants in our dataset were detained pending trial, nearly all of them ostensibly due to inability to post bail. Their detention, alone, significantly increased the chance of conviction. That is to say that not only were these people deprived of their liberty on the basis of wealth; they were also deprived of equal access to justice. In Harris County misdemeanor court, all do not stand equal before the law.[124]

There are reform efforts underway that may mitigate this problem, but they will not eliminate equality concerns. The new bail reform movement seeks to shift pretrial policy from a "resource-based" to a "risk-based" model driven by actuarial assessment of a defendant's risk of

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[121] *Id.* at 371 n.8 (internal citation omitted); *see also id.* at 363 ("[I]n the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is *free* to accept or reject the prosecution's offer") (emphasis added).

[122] *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike.") (citing Plyler v. Doe*,* 457 U. S. 202, 216 (1982)); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (noting that the Fifth Amendment includes the same prohibition vis-à-vis the federal government).

[123] *See, e.g.*, U.S. Dep't of Justice, Statement of Interest filed in Varden v. City of Clanton, No. 2:15-cv-34-MHT-WC (M.D. Al., Feb. 13, 2015) ("Incarcerating individuals solely because of their inability to pay for their release . . . violates the Equal Protection Clause of the Fourteenth Amendment.") (citing Tate v. Short, 401 U.S. 395, 398 (1971); Williams v. Illinois, 399 U.S. 235, 240–41 (1970); Smith v. Bennett, 365 U.S. 708, 709 (1961)); see also Bearden v. Georgia, 461 U.S. 660, 671 (1983).

[124] To the extent that Harris County relies on "bail schedules" that are unresponsive to a defendant's ability to pay, that practice violates the Equal Protection Clause. *See* U.S. Dep't of Justice, Statement of Interest, *supra* note 119 ("[A]s courts have long recognized, any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses in order to gain pretrial release, without any regard for indigence, not only violates the Fourteenth Amendment's Equal Protection Clause, but also constitutes bad public policy.").

flight and rearrest.[125] The effort to eliminate wealth disparities in the system is laudable, but actuarial risk assessment is likely to import the effects of race and class bias earlier in the system.[126] Without violating the Equal Protection Clause, risk assessment might still discriminate, subtly, along race and class lines, and result in the disproportionate pretrial detention of poor and minority communities.[127] To the extent that detention also changes case outcomes, this means that a risk-based system of pretrial detention could continue to dispense deeply unequal justice. In view of the cost of detention—both its immediate fiscal and human costs and its downstream effects—policymakers should work to avoid this result.

CONCLUSION

Pretrial detention has a significant impact on downstream criminal justice outcomes—both in the immediate case, and through the future criminal activity of detained defendants. Detention increases the rate of guilty pleas, and leads detained individuals to commit more crime in the future. These findings carry import for not only Harris County, but raise a host of broader empirical and constitutional questions that merit attention.

To appreciate the magnitude of the effects we document here, we offer the following thought experiment: Imagine if, during the period of our sample, Harris County had released those defendants assigned the lowest amount of bail, $500, on personal bond (recognizance) rather than assessing bail. Using these estimates, and drawing from other data carefully documenting the costs of detention and probation supervision in Harris County[128], we predict that the county would have released 40,000 additional defendants pretrial, and these individuals would have avoided approximately 5,900 criminal convictions, many of which would have come through possibly erroneous guilty pleas. Incarceration days in the county jail—severely overcrowded as of April 2016—would have been reduced by at least 400,000[129]. Over the next 18 months post-release, these defendants would have committed 1,600 fewer felonies and 2,400 fewer misdemeanors. On net, after accounting for both reductions in jail time and increases in probation time, the county would have saved an estimated $20 million in supervision costs alone

[125] *See, e.g.*, Pretrial Justice Institute, Presentation, Resource-based to Risk-based Pretrial Justice (Aug. 7, 2015), *available at* https://prezi.com/h6eboff0oyhx/resource-based-to-risk-based-pretrial-justice.

[126] The most universal risk factors for future criminal behavior in current pretrial risk assessment tools are prior contacts with the criminal justice system. *See* Mayson, *supra* note 95; Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT. R. 237 (Vera Inst. Just. 2015).

[127] Equal protection only prohibits facial (explicit) and intentional discrimination. Washington v. Davis, 426 U.S. 229, 240-42 (1976). There is an argument that actuarial risk assessment is facially discriminatory if the variables used to predict risk include things like race and income. *See* Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 811-12, 821-36 (2014).

[128] VERA INSTITUTE OF JUSTICE, THE PRICE OF JAILS: MEASURING THE TAXPAYER COST OF LOCAL INCARCERATION (May 2015), http://www.vera.org/sites/default/files/resources/downloads/price-of-jails.pdf; TEXAS CRIMINAL JUSTICE COALITION, HARRIS COUNTY, TEXAS ADULT CRIMINAL JUSTICE DATA SHEET, http://countyresources.texascjc.org/sites/default/files/adult_county_data_sheets/TCJC's%20Adult%20Harris%20County%20Data%20Sheet.pdf

[129] This is actually a conservative estimate because it is based on the estimate of the change in the jail sentence associated with detention, and thus ignores time spent in pretrial detention that does not end up counting against the final sentence of the accused.

for this population. Thus, with better pretrial detention policy, Harris County could save millions of dollars per year, increase public safety, and likely reduce wrongful convictions.

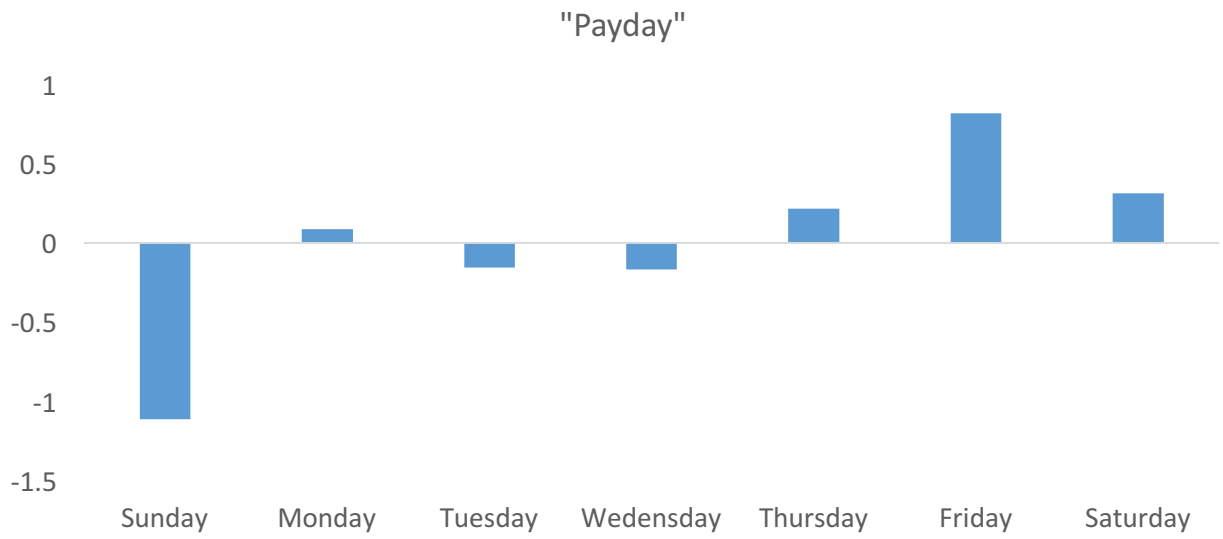
Our findings also carry import beyond the borders of Harris County. Many of the key features of Harris County's system—a heavy reliance on cash bail, assembly-line handling of bail hearings, and nonexistent representation for defendants at these hearings—are characteristic of misdemeanor bail systems across the country. The strong empirical evidence that under such circumstances the bail hearing influences later case outcomes demands further clarification from the courts as to whether the Sixth Amendment guarantees the assistance of counsel at such hearings, and whether such a process sufficiently protects the due process and Eighth Amendment rights of defendants.

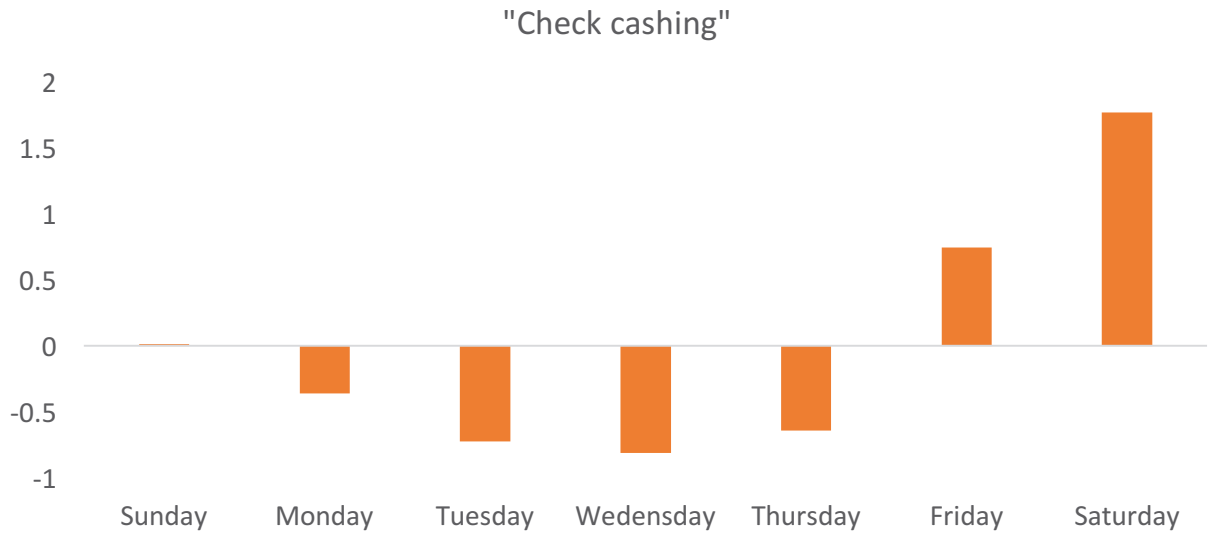
Our results also have important implications for the conduct of future empirical studies assessing the effects of pretrial detention. Our analysis suggests that prior work measuring the association between pretrial detention and case outcomes, which controls for only a limited set of defendant and case characteristics, risks the possibility of overestimating the causal effect of detention. After controlling for a broader set of characteristics, however—including the exact offense and the precise amount of bail set at the initial hearing—we are able to obtain correlational estimates that approach the causal estimates we observe using a natural experiment. In this respect, our results mirror those of Stevenson.[130] Researchers therefore may be able learn much about bail effects across many other jurisdictions operating under different systems without resorting to costly, and in some cases practically infeasible, randomized controlled trials, so long as we are sufficiently careful to account for pre-existing differences between the pools of detained and released defendants. Such future work could help to catalyze a shift towards bail systems that reduce wealth disparities, increase public safety, and minimize the lengthy periods of detention that have such high budgetary and human costs.

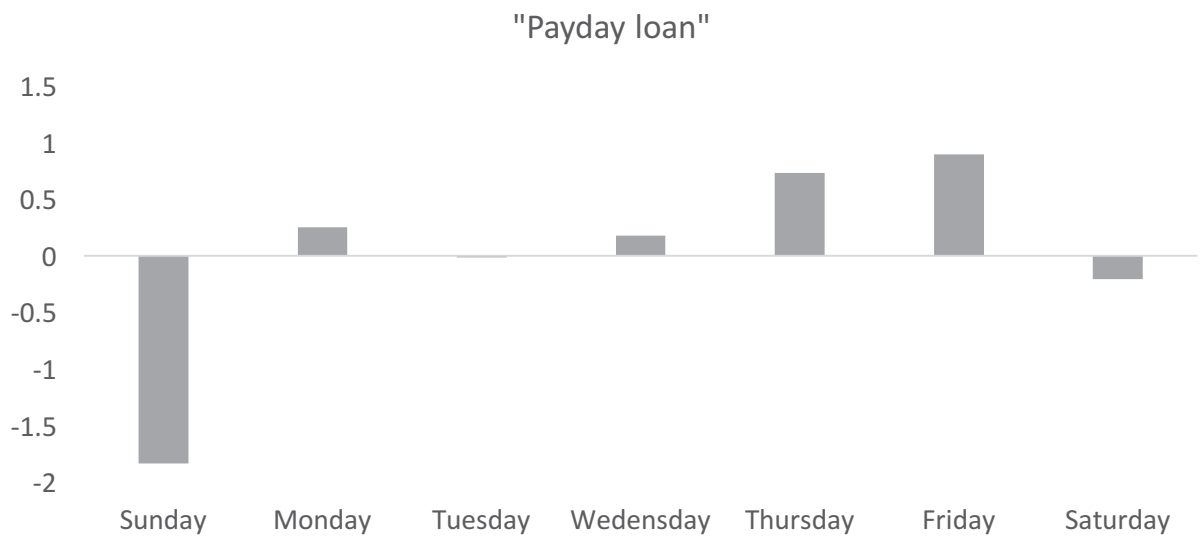
[130] *See supra* note 35 and accompanying text.

APPENDIX

Figure A.1: Google Daily Keyword Search Volume by Day of Week, Standardized Score







Note: This figure plots average daily Google search volume by day of week for several search terms that serve as proxies for liquidity. For each term, daily search volume was standardized and then averaged by day of week to construct the bars in the chart. Data were downloaded from Google Trends (https://www.google.com/trends/) and cover the period from 1/31/2016 to 4/23/2016.

Figure A.2: Distribution of Bail Assessments By Day of Week of Hearing

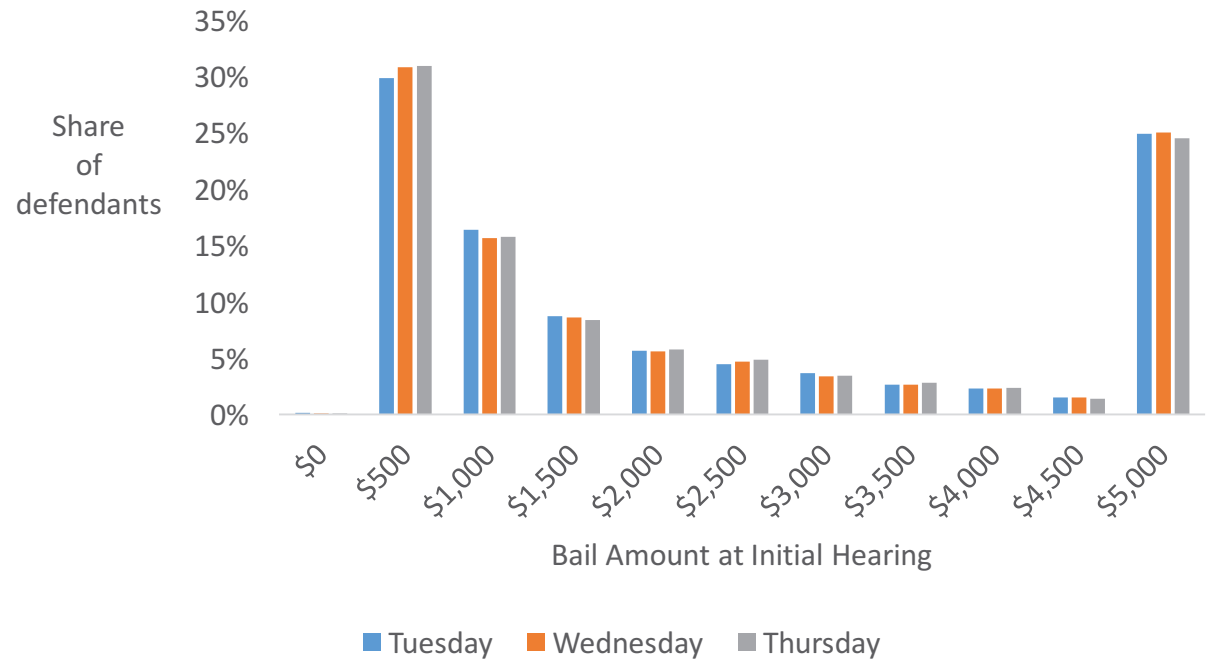


Table A.1: Numeric Results for Misdemeanor Recidivism Analysis

Days since bail hearing	Cumulative new misdemeanors per released defendant	Estimated effect of detention	Standard Error	P-Value	% change in misdemeanors due to detention
1	0.0004	-0.0004	0.00006	4.56E-10	-97.0%
2	0.0010	-0.0009	0.00013	4.55E-11	-89.1%
3	0.0015	-0.0008	0.00018	1.12E-05	-50.6%
4	0.0022	-0.0010	0.00022	5.52E-06	-45.6%
5	0.0029	-0.0011	0.00026	1.74E-05	-38.1%
6	0.0037	-0.0012	0.00030	7.28E-05	-31.8%
7	0.0046	-0.0014	0.00033	2.14E-05	-31.2%
8	0.0052	-0.0014	0.00036	0.000	-26.8%
9	0.0059	-0.0012	0.00040	0.003	-20.0%
10	0.0065	-0.0011	0.00043	0.009	-17.0%
11	0.0072	-0.0013	0.00045	0.005	-17.6%
12	0.0080	-0.0013	0.00048	0.005	-16.6%
13	0.0089	-0.0013	0.00050	0.009	-14.8%
14	0.0098	-0.0009	0.00053	0.079	-9.5%
15	0.0106	-0.0008	0.00056	0.127	-8.0%
16	0.0112	-0.0008	0.00057	0.178	-6.9%
17	0.0118	-0.0004	0.00059	0.520	-3.2%
18	0.0125	-0.0001	0.00061	0.870	-0.8%
19	0.0130	0.0002	0.00062	0.800	1.2%
20	0.0137	0.0005	0.00064	0.406	3.9%
21	0.0145	0.0006	0.00066	0.399	3.9%
22	0.0151	0.0009	0.00068	0.197	5.8%
23	0.0157	0.0010	0.00069	0.149	6.3%
24	0.0164	0.0012	0.00071	0.097	7.1%
25	0.0170	0.0013	0.00072	0.069	7.7%
26	0.0177	0.0014	0.00074	0.054	8.0%
27	0.0183	0.0017	0.00075	0.025	9.2%
28	0.0190	0.0019	0.00076	0.012	10.1%
29	0.0197	0.0020	0.00078	0.009	10.3%
30	0.0204	0.0022	0.00079	0.005	10.9%
60	0.0413	0.0075	0.00113	2.32E-11	18.2%
120	0.0805	0.0154	0.00158	1.58E-22	19.2%
180	0.1160	0.0219	0.00193	4.98E-30	18.9%
240	0.1480	0.0284	0.00223	3.26E-37	19.2%
300	0.1830	0.0364	0.00249	3.58E-48	19.9%
360	0.2086	0.0447	0.00272	1.19E-60	21.4%
420	0.2335	0.0515	0.00294	1.36E-68	22.0%
480	0.2575	0.0584	0.00314	3.07E-77	22.7%
540	0.2808	0.0638	0.00332	5.13E-82	22.7%

Table A.2: Numeric Results for Felony Recidivism Analysis

Days since bail hearing	Cumulative new felonies per released defendant	Estimated effect of detention	Standard Error	P-Value	% change in felonies due to detention
5	0.0015	-0.0012	0.00018	1.48E-10	-79.5%
10	0.0032	-0.0018	0.00028	6.28E-10	-55.1%
15	0.0052	-0.0022	0.00038	1.05E-08	-42.2%
20	0.0069	-0.0022	0.00045	6.67E-07	-32.5%
25	0.0084	-0.0020	0.00051	0.0001	-23.7%
30	0.0101	-0.0022	0.00056	0.0001	-21.3%
35	0.0117	-0.0022	0.00061	0.000	-18.6%
40	0.0133	-0.0020	0.00065	0.002	-15.4%
45	0.0148	-0.0019	0.00068	0.005	-13.0%
50	0.0162	-0.0018	0.00072	0.015	-10.8%
55	0.0176	-0.0012	0.00076	0.111	-6.9%
60	0.0192	-0.0010	0.00079	0.212	-5.2%
65	0.0205	-0.0003	0.00082	0.697	-1.6%
70	0.0218	0.0004	0.00085	0.650	1.8%
75	0.0233	0.0007	0.00089	0.429	3.0%
80	0.0247	0.0009	0.00092	0.328	3.6%
85	0.0260	0.0014	0.00095	0.126	5.6%
90	0.0274	0.0019	0.00097	0.046	7.1%
95	0.0286	0.0023	0.00100	0.021	8.0%
100	0.0298	0.0028	0.00102	0.006	9.4%
120	0.0351	0.0047	0.00111	0.000	13.5%
180	0.0498	0.0104	0.00136	0.000	20.9%
240	0.0644	0.0150	0.00157	0.000	23.3%
300	0.0782	0.0196	0.00177	0.000	25.1%
360	0.0911	0.0250	0.00194	0.000	27.4%
420	0.1039	0.0296	0.00210	0.000	28.5%
480	0.1163	0.0343	0.00224	0.000	29.5%
540	0.1280	0.0395	0.00237	0.000	30.9%

Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes

Megan Stevenson*†

November 8, 2016

Abstract

One in five incarcerated people in the United States are in jail awaiting trial, and many are detained due to an inability to pay relatively small amounts of money. This paper uses a natural experiment to analyze whether incarceration during the pretrial period affects case outcomes. In Philadelphia, defendants randomly receive bail magistrates who differ widely in their propensity to set bail at affordable levels. Using magistrate leniency as an instrument, I find that pretrial detention leads to a 13% increase in the likelihood of being convicted, an effect largely explained by an increase in guilty pleas among defendants who otherwise would have been acquitted or had their charges dropped. Pretrial detention also leads to a 41% increase in the amount of non-bail court fees owed and a 42% increase in the length of the incarceration sentence. While I find little evidence of explicit bias, the use of money bail results in disproportionate rates of detention for African-Americans and the poor, with ripple-out effects on case outcomes. Controlling for pretrial detention status reduces the prison sentence differential between blacks and non-blacks by 42%, even after the charge and criminal history have been accounted for.

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I have had the 'you can wait it out or take the deal and get out' conversation with way too many clients. -a public defender, Philadelphia

1 Introduction

There are currently 467,000 people awaiting trial in jail in the United States (Cohen and Reaves, 2007). In fact, there are more people in jail awaiting trial than are incarcerated due to a drug sentence.[1] This number is particularly striking considering that our criminal justice system is founded on a presumption of innocence, where "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[2]

According to Bureau of Justice Statistics, five out of six people detained before trial on a felony charge are held on money bail (Cohen and Reaves, 2007). Some of these defendants are facing very serious charges, and accordingly, have very high bail. But many have bail set at amounts that would be affordable for the middle or upper-middle class but are simply beyond the reach of the poor. In Philadelphia, the site of this study, more than half of pretrial detainees would be able to secure their release by paying a deposit of $1000 or less, most of which would be reimbursed if they appear at all court dates. Many defendants remain incarcerated even at extremely low amounts of bail, where the deposit necessary to secure release is only $50 or $100. Nor are the charges faced by many pretrial detainees particularly serious: 60% of those held for more than three days were charged with non-violent crimes and 28% were charged only with a misdemeanor.

It's long been postulated that pretrial detention increases the likelihood of conviction and the severity of sentences. Defendants may plead guilty to get out of jail, or accept an overly punitive plea deal because detention impaired her ability to gather evidence or meet with her lawyer. Adjustment to life in jail, combined with the potential loss of employment or housing, may reduce the incentives to fight the charges. While prior research has shown a correlation between pretrial detention and unfavorable case outcomes, it did not show that the relationship was causal.[3] Those detained differ from those released in ways that are both observable and unobservable to the researcher; they tend to be facing more serious charges and have longer criminal histories, and they may also have stronger evidence against them. They are expected to have worse case outcomes regardless of detention status. Isolating the causal effect of pretrial detention

[1]The number of state and federal prisoners whose most serious offense was drug-related is found in Minton and Zeng (2015). The most recent information on the percentage of convicted jail inmates with a drug sentence is from James (2004).

[2]Supreme Court ruling in United States v. Salerno, 1987

[3]See Ares et al. (1963); Rankin (1964); Goldkamp (1980); Williams (2003); Phillips (2007, 2008); Tartaro and Sedelmaier (2009); Sacks and Ackerman (2012); Lowenkamp et al. (2013); Oleson et al. (2014)

requires an experimental research design.[4]

In this paper I present some of the first quasi-experimental evidence that pretrial detention increases the likelihood of being convicted, pleading guilty, receiving lengthy incarceration sentences, and being required to pay hundreds of dollars in court fees. The research design takes advantage of the fact that defendants randomly receive bail magistrates who vary widely in their propensity to set bail at affordable levels. Those who receive a strict magistrate are statistically identical to those who receive a more lenient magistrate except in their likelihood of being detained pretrial. If those who receive a strict magistrate are also more likely to be convicted or receive unfavorable sentences we can infer that this is due to differences in detention rates and not some other unseen difference in defendant or case characteristics.

The data used in this analysis covers all criminal cases originated in Philadelphia between September 2006 and February 2013, with a total sample size of 331,971 cases. The rotating work schedule of the bail magistrates creates random variation in which magistrate is on duty; each magistrate works an equal number of night shifts, weekend shifts, etc. The duties of the bail magistrate are very limited and there are few plausible alternative channels through which they could affect case outcomes. After the bail hearing, the magistrates do not interact with the defendant or make any other decisions related to her case, nor does the schedule of the magistrates align with that of the judges or any other actors in the criminal justice proceedings. The institutional features of Philadelphia's pretrial process provide a particularly clean natural experiment with which to estimate the impacts of pretrial detention.

For each defendant, I build an instrument for pretrial detention which consists of the average detention rates of *other* defendants who had bail set by the same magistrate. Using this measure of magistrate leniency as an instrument, I estimate that pretrial detention leads to a 6.2 percentage point increase in the likelihood of being convicted on at least one charge, over a mean 49% conviction rate. The effect on conviction (being found guilty either through plea or at trial) is largely explained by a 4.7 percentage point increase in the likelihood of pleading guilty among those who would otherwise have been acquitted, diverted, or had their charges dropped. Those detained will be liable for $129 more in non-bail court fees (a 41% increase over the mean), and will be sentenced to an additional 124 days of incarceration (a 42% increase over the mean).

The adverse effect that pretrial detention has on case outcomes raises concerns about socio-economic disparities in pretrial detention, particularly since detention status depends partly on the ability to post bail. The Department of Justice recently

[4]Ares et al. (1963) used an experimental method to look at the impact of pretrial detention on case outcomes but did not present the results in a manner that allows for causal interpretation. Goldkamp (1980) and Abrams and Rohlfs (2011) used a randomized experiment to look at how the bail amount affects crime, flight, and the likelihood of posting bail, but did not evaluate the impacts on case outcomes.

released a statement saying that money bail that doesn't take ability to pay into account is in violation of the Equal Protection Clause of the Fourteenth Amendment.[5] Nonetheless, I find no evidence that bail is set proportionally to the ability to pay in Philadelphia. The bail amount of defendants from low-income zip codes is statistically indistinguishable from bail set for defendants from wealthier neighborhoods, after controlling for a wide range of variables describing the charge, criminal history and other demographic characteristics. Despite equivalent bail amounts, those from low-income zip codes are less able to afford bail, and are 7% more likely to be detained. Bail amounts are only slightly higher for African-Americans than for non-black defendants facing the same charge and with the same criminal history, however they are 10% more likely to be detained.[6] Median household income for African-Americans is less than 2/3 that of white households in Philadelphia (Ingram, 2007).

Socio-economic disparities in detention have ripple-out effects on sentencing. Even after controlling for a very detailed set of variables describing the current charges and criminal history, the average incarceration sentence of African-Americans and people from low income neighborhoods are longer than those for wealthier, non-black defendants. Adding controls for detention status reduces the race and income sentence differentials by 40% and 16% respectively.

The results of this paper speak to several important policy issues. First, the downstream criminal justice consequences of pretrial detention underline the importance of eliminating socio-economic disparities in detention rates. This could be achieved by eliminating the use of money bail, or implementing procedures to ensure that the bail amount is proportional to defendants' financial resources. Race-and-wealth-neutral risk assessment tools can be helpful in determining which defendants can be released under minimal conditions.[7] Second, the results of this paper show that the bail hearing is a critical stage in the criminal procedure and should be treated accordingly. Currently, bail hearings in Philadelphia – as in many jurisdictions – last only about a minute, occur over videoconference, and without legal representation for the defendants. Defendants should have the right to counsel at the bail hearing, and jurisdictions should provide increased training and guidance to the magistrates to reduce the idiosyncratic variance in detention.

In the months since this paper was first circulated, several other papers, developed in parallel and also evaluating the impact that pretrial detention has on case outcomes, have come out. Gupta et al. (2016), Heaton et al. (2016), Dobbie et al. (2016) and Leslie

[5]From a Department of Justice amicus brief in Walker v. Calhoun, August 2016.

[6]A 2004 literature review of racial disparities in bail finds mixed results Free. An interesting prior paper shows that bail bondsmen charge lower rates for blacks than whites, suggesting that blacks pose a lower risk than whites at the same bail amount (Ayres and Waldfogel, 1994).

[7]Caution is warranted, however, since risk assessment tools which include race and income proxies, like zip code, may perpetuate socio-economic disparities in detention.

and Pope (2016) have shown that pretrial detention leads to an increase in conviction rates in New York City, Houston, Miami, Philadelphia, and Pittsburg. Heaton et al. (2016) and Leslie and Pope (2016) also find that pretrial detention leads to an increase in criminal behavior after the time of disposition. Dobbie et al. (2016) finds suggestive evidence that pretrial detention destabilizes labor market participation. My paper differs from the others in its focus on the socio-economic disparities induced by a money bail system.

In Section 2 I give a brief overview of the pretrial process, in Section 3 I describe the natural experiment, and in Section 4 I discuss the data and provide descriptive statistics and graphs. Section 5 discusses the empirical strategy and provides evidence that magistrate assignment is as-good-as-random. Section 6 presents the results for the full sample and provides several robustness checks. Section 7 shows results for various subgroups. Section 8 analyzes socio-economic disparities in detention rates and discusses some of the implication of the results. Section 9 concludes.

2 The pretrial process

Pretrial detention is the act of keeping a defendant confined during the period between arrest and disposition for the purposes of ensuring their appearance in court and/or preventing them from committing another crime. The vast majority of jurisdictions use a money bail system to govern whether or not a defendant is detained (PJI, 2009). In such a system a judge or a magistrate determines the amount of the bail required for release and the defendant is only released if she pays that amount and agrees to certain behavioral conditions. In some cases the defendant will be released without having to pay anything, in others (usually only the most serious cases) she will be denied bail and must remain detained. While the defendant is liable for the full amount of the bail bond if she fails to appear at court or commits another crime during the pretrial period, she usually does not need to pay the full amount in order to secure release. In many jurisdictions she will borrow this sum from a bail bondsman, who charges a fee and holds cash or valuables as collateral (Cohen and Reaves, 2007). In some jurisdictions, Philadelphia included, the courts act as a bail bondsman and will release the defendant after the payment of a deposit.

Bail hearings are generally quite brief – in Philadelphia most last only a minute or two – and often do not have any lawyers present.[8] After the bail hearing there are a series of pretrial court appearances that defendants must attend. Although the ex-

[8]PJI (2009) shows 40% of respondent districts do not have defense attorneys at bail hearings. While there is no systematic survey of the length of bail hearing, they are reported to be very short in many jurisdictions: three minutes long in North Dakota (VandeWalle, 2013), less than two minutes in Cook County (Staff, 2016) and only a couple minutes long in Harris County (Heaton et al., 2016).

act procedure varies across jurisdictions these usually include at least an arraignment (where formal charges are filed) and some sort of preliminary hearing or pretrial conference (where the case is discussed and plea deals can be negotiated). Plea bargaining usually begins around the time of arraignment and can continue throughout the criminal proceedings. In some jurisdictions, like New York City, the arraignment happens simultaneous to the bail hearing and it is not uncommon to strike a plea deal at this first appearance (Barry et al., 2012). In other jurisdictions, such as New Orleans, arraignments often do not happen until six months after the bail hearing and a defendant who is unable to make bail must wait until then to file a plea.[9] In Philadelphia, arraignments usually happen within a month of the bail hearing.

Plea negotiation is a process in which the defendant receives reduced charges or shorter sentences in return for pleading guilty and waiving her right to a trial. Since defendants often face severe sentences if found guilty at trial, the incentives to plead are strong. It's estimated that 90-95% of felony convictions are reached through a plea deal (Devers, 2011). Philadelphia differs from many other jurisdictions in its wide use of bench trials on felony cases. Since sentencing tends to be more lenient in bench trials than jury trials, this reduces the incentive to plead guilty.[10] As such, only about 78% of felony convictions are reached through plea in Philadelphia. Trial by jury is not constitutionally required if the maximum incarceration sentence is less than six months, and the use of bench trials for misdemeanors, as is the custom in Philadelphia, is more common across jurisdictions.

There are a number of reasons why a detained defendant might be more likely to be convicted, or receive a more punitive sentence. Any plea deal that involves immediate release from jail would be very tempting, even if the deal involved onerous probation requirements, heavy fines, and negative impacts on future labor market prospects or access to public benefits (Bibas, 2004). It may be that since some of the disruptions of incarceration have already occurred – loss of job/housing, the initial adjustment to life behind bars – the incentives to fight the charges are lower. Jail may affect optimism about the likelihood of winning the case, or may affect risk preferences in such a way that the certainty of a plea deal seems preferable to the gamble of a trial. Detention also impairs the ability to gather exculpatory evidence, makes confidential communication with attorneys more difficult, and limits opportunities to impress the judge with gestures of remorse or improvement (taking an anger management course, entering rehab, etc.) (Goldkamp, 1980). Detained defendants may attend pretrial

[9]Based on discussions with former New Orleans Parish defenders.

[10]In Philadelphia, a bench trial is the default for all but the most serious felonies. The right to a jury trial can be asserted upon request, but this is uncommon. While there is no formal mechanism that ensures that a bench trial will lead to better outcomes for the defendant than a jury trial, all defense attorneys interviewed assured me that this was the case.

court appearances in handcuffs and/or prison garb, creating superficial impressions of criminality. Furthermore, if a defendant must await trial behind bars he may be reluctant to employ legal strategies that involve delay. While a released defendant may file continuances in the hopes that the prosecution's witnesses will fail to appear, memories will blur, or charges eventually get dropped, a detained defendant pays a much steeper price for such a strategy. More nefariously, those detained have less opportunity to coerce witnesses, destroy evidence or otherwise impede the investigation (Allen and Laudan, 2008).

There are many mechanisms through which pretrial detention may affect case outcomes, and they are likely to vary in importance by defendant and according to the local characteristics of criminal procedure. While there is little reason to believe that the results shown in this paper are unique to Philadelphia, the magnitude of the effects may differ across jurisdictions.

3 The natural experiment

Immediately after arrest, arrestees are brought to one of seven police stations around the city. There, the arrestee will be interviewed via videoconference by Pretrial Services. Pretrial Services collects information about various risk factors as well as financial information to determine eligibility for public defense. Using risk factors and the current charge, Pretrial Services will determine the arrestee's place in a 4 by 10 grid of bail recommendations. These bail guidelines suggest a range of appropriate bail, but are only followed about 50% of the time (Shubik-Richards and Stemen, 2010). Once Pretrial Services has entered the bail recommendation and the financial information into the arrest report the arrestee is ready for her bail hearing.

Once every four hours the magistrate will hold bail hearings (in Philadelphia these are called Preliminary Arraignments) for all arrestees who are ready. The bail hearing will be conducted over videoconference by the magistrate, with a representative from the district attorney's office, a representative from the Defender Association of Philadelphia (the local public defender), and a clerk also present. In general, none are attorneys. The magistrate makes the bail determination on the basis of information in the arrest report, the pretrial interview, criminal history, bail guidelines, and advocacy from the district attorney and public defender representatives.

There are four things that happen during the bail hearing: the magistrate will read the charges to the arrestee, inform her of her next court appearance, determine whether the arrestee will be granted a court-appointed defense attorney, and set the bail amount. The first two activities are formalities that ensure the defendant is aware of what she is being charged with and where her next court date is. Eligibility for

public defense is determined by income. If the defendant is deemed eligible, she will be assigned either to the Defender Association, or to a private attorney who has been approved to accept court appointments by the City of Philadelphia. The default is to appoint the Defender Association; if procedural rules require the court to appoint an attorney outside of the Defender Association the magistrate's clerk will appoint the attorney at the top of a rotating list of eligible attorneys known as a 'wheel'.[11]

A typical bail hearing lasts only a minute or two and the magistrate has broad authority to set bail as she sees fit.[12] Bail decisions fall into three categories: release with no payment required, cash bail or no bail.[13] Those with cash bail will be required to pay a 10% deposit on the total bail amount in order to be released. After disposition, and assuming that the behavioral conditions of the pretrial period were met, 70% of this deposit will be returned. The City of Philadelphia retains 30% of the deposit, even if charges get dropped or the defendant is acquitted on all charges. Those who do not have the 10% deposit in cash can borrow this amount from a commercial bail bondsman, who will accept cars, houses, jewelry and other forms of collateral for their loan. If the defendant's arrest occurred while she is already on parole, her parole officer may choose to file a detainer. If a detainer is filed she may not bail out until a judge removes the detainer.[14]

The research design uses variation in the propensity of the magistrates to assign affordable bail as an instrument for detention status. The validity of the instrument rests on several factors, including that the magistrate received is essentially random and that the instrument not affect outcomes through a channel other than pretrial detention. The following details help ease concerns along these lines.

Philadelphia employs six Arraignment Court Magistrates at a time, and one of the six will be on duty 24 hours a day, 7 days a week, including holidays. Each day is composed of three work shifts: graveyard (11:30 pm-7:30 am), morning (7:30 am-3:30 pm) and evening (3:30 pm-11:30 pm). Each magistrate will work for five days on a particular shift, take five days off, then do five days on the next shift, five days off, and

[11]If there are multiple codefendants, such that representing all of them would pose a conflict of interest, one defendant will be randomly selected to be served by the Defender Association and the others will receive a court-appointed attorney. For opaque historical reasons, four out of five defendants charged with murder will be represented by court-appointed attorneys and the fifth will be represented by the homicide division of the Defender Association (Anderson and Heaton, 2012). This decision is made by the order in which defendants are entered into the data system and the court-appointed attorney is chosen by a Municipal Court judge, not a magistrate.

[12]If either the defense or the prosecution is unhappy with the decision they can make an appeal to a judge immediately after the bail hearing. However the bar is high for overturning the original bail decision so this is not very common.

[13]Holding a defendant without bail is uncommon, although bail is sometimes set at prohibitively high rates.

[14]The detainer hearing usually happens within a week of arrest. Detainer cases are evenly distributed across magistrates and should not bias the results.

so forth. For example, a magistrate may work the graveyard shift from January 1st to January 5th, have January 6th-10th off, then work the morning shift from January 11th-15th, have the 16th-20th off, do the evening shift from January 21st-25th, take the next five days off, and then start the cycle all over again.

This rotation relieves concerns that certain magistrates set higher bail because they work during shifts which see higher-risk defendants. Over time, each magistrate will be scheduled to work a balanced number of weekends, graveyard shifts, and so forth. However the magistrates do not always work their appointed shifts; in fact, about 20% of the time there is a substitute (usually one of the other magistrates). To avoid potential confounds I instrument with the magistrate who was scheduled to work instead of the magistrate that actually worked. Furthermore, arrestees do not have latitude to strategically postpone their bail hearing to receive a more lenient magistrate. The process from arrest to bail hearing has been described as a conveyor belt: on average the time from arrest to the bail hearing is 17 hours and defendants are seen as soon as Pretrial Services notifies the Arraignment Court that they are ready (Clark et al., 2011). Thus the magistrate received by each defendant is essentially random, at least in that the sample of defendants who are seen by each magistrate should be statistically identical. I confirm this empirically in Section 5.

Since the duties of the bail magistrate are so limited, there are few channels outside of the setting of bail through which the magistrate could affect outcomes. One concern would be a correlation between the schedules of the magistrates and the likelihood of receiving a particular judge, prosecutor or defense attorney later on in the criminal proceedings. However the peculiar schedule of the magistrates does not align with the schedule of any other actors in the criminal justice system. For one, this is because the other courts are not open on weekends. This is also because Philadelphia predominantly operates on a horizontal system, meaning that a different prosecutor handles each different stage of the criminal proceedings. Likewise, if the defendant is represented by the Defender Association ($\sim$60% of the sample), she will have a different defense attorney at each stage.[15] While attorneys often rotate duties, their rotations are based on a Monday-Friday work week and not the 'five days on, five days off' schedule of the magistrates.

Eligibility for public defense is another potential channel through which the magistrate could affect outcomes; 75% of the sample has a public defender at the time of disposition. However there is no correlation between the leniency of the bail magistrate and having a public defender. This can be seen in Figure 1a, where the x and y axes show residuals from regressions of conviction and having a public defender (re-

[15]The most serious cases are not handled horizontally, however the choice of attorney to handle these cases has nothing to do with the magistrate.

spectively) on controls for the time and season of the bail hearing. The time controls account for the fact that certain magistrates do not work through the entire time period of my data, and each dot represents the average per magistrate. There is no visible correlation between the likelihood of receiving a lenient magistrate and the likelihood of having a public defender. (Nor is there any statistically significant relationship between the two in a regression.) In Section 6 I show that controlling for whether or not the defendant is represented by a public defender has no meaningful effect on the main results.

The only other condition of release that the magistrates are responsible for is determining whether the defendant must phone in periodically with Pretrial Services. As of 2009, approximately 9% of defendants were required to call into pretrial services either once or twice a week as a part of their condition of release (Clark et al., 2011). These phone calls are made to an interactive voice-response system, there is no therapeutic element involved. Those who violate the call-in requirement do so with impunity: no violation notice is sent to the court, nor are any sanctions applied (Clark et al., 2011). It is unlikely that these calls will have more than a minor effect on case outcomes. In the Appendix I provide further evidence that the main results are robust to inclusion of controls for the telephone call-in requirement.

More invasive conditions of release are available to judges later in the criminal proceedings, but not to the magistrate who makes the initial bail assignment. These include electronic monitoring, drug testing, substance abuse counseling, in-person meetings with pretrial services or house arrest. As of 2009, only about 1% of arrestees were assigned to any of these conditions (Clark et al., 2011). The schedules of the judges who assign these conditions of release do not correlate with the rotating schedule of magistrates.

4 Data and descriptive statistics

The data for this analysis comes from the court records of the Pennsylvania Unified Judicial System. PDF files of case dockets and court summaries were acquired by web-scraping public records; these were converted into data suitable for statistical analysis by text-parsing. The data covers all Philadelphia arrests in which charges were filed between September 13, 2006 and February 18, 2013. Before September 13, 2006, Philadelphia used a different data management system and the data from that time period is of much lower quality. I do not look at cases which began after February 18, 2013 both because I wanted to leave ample time for all cases to resolve and because one of the magistrates was replaced by a new one on that date.

Each observation in my data set refers to a particular criminal case. A case can

have multiple charges and a defendant can have multiple cases. Information about the bail amount, the magistrate, the bail hearing, and the charges at the time of the bail hearing comes from the Municipal Court (lower court) dockets. Information about court fees and whether the defendant is held pretrial on a detainer can be found in the Municipal Court dockets as well as the Court of Common Pleas (felony court) dockets. In addition, each defendant has a Court Summary Report, which summarizes the outcomes of each criminal case in which charges were filed in Pennsylvania. This provides both criminal history and recidivism information, as well as other general descriptors of each case (outcomes, sentencing, attorneys, dates of arrest/disposition etc.). Average gross income for each zip code in 2010 was acquired from IRS.gov.[16]

A few constraints of the data should be noted. First, criminal history and recidivism is only available for crimes committed within Pennsylvania. Of these, I have the full range of past crimes, and all future crimes as of December, 2015. Second, the data does not allow me to distinguish between concurrent and consecutive incarceration sentences. The definition of the length of incarceration that is used in this paper is the longest sentence received. Finally, a small subset of the data got lost in the web-scraping process. I am missing key data sources for about 0.33% of the sample (about 1000 cases), these have been dropped. Since these missing variables are due to technical errors in the download, they should not result in any systematic selection of cases and are not expected to affect the results. The final sample consists of 331,971 cases.

Figure 1b shows a histogram of the number of days defendants are detained before disposition, conditional on being detained more than three days and less than 600 days. The left tail of the distribution is omitted since the primary definition of 'detainees' used in this paper is being unable to make bail within three days; the long right hand tail of the distribution is omitted for visual simplicity. The median number of days detained for those who are unable to make bail within three days is 78, the mean is 146.

Summary statistics for the released group, the detained group, and the whole sample are shown in Table 1. Defendants are predominantly male, and, although race is missing for 11% of the sample, largely African-American. Those detained tend to have longer criminal histories and are facing more serious charges than those released. 11% of detainees are charged with a violent crime such as robbery, aggravated assault, murder, rape or burglary. It should be noted, however, that 28% of the detained sample are only facing misdemeanor charges.[17]

Almost half the sample have their charges dropped, dismissed, or are placed in

[16]https://www.irs.gov/uac/soi-tax-stats-individual-income-tax-statistics-zip-code-data-soi

[17]The offense information used in this paper is taken from the charge at the time of the bail hearing. Many of those who were originally charged with felonies subsequently had the felony charge downgraded to a misdemeanor.

some sort of diversion program.[18] Almost everyone else was convicted, through plea or at trial, on at least one charge. 90% of cases resolved at trial result in convictions, suggesting that prosecutors will not bring a case to trial if they don't believe they have a strong chance of winning. If a detained defendant pleads quickly to avoid more time waiting in jail, she may be pleading guilty on a case that otherwise would not have proceeded to court.

One third of the sample is released without being required to pay bail and an additional 26% are able to pay their way out within three days of the bail hearing. Figure 1c shows the distribution of bail amounts for all defendants. The median amount of bail for the detained group is $10,000. About 10% of the sample has bail set at an amount greater than $0 but less than or equal to $2000. Among this low-bail sample – 77% of whom are charged only with misdemeanors – the average number of days detained pretrial is 28, and 40% are detained for at least four days. This group would need to pay a deposit of $200 or less to secure their freedom.

Figure 1d shows the percentage detained and released at various levels of bail. This sample is limited to defendants who do not have a detainer placed on them – in other words, these defendants would be free to leave if they posted bail. Almost 40% of defendants with bail set at $500 do not post bail within three days of the bail hearing. These defendants would only need to post a deposit of $50 in order to secure release. While a tiny percentage may prefer to stay in jail, it is reasonable to infer that the large majority would post bail if they could afford it. As of 2008, Philadelphia's jails housed 44% more inmates than they were designed to, and 20% of inmates were living in "triple cells" (three inmates in a cell designed for one or two people).[19] "Lock-downs" and restrictions on movement are common, and despite the heat and humidity which characterize Philadelphia's summers, many buildings lacked air conditioning.

5 Empirical strategy

Instrumenting for sentencing outcomes using varying propensities of randomly assigned or rotating judges is a popular method of identifying causal effects in criminal justice (Kling, 2006; Aizer and Doyle, 2009; Loeffler, 2013; DiTella and Schargrodsky, 2013; Mueller-Smith, 2015). My empirical specification follows in that tradition, most closely resembling that of Mueller-Smith (2015) and a specification used in a robustness test in Aizer and Doyle (2009). I use a jackknife (leave-one-out) instrumental variables method, allowing the preferences of the magistrate to vary across three time periods

[18] Diversion programs are designed for those with low level misdemeanor charges; if the defendant agrees to requirements such as paying restitution to victims, entering rehab, or performing community service, they are generally able to avoid a formal adjudication of guilt and a criminal record.

[19] From Williams v. City of Philadelphia, 2008

and according to the offense, criminal history, race and gender of the defendant. The first stage of this specification is shown in Equation 1 where a dummy for pretrial detention in case i ($Detention_i$) is regressed on the magistrate dummy ($Magistrate_i$) interacted with a subset of covariates (Cov_i^{sub}) and with indicators for three time periods (T_i), as divided by February 23, 2009 and February 23, 2011.[20] Other offense, criminal history, and demographic controls are included in X_i, and controls for the time and date of the bail hearing are included in $Time_i$.[21][22] The instrument for pretrial detention for the defendant in case i is thus the average detention rate of all other individuals with a similar offense, criminal history, race and gender who had their bail set by the same magistrate during a two year period.

$$\begin{aligned} Detention_i = \alpha_1 + Magistrate_i * T_i * \omega_1 + Magistrate_i * Cov_i^{sub} \\ * \phi_1 + Cov_i^{sub} * T_i * \delta_1 + X_i * \gamma_1 + Time_i * \psi_1 + e_i \end{aligned} \tag{1}$$

The second stage of the two stage least squares regression is shown in Equation 2 where $Case\_Outcome_i$ represents a variety of case outcomes, $\widehat{Detention}_i$ is the fitted value from the jackknifed first stage, and Cov_i^{sub}, X_i, T_i and $Time_i$ are as described above.

$$\begin{aligned} Case\_Outcome_i = \alpha_2 + \widehat{Detention}_i * \beta_2 + Cov_i^{sub} * T_i * \delta_2 + X_i * \gamma_2 + \\ Time_i * \psi_2 + \epsilon_i \end{aligned} \tag{2}$$

Each magistrate sees about 17,000 cases during a two year period. Since the interaction effects are additive, the instrument for each case will be estimated off of many thousands of other defendants. For example, the instrument for a white female with an

[20] Cov^{sub} consists of the following variables: dummies for the 17 most common offenses (murder, robbery, aggravated assault, burglary, theft, shoplifting, simple assault, drug possession, drug sale, drug purchase, marijuana possession, 2nd degree felony firearm possession, 3rd degree felony firearm possession, vandalism, prostitution, first offense DUI, motor vehicle theft), a dummy for being African-American, a dummy for being female, the number of prior cases, the number of prior violent crimes, a dummy for having at least one prior and a dummy for having a detainer.

[21] X_i includes controls for age, age squared, age cubed, the number of prior felony cases, prior cases where the defendant was found guilty of at least one charge, dummies for having at least one prior case, having at least three prior cases, awaiting trial on another charge, and having a prior arrest within five years of the bail hearing. Offense variables include dummies for having a charge in the following category: rape, possession of stolen property, second offense DUI, resisting arrest, stalking, indecent assault, arson, solicitation of prostitutes, disorderly conduct, pedophilia, intimidation of witnesses, accident due to negligence, false reports to a police officer, fleeing an officer, and reckless endangerment. Additional offense controls include dummies for being charged with a first, second or third degree felony, an unclassified felony, a first, second or third degree misdemeanor, an unclassified misdemeanor, or a summary offense. I also control for the total number of charges, the total number of felony charges, the total number of misdemeanor charges, and the total 'offense gravity score' of the charges (the offense gravity score is used by Philadelphia to measure the seriousness of a charge on a scale of 1-8).

[22] $Time_i$ includes dummies for each year, a cubic in the day of the year (1-365), dummies for each day of the week, and for each shift in the day (graveyard, morning, evening).

aggravated assault charge who had bail set by Magistrate 3 will be calculated *not just* using others with the exact same characteristics, but rather the cumulative differential effect Magistrate 3 has on the detention status of whites, females, and those facing aggravated assault charges, compared to the sample average.

The magistrate received by each defendant must be essentially random to allow for a causal interpretation of the results. Table 2 shows that the instrument for magistrate leniency is uncorrelated with observable characteristics. Each cell of the table comes from a separate regression. The dependent variables of each regression – various covariates describing the case and the defendant – are shown in the left hand side of the table. Each cell shows the coefficient on pretrial detention (Column 1) or the instrument for pretrial detention (Columns 2 and 3). Column 1 shows results for OLS regressions of each covariate on a dummy for pretrial detention, controlling only for a small set of time controls: fixed effects for each year and a cubic in the day of the year (1-365). As can be seen, pretrial detention is strongly endogenous. Those detained are facing more serious charges, have longer criminal histories, are more likely to be male, and more likely to have a graveyard-shift bail hearing. Column 2 shows results from a simple jackknife IV regression in which pretrial detention is instrumented for with the eight magistrate dummies. Fixed effects for each year, and a cubic in the day of the year, are included to absorb seasonal and time changes. While pretrial detention is strongly endogenous, this simple instrument for pretrial detention is not. Of the 17 tests conducted, only one is statistically significant at the 5% level, no more than would be expected by chance.

Column 3 shows jackknife IV regressions of various covariates on the interacted instrument for pretrial detention. The first and second stage of this randomization test are shown in Equations 3 and 4. The dependent variables in Column 3 are from X_i: variables that are included as controls in the main regression but are not included as interactions with magistrate fixed effects in the first stage. These include less common crime types, general descriptors of the charges (such as the total number of felony charges), indicators for shift times or weekends, and additional measures of criminal history. Also included as a dependent variable is the "offense gravity score", which is a measure used in Philadelphia to evaluate the seriousness of the charges. Once again, the results show that the instrument for pretrial detention is exogenous to a wide variety of observable characteristics.

$$\begin{aligned} Detention_i = \alpha_3 + Magistrate_i * T_i * \omega_3 + Magistrate_i \\ * Cov_i^{sub} * \phi_3 + Cov_i^{sub} * T_i * \delta_3 + Time_i * \psi_3 + e_i \end{aligned} \tag{3}$$

$$x_i = \alpha_4 + \widehat{Detention}_i * \beta_4 + Cov_i^{sub} * T_i * \delta_4 + Time_i * \psi_4 + \epsilon_i \tag{4}$$

Appendix A shows an alternative randomization test. For each covariate, I conduct an F test of joint significance on the magistrate fixed effects from a regression of the covariate on magistrate dummies and time controls. These tests reveal that there is slightly less balance across the magistrates than would be expected if the magistrate was independently and identically drawn at every bail hearing. Since magistrates work five day rotating schedules there is more correlation in case types seen by each magistrate than are expected under a standard F distribution. I conduct a permutation test where I build 500 'false' work schedules which follow the basic parameters of the real work schedules (five day rotating shifts) and show that the amount of imbalance across magistrates is no more than what would be expected by chance. Importantly, this slight imbalance does not affect the exogeneity of the instrument, as demonstrated by Table 2.

The inclusion of interacted effects in the first stage increases the power of the instrument, but it also relaxes the monotonicity assumption. Under the monotonicity assumption, all defendants who have bail set by a magistrate who is strict in general must see an increase in their likelihood of being detained. If a magistrate who is strict on average is relatively lenient with certain types of offenses the monotonicity assumption is violated. By allowing the magistrate's preferences to vary across case and defendant characteristics non-monotonicity is limited. Figure 2a shows detention rates by magistrate across the entire sample. The y axis shows residuals from a regression of the pretrial detention dummy on a set of time controls; the whiskers show the 95% confidence intervals. Each bar is the average residuals per magistrate. Figures 2b-f show the same per-magistrate average detention residuals among a sample limited to those charged with each of the five most common offense types: robbery, first offense DUI, aggravated assault, drug selling and drug possession. There is clear evidence of magistrate heterogeneity in these graphs. The magistrate that is most lenient overall is the strictest on robbery charges, the magistrate who is strictest overall is the most lenient on drug selling charges, and so forth. If there is heterogeneity in treatment effects, an IV method which did not account for the heterogeneity in magistrate preferences would be biased.

Figure 3 shows graphical evidence of the main results: defendants whose bail hearing is presided over by a strict magistrate are more likely to be convicted. In Figure 3a the y and x axes show residuals from a regression of conviction and pretrial detention respectively on the set of time controls described by $Time$. Figure 3b is similar except the dummies are residualized over $Cov^{sub} * T^3, X$ and $Time$. Each circle represents the average detention and conviction residuals of one of the eight magistrates. As can be seen, there is a clear positive correlation between conviction and detention which, if anything, only gets stronger once the effect of covariates have been removed.

6 Full sample results

This section provides IV and OLS results for the full sample of defendants. The IV results are local average treatment effects: treatment effects for those defendants whose likelihood of being detained increases upon receiving a strict magistrate. While the instrument is predictive of pretrial detention across a broad spectrum of defendants, its predictive power is strongest among those at the middle range of case severity. I conduct a diagnostic test which entails dividing the sample into five groups based on their expected length of incarceration sentence (as a function of the current charge, criminal history and demographics) and regressing a dummy for pretrial detention on the instrument and controls for each subgroup. A high t-statistic on the instrument for a particular subgroup suggests that this subgroup has a high percentage of "compliers", or defendants whose likelihood of being detained increases when receiving a strict magistrate. I find that the t statistic on the instrument is over ten for all five subgroups, but is almost twice as large (23-24) among the three middle subgroups. This suggests that there is less magistrate heterogeneity when it comes to very serious cases (murder, etc.) or low level cases (first time marijuana possession) than there is in the middle range of cases. The most common charges in this middle group include drug possession, aggravated assault, robbery, and theft. Similar to the sample averages shown in Table 1, the average number of prior arrests for this middle group is 5.47, the average age is 33, 57% are identified as black, and 83% are male.

In Table 3 I show how pretrial detention affects both conviction and the likelihood of pleading guilty using a variety of different jackknife IV specifications. The specifications vary in whether or not controls are included and in the extent to which magistrate preferences are allowed to vary over case and defendant characteristics. Column 1 shows results with no covariates and without allowing the magistrates' preferences to vary (i.e. the only exogenous variables in the first stage are the eight magistrate dummies). In Column 2 the magistrate dummies are interacted with dummies for the three time periods T^3. The standard errors decrease between the first and second column by about 10%, suggesting that allowing the magistrates to respond differently to the various changes that occur during the period of my analysis increases the power of the instrument. In the third column, detailed controls for the charges, criminal history, and demographics are introduced. The effect sizes either increase (conviction) or remain constant (guilty pleas). In Column 4 the magistrate preferences are allowed to vary according to the top five most common lead charges: drug possession, first offense DUI, robbery, selling drugs, and aggravated assault. In Column 5 I add interactions between magistrate dummies and the number of prior cases/prior violent crimes, dummies for having at least one prior case, having a detainer, and being African-American or female. In Column 6 I add interactions between the magistrate dummies and the

other most common crime types: murder, burglary, theft, shoplifting, simple assault, buying drugs, marijuana possession, 2nd and 3rd degree felony firearm possession, vandalism, prostitution, and motor vehicle theft. Both effect sizes and standard errors decrease as instruments are added. This suggests that allowing the bail-setting habits of the magistrates to vary across defendant characteristics both increases the power and reduces non-monotonicity bias in the results. In particular, if treatment effects are smaller among crime types for which the monotonicity assumption is violated, then the estimates in Columns 1-3 will be biased upwards. It should be noted, however, that non-monotonicity bias will not generate spurious results if no treatment effects exist. Under the null hypothesis it would be very unlikely to see effect sizes as large as those shown in Table 3.

A t-statistic measuring the power of the first stage is shown in the bottom panel. This is the t statistic from a regression of a dummy for pretrial detention on the instrument (the fitted values from the first stage) and the full set of controls. The t-statistic is almost three times as large in the right hand column than in the simplest specification.

Heteroskedastic-robust standard errors are shown in parentheses, and the final column also includes empirical p-values from a permutation test.[23] The permutation test entails building a number of 'false' work schedules for the magistrates. Like the real schedules, each false work schedule has a magistrate working for five days in a row on the same shift, and each magistrate only works one shift per five day period. Within these constraints, work schedules are randomly assigned to create 500 unique false work schedules. The two-stage-least-squares results are calculated for each of the false schedules and the t-statistics on the instrument for pretrial detention in the second stage are collected. The empirical p-values are the fraction of false-schedule t-statistics which are greater in absolute value than the t-statistic from the real data. This process is computationally expensive, therefore only certain specifications have this result.

My preferred specification is the one where magistrates' preferences are allowed to vary across all 17 of the most common crime types, across the criminal history, race, and gender of the defendant, and over the three time periods. The power of the instrument is greatest in this specification, the standard errors are smallest, and non-monotonicity is less likely to be a concern when magistrates preferences are allowed to vary. It should also be noted that this is the most conservative specification: the effect sizes are smaller than in the simpler specifications. I estimate that pretrial detention leads to a 6.2 percentage point increase in the likelihood of being convicted and a 4.7 percentage point increase in the likelihood of pleading guilty. Compared to the means

[23] Clustering standard errors at the magistrate or defendant level do not affect the standard errors considerably.

for each dependent variable, that converts into a 13% increase in the probability of conviction and a 18% increase in the likelihood of pleading guilty. The empirical p-values described above are 0.016 for conviction and 0.052 for pleading guilty. These are shown in curly brackets. For reference, the parametrically estimated p-values are also shown, in double parentheses. The empirical p-values are actually slightly smaller than those estimated parametrically.

Table 4 shows how pretrial detention affects conviction rates, guilty pleas, court fees, the likelihood of being incarcerated, and both the maximum and minimum incarceration sentence.[24] Panel A shows results from the jackknife instrumental variables method with the most fully interacted specification; the first two columns are identical to the final column of Table 3. Panel B shows results from an OLS regression controlling for the full set of offense, criminal history, demographic and time controls and Panel C shows OLS results with controls only for the time and date of the bail hearing. With the exception of court fees and the incarceration dummy, results do not vary substantially between IV and OLS with controls. This suggests that researchers who are interested in estimating the effects of pretrial detention in other jurisdictions may be able to achieve reasonable results with standard court data even in the absence of a natural experiment.

The IV estimates show that pretrial detention leads to an average increase of $129 in non-bail court fees owed, counting defendants who are not convicted as receiving $0 fees. In general, defendants who are convicted in Philadelphia are required to pay court fees to cover a variety of expenses associated with the case, including court costs, victim restitution, lab tests, probation expenses, etc. Conditional on being convicted, court fees average at $611. For the tens of thousands of people convicted as a result of pretrial detention – many of whom were unable to pay even fairly small amounts of bail – these court fees may pose a significant challenge. Most defendants pay only a portion of these fees, remaining in debt to the city. 83% of defendants who were charged court fees are still in debt by December, 2015, with an average debt of $725, or 86% of the total amount. In 2011, Philadelphia hired a collection agency and began an aggressive campaign of collecting unpaid court debt dating back to 1971. This collection effort was controversial, partly because the court lacked records to back up computerized debt claims. Those who do not pay court fees face the threat of criminal prosecution, with a jail sentence of up to six months. There is no evidence, however, that criminal charges were ever filed against Philadelphia debtors (Denvir, 2012). Facing public backlash and civil rights lawsuits, Philadelphia scaled back on debt collection in 2014.

The IV results for the likelihood of being incarcerated are positive but noisy, however the results for the incarceration sentence length are more precise. Pretrial deten-

[24]Sentence length is coded as zero for individuals who do not receive an incarceration sentence.

tion leads to an expected increase of 124 days in the maximum days of the incarceration sentence, a 42% increase over the mean. Detention leads to a 136 day increase in the minimum number of days before being eligible for parole. Some defendants who have been detained get released on "time-served" – in other words, they time they spent detained pretrial is considered punishment for the crime. Since it was retrospectively considered punishment, I include time served as part of the incarceration sentence. Using alternative definitions, in which time served is not included as part of the sentence length, I estimate that pretrial detention leads to a 92 day increase in the maximum sentence and a 107 day increase in the minimum sentence. These results are noisier, although the latter result is still significant at the 10% level.

Empirical p-values for all these results are shown in curly brackets. For ease of reference, the parametrically estimated p values are shown in double parentheses. Again, the empirical p values are generally a little smaller than those estimated parametrically.

Table 5 provides evidence that variation in eligibility for public defense does not confound the estimates of the impacts of pretrial detention. Panel A of Table 5 is identical to Panel A of Table 4 except that there are two endogenous variables that are instrumented for with magistrate dummies: pretrial detention and a dummy for having a public defender at the time of disposition.[25] I find no statistically significant effect on having a public defender in any specification, and the coefficients on pretrial detention change only trivially. Panel B is similar to Panel A except that I add the controls for having a public defender in the second stage. Once again, the coefficients on pretrial detention change only trivially; if anything, they increase slightly in both magnitude and precision.

While not the focus of this paper, I also include estimates of the effect of pretrial detention on crime. Table 6 shows how pretrial detention impacts the likelihood of being charged with a new crime during the first six months after the bail hearing (Column 1), the likelihood of being charged with a new violent crime during the first six months after the bail hearing (Column 2), the likelihood of being charged with a new crime at least one year after the bail hearing (Column 3), the likelihood of being charged with a new crime within the second and third years after the bail hearing (Column 4), and the likelihood of being charged with a new crime within the third or fourth years after the bail hearing (Column 5). The first two columns will mostly be detecting the influence that pretrial detention has on pretrial crime. The latter three columns will mostly be detecting the impact that pretrial detention has on post-disposition crime. I define the recidivism time windows with reference to the bail hearing instead of the disposition date since the time to disposition is a function of

[25]The dummy is equal to one if the defender has a public defender or a court appointed attorney; 86% of public defense is handled by a public defender. The magistrate has no say over which type of public defense is received.

detention status. Since those detained generally have a shorter time to disposition than those released, the effects of pretrial detention on pretrial or post-disposition crime is confounded with the length of those periods.

The sample in the latter two columns is limited to defendants for which at least three and five years (respectively) of post-bail-hearing data is available. Violent crimes consist of murder, rape, aggravated assault, robbery, and burglary. All specifications in Panel A use the fully interacted jackknife IV, all specifications in Panel B use OLS with extensive controls. Column 1 indicates that pretrial detention leads to a substantial decrease in the likelihood of a new charge. The IV estimates are about twice as large in magnitude as the OLS methods. The IV results show that detaining people for more than three days after the bail hearing (many of whom remain incarcerated for months) decreases the rate of rearrest within six months by 13 percentage points. Pretrial detention decreases the six month rate of rearrest for a violent offense by almost six percentage points. The OLS estimates on the effects of pretrial detention on violent crime are much smaller, indicating that pretrial detention predicts a decrease of less than a percentage point in six month violent crime arrest. The differences between OLS and IV in this Table is likely partly due to selection bias and partly due to the difference between the average treatment effect and the local average treatment effect.

The IV coefficients on pretrial detention in the latter three columns are negative, but only one is marginally significant at the 10% level. This is consistent with increased incapacitation due to longer incarceration sentences. The OLS results show that pretrial detention predicts an increase in post-disposition crime. This may be due to selection bias.

In Table 1B in the Appendix, I provide alternate specifications in which bail (Panel A) and non-financial release (Panel B) are the independent variables of interest. I use the jackknife IV method with the full set of magistrate interactions in the first stage. The signs of the coefficients are generally as expected: higher bail amounts are associated with higher conviction rates, court fees and incarceration, and non-financial release is associated with lower conviction rates, court fees and incarceration. The effects are less precisely estimated than the effects of pretrial detention.

Panel C of Table 1B in the Appendix shows that the main results are robust to controls for being required to make weekly or bi-weekly telephone call-ins to an automated voice message system. These telephone call-ins are the only conditions of release that the magistrates have authority to assign to defendants during the period of my analysis. A dummy for being released without monetary bail, but required to call in periodically, is instrumented for using the same magistrate interaction effects as are used to instrument for pretrial detention. This dummy will be correlated with pretrial detention, since the call-in requirement is a type of release. As such, a reduction in the

coefficients on pretrial detention would not be surprising. However the coefficients on pretrial detention do not change considerably in magnitude with the addition of these controls, suggesting that the estimated impacts of pretrial detention on case outcomes is not caused by variation in the call-in requirement.

7 Subgroup effects

In Table 7 I show results for misdemeanors and felonies using both IV and OLS techniques.[26][27] The IV effect sizes of the felony sample are similar in magnitude to the full sample, but are noisy. The IV effects among misdemeanors are more precisely measured and are slightly larger than the full sample estimates, especially in relation to the means of the dependent variables. In fact, pretrial detention among misdemeanor defendants leads to a statistically significant increase in all outcomes. The effects on punishment are particularly large: those detained will be 7.6 percentage points more likely to receive a sentence of incarceration over a mean 16% incarceration rate. While the expected increase in sentence length is only a month or two, this represents more than a 100% increase relative to the mean. The large incarceration effects among misdemeanor defendants may be partly explained by defendants who receive a sentence of "time-served", which is more common among misdemeanors. Using alternative definitions of sentence length in which time spent detained pretrial is subtracted from the incarceration sentence, pretrial detention is estimated to lead to a 38 day increase in the maximum days and an 11 day increase in the minimum days.

Figure 4 shows how the impacts on conviction vary across offense. The top panel shows OLS results for each subgroup of defendants facing the charge shown on the left. The dot is the coefficient and the line represents the 95% confidence interval. The bottom panel is similar to the top, except the jackknife IV method (using only the 8 magistrate dummies, no interactions) is used. The IV results are included for completeness, however the wide confidence intervals preclude meaningful inference. The subgroup IV results with the widest intervals were omitted for visual clarity. The OLS results are much more precisely estimated and the effects vary widely by offense type. While OLS results may exhibit bias, it is unlikely that the bias for each subgroup would exactly cancel out the heterogeneity in effect size.

Several explanations are consistent with the variation in effect sizes shown in the OLS regressions. Generally, effect sizes appear larger among more serious crimes, but there are exceptions. Selling drugs is considered a serious crime in Philadelphia, as

[26]The felony sample is defined as those who were charged with at least one felony at the time of the bail hearing; many of these had their charges downgraded to misdemeanors only by the time of the arraignment.

[27]The IV specifications allow the magistrate preferences to vary across time and across defendant characteristics, as shown in Column 6 of Table 3.

is illegal firearm possession. The effect sizes are relatively small for these offenses. Conversely, simple assault is a less serious crime, but the effect size is large for this category. Another potential explanation has to do with the strength of the evidence that tends to be available in each type of case. Evidence can be difficult to refute in certain types of crimes, generally those in which the defendant is caught in the illegal act: drug possession/sale, DUI, illegal firearm possession. In other types of crimes, the inculpatory evidence is weaker. It's possible that there is less room for extra-legal factors such as detention status to influence case outcomes when the evidence is strong than in cases where the evidence is more contestable. When the prosecution's evidence is weak the defendant's success depends more on her ability to gather exculpatory evidence, confer with her lawyer, or engage in strategic delay tactics. These are all more difficult for those in jail. Further, pretrial detention may change the defendants' reference point so that incarceration is the default and freedom seen as a gain. Since weaker evidence cases will have higher variance in the outcome, risk aversion over gains may tilt the defendant towards pleading guilty.

I develop two measures of the strength of the evidence that tends to be available in different types of cases. The first measure is a survey of Philadelphia's criminal justice professionals, in which I ask them to rate the strength of evidence that is typical of different offense types. The second measure is the average conviction rate per offense type, with the assumption that offense types where the evidence tends to be strongest will have the highest rates of conviction. While the two methods vary somewhat in the ranking, the results are broadly similar. The offenses shown in Figure 4 are ordered by the average of the two rankings, with the strong-evidence cases on the top and the weak-evidence cases on the bottom. Indeed, effect sizes do appear generally larger among weaker-evidence offense types. While suggestive, more research is necessary to understand why pretrial detention affects case outcomes more in certain types of cases than others.

Tables 1C, 1D, and 1E in the Appendix show IV results for blacks, whites, young defendants, older defendants, those with one or no prior arrests, and those with more extensive criminal history. There is suggestive evidence that effect sizes are slightly large for those with limited prior history, particularly with reference to the means of the dependent variables, but the confidence intervals are too large to draw definitive conclusions. The effect sizes do not appear to differ substantially across the age or race of the defendant.

8 Socio-economic disparities

The results shown in the previous two sections demonstrate that pretrial detention has serious consequences beyond simply the loss of freedom during the pretrial period. This is particularly concerning if poor people and minorities are detained at a disproportionate rate. The Department of Justice recently filed an amicus brief stating that money bail which does not take ability to pay into account violates the Equal Protection Clause of the Fourteenth Amendment.[28] If magistrates were taking ability to pay into account as they set bail we would expect bail to be lower for low-income defendants. To the contrary, I find that defendants from low-income neighborhoods have bail set at the same level as those from wealthier neighborhoods with similar charges and criminal history. Despite similar levels of bail, they are detained at higher rates. The evidence suggests that the current usage of money bail to determine release generates socio-economic disparities in pretrial detention, which are carried forward into disparities in conviction and incarceration.

Column 1 of Table 8 tests for socio-economic disparities in the amount of bail set. The log of the bail amount (plus one) is regressed on a dummy which is equal to one if the average income of the defendant's zip code is in the poorest quintile, and a dummy for being African-American. Zip code information is missing for some defendants, these are omitted from the sample. Detailed controls for offense, criminal history, age and gender are included in the OLS regression. There is no evidence that those from low-income neighborhoods have bail set any differently from those from wealthier neighborhoods, once offense and criminal history have been accounted for. While African-Americans have bail set a little higher than other races, the difference is relatively small: about three percent. A three percent increase in the bail amount predicts only a .18% increase in the likelihood of being detained pretrial.[29] Columns 2-4 regress a dummy for being detained pretrial on the indicator for living in low-income neighborhood and being African-American. African-Americans are about 4 percentage points more likely to be detained pretrial. This is a vastly larger difference in the detention rate than is predicted by the slight increase in the bail amount.[30] Since the average detention rate is 41%, this translates into a 10% increase over the mean. Those from low income neighborhoods are 2.7 percentage points more likely to be detained, a 7% increase over the mean.

These results suggest that the use of money bail increases the rate at which African-Americans and the poor are detained pretrial. While those from low-income zip codes

[28] Walker v. Calhoun, 2016

[29] A regression of pretrial detention on the log bail amount yields a coefficient of 0.06, which is stable to the inclusion of controls. Thus an increase of .03 in the log bail amount would predict a 0.0018 increase in detention.

[30] Controlling for the bail amount brings the race disparities down to 3.6%.

have bail set at the same rate as wealthier defendants, they are 7% more likely to be detained than those from wealthier neighborhoods, presumably because they are less likely to be able to afford the amount of bail that's been set. While African-Americans have bail set only slightly higher than other races, they are 10% more likely to be detained, again likely because, on average, they have lower income and wealth.

Upstream disparities in an influential stage of the criminal justice proceeding will result in downstream disparities in conviction, plea bargaining, court fees and incarceration. Disparities in incarceration pose a particular concern, both because of the high cost to society and the high personal costs. The results presented in Table 4 show that pretrial detention results in a 124 day (42%) increase in the maximum incarceration sentence. The final two columns of Table 8 shed light on the extent to which disparities in detention rates affect disparities in the length of the incarceration sentence.

Column 5 of Table 8 regresses the maximum days of the incarceration sentence on the dummies for being African American and living in a low-income zip code. Detailed controls for offense, criminal history, age, gender and time are included. After accounting for all these factors, differences in sentences remain. Those from low income zip codes receive sentences that are 19 days longer and African-Americans receive sentences that are 14 days longer. Again, these average differences in sentence length include zeros for people who did not get incarceration sentences, pulling the estimates lower than they would be if they included only those who received an incarceration sentence. Conditional on receiving an incarceration sentence, the sentence premium is about 60 more days for African Americans and 36 more days for those from low-income zip codes. I focus on the unconditional difference in sentence length since this estimates the joint impact that race has on the likelihood of being convicted and on the length of the sentence, conditional on being convicted.

Column 6 of Table 8 is identical to Column 5, except that controls for pretrial detention status are added. The sentence differentials decline to 16 days for those from low income zip codes and 8.5 days for African Americans. That's equivalent to a 16% decrease in the sentence differential across neighborhood income, and a 40% decrease in the sentence differential across race. While racial bias may explain some of the sentence differential, a money bail system combined with unequal distribution of wealth explains a considerable fraction of the race gap in sentence lengths.

9 Conclusion

Right now there is a wave of momentum in bail reform that dwarfs any seen in decades. In the last several years, pretrial reform has been committed to or implemented in New Jersey, Kentucky, Colorado, Maryland, New Mexico, Connecticut,

Chicago and New York City. 26 cities are implementing new pretrial risk assessment regimes in partnership with the Laura and John Arnold Foundation and 20 cities are developing pretrial reform proposals with a $75 million fund from the MacArthur Foundation. Yet despite all this activity, research on the pretrial period is limited.

Using a natural experiment in Philadelphia where the likelihood of being detained pretrial is exogenously affected by the magistrate who presides over the bail hearing, I find that pretrial detention leads to an increase in the likelihood of being convicted, mostly by increasing the likelihood that defendants, who otherwise would have been acquitted or had their charges dropped, plead guilty. Pretrial detainees will owe more in court fees and receive longer incarceration sentences than similarly situated releasees.

I find no evidence that ability to pay is taken into account in the setting of bail, despite the constitutional requirements of Equal Protection. Those from low income neighborhoods have bail set at the exact same amount as those from wealthier neighborhoods with the same charge and criminal history. Yet those from low income neighborhoods are more likely to be detained, presumably because they are less able to afford that bail. African Americans are also more likely to be detained than non-black defendants with the same charge and criminal history, despite bail amounts which differ only trivially. These disparities in detention rates translate into disparities in conviction rates, courtroom debt, and incarceration.

The results from this paper suggest that Philadelphia should reform its pretrial system to reduce socio-economic disparities in detention. This could be accomplished through a reduced reliance on money bail, increased income verification, increased use of risk assessment instruments, and increased training for the magistrates. While effect sizes may differ across jurisdictions, there is no reason to believe that the impact pretrial detention has on case outcomes is unique to Philadelphia. Other jurisdictions that use money bail to determine who is released or detained pretrial are likely to promulgate socio-economic disparities in case outcomes as well.

Second, given the downstream consequences of pretrial detention, greater care should be given to the process of determining who is released and who is detained. Bail hearings that last a minute long, occur over videoconference, and have no lawyers present are unlikely to be effective in determining which defendants pose a high risk to society, and which can be safely released. Currently, there is no guaranteed right to representation at the bail hearing, and jurisdictions differ as to whether a defender is provided. Given the high stakes of the bail decision, a defendant should have the right to counsel in this critical juncture.[31] A hearing in which both sides have a chance to present their argument, and where more than a minute is given to evaluate the evidence

[31]Philadelphia is currently implementing reforms to provide a public defender to confer with the client before the bail hearing, and to present any mitigating evidence to the magistrate.

and the individual circumstances of the case, will reduce the arbitrary component of the release decision.

References

Abrams, David S. and Chris Rohlfs, "Optimal Bail and the Value of Freedom: Evidence from the Philadelphia Bail Experiment," *Economic Inquiry*, 2011, *49* (3), 750–770.

Aizer, Anna and Joseph J. Jr. Doyle, "Juvenile Incarceration, Human Caoital and Future Crime: Evidence from Randomly-Assigned Judges," *National Bureau of Economic Research Working Paper*, 2009.

Allen, Ronald J. and Larry Laudan, "Deadly Dilemmas II: Bail and Crime," *Northwestern Public Law Research Paper*, December 2008, (08-44).

Anderson, James M. and Paul Heaton, "How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes," *Yale Law Journal*, 2012, *122* (1).

Ares, Charles E., Anne Rankin, and Herbert Sturtz, "The Manhattan Bail Experiment: An Interim Report on the Use of Pretrial Parole," *New York University Law Review*, 1963, *38.*

Ayres, Ian and Joel Waldfogel, "A Market Test for Race Discrimination in Bail Setting," *Stanford Law Review*, May 1994, *46*, 987–1047.

Barry, Justin, Lisa Lindsay, Tara Begley, Darren Edwards, and Carolyn Cardoret, "Annual Report," Criminal Court of the City of New York 2012.

Bibas, Stephanos, "Plea Bargaining Outside the Shadow of the Trial," *Harvard Law Review*, June 2004, *117* (8).

Clark, John, Daniel Peterca, and Stuart Cameron, "Assessment of Pretrial Services in Philadelphia," Technical Report, Pretrial Justice Institute February 2011.

Cohen, Thomas H. and Brian A. Reaves, "Pre-Trial Release of Felony Defendants in State Court," Technical Report, Bureau of Justice Statistics Special Report November 2007.

Denvir, Daniel, "Philly courts pursue old debt, might jail debtors," The Council of State Governments 2012.

Devers, Lindsey, "Plea and Charge Bargaining: Research Summary," BJA Report January 2011.

DiTella, Rafael and Ernesto Schargrodsky, "Criminal Recidivism after Prison and Electronic Monitoring," *Journal of Political Economy*, 2013, *121* (1), 28 – 73.

Dobbie, Will, Jacob Goldin, and Crystal Yang, "The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges," NBER Working Paper July 2016.

Free, Marvin D. Jr., "Bail and Pretrial Release Decisions," *Journal of Ethnicity in Criminal Justice*, 2004, *2* (4), 23–44.

Goldkamp, John S., "The Effects of Detention on Judicial Decisions: A Closer Look," *The Justice System Journal*, 1980, *5* (3), 234–257.

Gupta, Arpit, Christopher Hansman, and Ethan Frenchman, "The Heavy Costs of High Bail: Evidence From Judge Randomization," Working Paper August 2016.

Heaton, Paul, Sandra Mayson, and Megan Stevenson, "The Downstream Consequences of Misdemeanor Pretrial Detention," Working Paper July 2016.

Ingram, Duane C., "The State of Black Philadelphia," Urban League of Philadelphia 2007.

James, Doris J., "Profile of Jail Inmates, 2002," Bureau of Justice Statistics July 2004.

Kling, Jeffrey R., "Incarceration Length, Employment, and Earnings," *American Economic Review*, June 2006, *96* (3), 863–876.

Leslie, Emily and Nolan G. Pope, "The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from NYC Arraignments," Working Paper July 2016.

Loeffler, Charles E., "Does Imprisonment Alter the Life Course? Evidence on Crime and Employment From a Natural Experiment," *Criminology*, 2013, *51* (1), 137–166.

Lowenkamp, Christopher T., Marie VanNostrand, and Alexander Holsinger, "Investigating the Impact of Pretrial Detention on Sentencing Outcomes," Technical Report, Laura and John Arnold Foundation 2013.

Minton, Todd D. and Zhen Zeng, "Jail Inmates at Midyear 2014," Technical Report, Bureau of Justice Statistics Bulletin June 2015.

Mueller-Smith, Michael, "The Criminal and Labor Market Impacts of Incarceration: Identifying Mechanisms and Estimating Household Spillovers," Working Paper August 2015.

Oleson, J.C., Christopher T. Lowenkamp, Timothy P. Cadigan, Marie VanNostrand, and John Wooldredge, "The Effect of Pretrial Detention on Sentencing in Two Federal Districts," *Justice Quarterly*, 2014.

Phillips, Mary T., "Pretrial Detention and Case Outcomes, Part 1: Nonfelony Cases," Final Report, New York Criminal Justice Agency, Inc. November 2007.

_ , "Bail, Detention and Felony Case Outcomes," Research Brief, New York Criminal Justice Agency, Inc. September 2008.

PJI, "Pretrial Justice in America: A Survey of County Pretrial Release Policies, Practices and Outcomes," Pretrial Justice Institute 2009.

Rankin, Anne, "The Effect of Pretrial Detention," *New York University Law Review*, 1964, *39.*

Sacks, Meghan and Alissa R. Ackerman, "Pretrial detention and guilty pleas: if they cannot afford bail they must be guilty," *Criminal Justice Studies*, 2012, *25* (3), 265–278.

Shubik-Richards, Claire and Don Stemen, "Philadelphia's Crowded, Costly Jails: The Search for Safe Solutions," Technical Report, Pew Charitable Trusts Philadelphia Research Inititiative May 2010.

Staff, Injustice Watch, "Bent on Bail," Injustice Watch 2016.

Tartaro, Christine and Christopher M. Sedelmaier, "A tale of two counties: the impact of pretrial release, race, and ethnicity upon sentencing decisions," *Criminal Justice Studies*, 2009, *22* (2), 203–221.

VandeWalle, Gerald, "State of the Judiciary Address," January 2013. Speech presented to the 63rd Legislative Assembly of North Dakota [Accessed: Nov. 4, 2016].

Williams, Marian R., "The Effect of Pretrial Detention on Imprisonment Decisions," *Criminal Justice Review*, 2003, *28* (2), 299–316.

Table 1: Summary statistics

	Released	Detained	Total
Age	32.8	32.0	32.5
Male	0.79	0.88	0.83
Caucasian	0.30	0.26	0.28
African-American	0.52	0.65	0.57
Missing race	0.15	0.06	0.11
Charged with selling drugs	0.12	0.13	0.12
Charged with robbery	0.02	0.14	0.07
Charged with drug possession	0.18	0.06	0.13
Charged with aggravated assault	0.07	0.11	0.09
Charged with 1st offense DUI	0.10	0.02	0.06
Number of prior cases	3.90	6.28	4.88
Has felony charge at time of bail hearing	0.36	0.72	0.51
Case proceeds to felony court	0.19	0.40	0.28
Number of charges per case	4.98	6.56	5.63
Bail	$3,413	$61,974	$26,844
Non-financial release	0.54	0.01	0.33
Detained>3 days	0	1	0.41
Detained at time of disposition	0	0.60	0.25
All charges dropped or dismissed	0.48	0.48	0.48
Case went to trial	0.32	0.19	0.27
Not guilty on all charges	0.03	0.03	0.03
Guilty of at least one charge	0.49	0.49	0.49
Pled guilty to at least one charge	0.21	0.33	0.26
Court fees charged	$387	$206	$312
Sentenced to incarceration	0.18	0.32	0.24
Maximum days of incarceration sentence	94	576	292
Minimum days of incarceration before parole eligibility	39	322	155
Observations	195,340	136,631	331,971
Conditional summary statistics			
Court fees charged (cond. on conviction)	$409	$753	$611
Sentenced to incarceration (cond. on conviction)	0.46	0.67	0.49
Max. days of incarc. sentence (cond. on incarceration)	529	1736	1213
Min. days before parole eligibility (cond. on incarceration)	220	971	645

Note: "Released" is defined as released from pretrial custody within three days after the bail hearing, and "Detained" is defined as detained pretrial for at least four days. The statistic shown is the mean and, unless otherwise indicated, variables are dummies where 1 indicates the presence of a characteristic. Age is measured in years, those marked "Number..." are count variables, and those expressed in dollar amounts are currency. The sentence is coded as zero if the defendant did not receive an incarceration sentence. The summary statistics in the bottom panel are limited to those who are convicted (top two rows) or receive an incarceration sentence (bottom two rows).

Table 2: Randomization test

	(1) OLS	(2) Simple IV	(3) Interacted IV
White	-0.0399****	0.0834	
	(0.00158)	(0.0631)	
Male	0.0905****	-0.00484	
	(0.00126)	-0.00484	
At least one prior charge	0.140****	-0.0485	
	(0.00143)	(0.0600)	
Robbery	0.127****	0.00994	
	(0.00101)	(0.0364)	
First time DUI	-0.0833****	-0.0429	
	(0.000760)	(0.0335)	
Selling drugs	0.00634****	0.0170	
	(0.00117)	(0.0466)	
Aggravated assault	0.0444****	-0.00302	
	(0.00105)	(0.0395)	
Age	-0.901****	-1.700	0.377
	(0.0398)	(1.574)	(0.602)
Prior felony arrests	0.819****	0.559**	-0.0623
	(0.00772)	(0.274)	(0.108)
Prior convictions	0.779****	-0.127	-0.0796
	(0.00902)	(0.337)	(0.128)
Offense gravity score	9.107****	-0.675	0.158
	(0.0422)	(1.673)	(0.365)
Number felony charges	3.193****	-0.494	-0.0167
	(0.0168)	(0.673)	(0.184)
Rape	0.0156****	-0.0104	0.00116
	(0.000372)	(0.0128)	(0.00457)
Resisting arrest	0.0108****	-0.0273	-0.00407
	(0.000591)	(0.0225)	(0.00878)
Disorderly conduct	-0.00712****	0.00861	0.00254
	(0.000420)	(0.0171)	(0.00274)
Graveyard shift	0.0311****	0.0753	0.00799
	(0.00165)	(0.0650)	(0.0284)
Weekend shift	-0.000252	0.0262	0.0197*
	(0.000635)	(0.0252)	(0.0113)
Observations	331971	331971	331971

Heteroskedastic-robust standard errors in parentheses

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$, **** $p < 0.001$

Note: The dependent variables are shown on the left hand side. Column 1 shows the coefficients on pretrial detention from an OLS regression. Columns 2 and 3 show the coefficients on the instrument for pretrial detention in a 2SLS regression. The first stage instruments in Column 2 are just the magistrate dummies; in Column 3 the magistrate dummies are interacted with three time periods, offense, criminal history and demographics. The only controls in these regressions are those for the year and season of the bail hearing.

Table 3: How does pretrial detention affect conviction rates and guilty pleas?

Panel A: Full sample (IV)	Conviction (mean dep. var.= 0.49)					
	(1)	(2)	(3)	(4)	(5)	(6)
Pretrial detention	0.167**	0.180***	0.282***	0.119***	0.0907**	0.0620**
	(0.0736)	(0.0655)	(0.0868)	(0.0412)	(0.0364)	(0.0291)
						{0.016}
						((0.032))
Panel B: Full sample (IV)	Guilty pleas (mean dep. var.=0.25)					
	(1)	(2)	(3)	(4)	(5)	(6)
Pretrial detention	0.124**	0.174***	0.177**	0.102***	0.0536*	0.0469*
	(0.0619)	(0.0563)	(0.0776)	(0.0366)	(0.0324)	(0.0262)
						{0.052}
						((0.073))
Magistrate X 3 time periods		Y	Y	Y	Y	Y
Magistrate X top 5 crimes				Y	Y	
Magistrate X crim. history					Y	Y
Magistrate X demographics					Y	Y
Magistrate X top 17 crimes						Y
Time controls	Y	Y	Y	Y	Y	Y
Covariates			Y	Y	Y	Y
Observations	331971	331971	331971	331971	331971	331971
First stage t-stat.	15.56	17.59	20.43	33.25	36.75	44.64
Mean indep. var	0.41	0.41	0.41	0.41	0.41	0.41

Heteroskedastic robust standard errors in parentheses

Empirical p values in curly brackets

Non-parametric p values in double parentheses

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$, **** $p < 0.001$

Note: The dependent variable in Panels A and B respectively are dummies for being convicted on at least one charge and pleading guilty to at least one charge. The exogenous variables in the first column are the eight magistrate dummies; in the subsequent columns they include interactions between the magistrate dummies and three time period fixed effects, the five most common crime types, a variety of criminal history variables, defendant demographics, and the remainder of the 17 most common crime types. The first two columns control only for the time and date of the bail hearing, all subsequent columns include the full set of controls for offense, criminal history and demographics as described in Section 5. Empirical p-values as derived from a permutation test are shown in curly brackets and parametrically estimated p-values are shown in double parentheses. The t statistic on the first stage of the jackknife IV are shown in the subpanel, as are the means of the independent variables. A linear jackknife instrumental variables regression is used. The R^2 is not reported due to difficulties of interpreting this statistic in an IV regression.

Table 4: Full sample results - jackknife IV and OLS

	(1) Conv-iction	(2) Guilty plea	(3) Court Fees	(4) Incarc-eration	(5) Max days	(6) Min days
Panel A: Full sample (IV)						
Pretrial detention	0.0620**	0.0469*	129.5****	0.0186	124.7*	136.4**
	(0.0291)	(0.0262)	(33.26)	(0.0249)	(74.40)	(62.61)
	{0.016 }	{0.052}	{0.000}	{0.466}	{0.054}	{0.008}
	((0.032))	((0.073))	((0.000))	((0.458))	((0.095))	((0.030))
Panel B: Full sample (OLS with full controls)						
Pretrial detention	0.0333****	0.0566****	-103.5****	0.0976****	133.7****	67.78****
	(0.00197)	(0.00181)	(2.618)	(0.00166)	(3.463)	(2.539)
Panel C: Full sample (OLS only time controls)						
Pretrial detention	0.000163	0.106****	-180.7****	0.154****	480.0****	281.8****
	(0.00176)	(0.00156)	(2.078)	(0.00154)	(5.766)	(4.843)
Observations	331971	331971	331971	331971	331971	331971
First stage t	44.64	44.64	44.64	44.64	44.64	44.64
Mean dep. var.	0.49	0.26	312	0.24	292	155

Heteroskedastic robust standard errors in parentheses

Empirical p values in curly brackets

Non-parametric p values in double parentheses

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$, **** $p < 0.001$

Note: This table shows how pretrial detention affects various case outcomes using both a jackknife IV regression (Panel A), an OLS regression with a full set of controls (Panel B), and an OLS regression with only time controls. The outcome variables are dummies for being convicted/pleading guilty, total non-bail court fees in dollars, a dummy for whether or not the defendant receives an incarceration sentence, the maximum days of that incarceration sentence and the minimum days the defendant must serve before being eligible for parole. In all of the IV specifications magistrate preferences are allowed to vary across three time periods and according to offense, criminal history and demographics of defendants. The t statistic on the first stage of the jackknife IV are shown in the sub-panel, as are the means of the dependent variables. All regressions include the full set of controls as described in Section 5.

Table 5: Robustness checks

Panel A: Instrumenting for public defender (Full sample, IV)						
	(1) Conv-iction	(2) Guilty plea	(3) Court Fees	(4) Incarc-eration	(5) Max days	(6) Min days
Pretrial detention	0.0625**	0.0470*	120.5****	0.0230	147.5*	149.0**
	(0.0304)	(0.0271)	(33.17)	(0.0255)	(79.02)	(66.97)
Public defender	0.00339	0.00115	-67.48	0.0329	169.6	93.54
	(0.0539)	(0.0481)	(72.23)	(0.0477)	(197.2)	(170.7)
Panel B: Controlling for public defender (Full sample, IV)						
	(1) Conv-iction	(2) Guilty plea	(3) Court Fees	(4) Incarc-eration	(5) Max days	(6) Min days
Pretrial detention	0.0688**	0.0520**	126.0****	0.0246	119.9	131.9**
	(0.0285)	(0.0257)	(33.18)	(0.0246)	(73.50)	(61.78)
Public defender	0.0394****	0.0292****	-36.43****	0.0421****	11.65	-4.382
	(0.00366)	(0.00330)	(4.531)	(0.00314)	(10.03)	(8.544)
Observations	331971	331971	331971	331971	331971	331971
Mean dep. var.	0.49	0.26	312	0.24	292	155
First stage t on detention	44.64	44.64	44.64	44.64	44.64	44.64
First stage t on pub. def.	31.08	31.08	31.08	31.08	31.08	31.08

Standard errors in parentheses

Heteroskedastic-Robust Standard Errors

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$, **** $p < 0.001$

Note: This table presents robustness checks for the main results. Panel A instruments for two endogenous variables: a dummy for having a public defender and the pretrial detention dummy. Panel B includes adds the controls for having a public defender into the second stage. The outcome variables are dummies for being convicted/pleading guilty, total non-bail court fees in dollars, receiving an incarceration sentence, the maximum days of that incarceration sentence and the minimum days the defendant must serve before being eligible for parole. In all specifications magistrate preferences are allowed to vary across three time periods and according to offense, criminal history and demographics of defendants. The t statistics on the instrument for pretrial detention, the t statistic on the instrument for public defense, and the means of the dependent variables are shown in the subpanel. All regressions include the full set of controls as described in Section 5.

Table 6: Impacts on crime

	(1) Charge within 6 mos.	(2) Violent charge within 6 mos.	(3) Charge after first year	(4) Charge in 2nd-3rd yr	(5) Charge in 4th-5th yr
Panel A: Full sample (IV)					
Pretrial detention	-0.129****	-0.0581****	-0.0440	-0.0531*	-0.0290
	(0.0256)	(0.0146)	(0.0286)	(0.0316)	(0.0355)
Panel B: Full sample (OLS with full controls)					
Pretrial detention	-0.0684****	-0.00547****	0.0109****	0.000959	0.0206****
	(0.00166)	(0.000939)	(0.00194)	(0.00212)	(0.00251)
Observations	331971	331971	331971	279941	182460
First stage t	44.64	44.64	44.64	42.12	38.36
Mean dep. var.	0.195	0.049	.507	0.361	0.293

Standard errors in parentheses

Heteroskedastic-Robust Standard Errors

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$, **** $p < 0.001$

Note: This table shows how pretrial detention affects future crime using both a jackknife IV regression (Panel A) and an OLS regression with a full set of controls (Panel B). The outcome variables are dummies for being charged with a new crime during the six months after the bail hearing, charged with a violent crime during the six months after the bail hearing, charged with a new crime at any point after the first year after the bail hearing, charged with a new crime within the second or third year after the bail hearing, and charged with a new crime in the fourth or fifth year after the bail hearing. In all of the IV specifications magistrate preferences are allowed to vary across three time periods and according to offense, criminal history and demographics of defendants. The t-statistic on the first stage of the jackknife IV is shown in the sub-panel, as are the means of the dependent variables. All regressions include the full set of controls as described in Section 5.

Table 7: Comparing results for misdemeanors and felonies

	(1) Conv-iction	(2) Guilty plea	(3) Court Fees	(4) Incarc-eration	(5) Max days	(6) Min days
Panel A: Misdemeanors (IV)						
Pretrial detention	0.0766**	0.0577*	77.55**	0.0759***	55.82**	26.62**
	(0.0363)	(0.0295)	(38.03)	(0.0281)	(21.95)	(12.09)
Panel B: Misdemeanors (OLS with controls)						
Pretrial detention	0.0148****	0.0523****	-15.71****	0.0490****	38.42****	19.25****
	(0.00298)	(0.00249)	(3.083)	(0.00213)	(2.110)	(1.401)
Observations	168734	168734	168734	168734	163125	163125
First stage t	37.91	37.91	37.91	37.91	37.91	37.91
Mean dep. var.	0.50	0.16	$351	0.16	48	18
Mean indep. var.	0.23	0.23	0.23	0.23	0.23	0.23
Panel C: Felonies (IV)						
Pretrial detention	0.0513	0.0391	139.3***	-0.0257	182.3	207.0*
	(0.0434)	(0.0414)	(53.69)	(0.0398)	(139.9)	(119.3)
Panel D: Felonies (OLS with controls)						
Pretrial detention	0.0512****	0.0589****	-172.4****	0.131****	188.2****	93.83****
	(0.00267)	(0.00260)	(4.016)	(0.00245)	(5.662)	(4.120)
Observations	168735	168735	168735	168735	168735	168735
First stage t	31.91	31.91	31.91	31.91	31.91	31.91
Mean dep. var.	0.47	0.35	$274	0.32	528	288
Mean indep. var.	0.58	0.58	0.58	0.58	0.58	0.58

Standard errors in parentheses

Heteroskedastic-Robust Standard Errors

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$, **** $p < 0.001$

Note: This table shows effect sizes in misdemeanor crimes (Panels A and B) and felonies (Panel C and D). The outcome variables are dummies for being convicted/pleading guilty, total non-bail court fees in dollars, receiving an incarceration sentence, the maximum days of that incarceration sentence and the minimum days the defendant must serve before being eligible for parole. In all IV specifications magistrate preferences are allowed to vary across three time periods and according to offense, criminal history and demographics of defendants. The t statistic on the first stage of the jackknife IV is shown in the sub-panel, as are the means of the dependent and independent variables. All regressions include the full set of controls as described in Section 5.

Table 8: Socio-economic disparities in pretrial detention rates

	(1)	(2)	(3)	(4)	(5)	(6)
	Log bail	Detained	Detained	Detained	Max days	Max days
Low-income zip code	-0.00861	0.0227****	0.0268****		19.09****	15.97***
	(0.0131)	(0.00183)	(0.00182)		(5.639)	(5.638)
African-American	0.0385****	0.0415****		0.0432****	14.10****	8.539**
	(0.0116)	(0.00162)		(0.00161)	(3.943)	(3.936)
Pretrial detention						134.7****
						(3.582)
Observations	289581	295008	295008	295008	295007	295007
Mean dep. var.	5.96	.40	.40	.40	283	283
R^2	0.452	0.313	0.312	0.313	0.220	0.222

Standard errors in parentheses

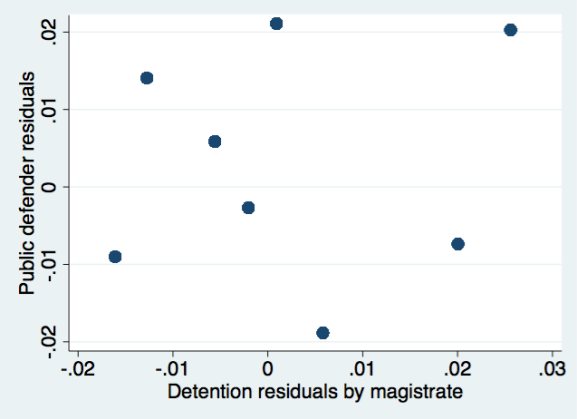
Heteroskedastic-Robust Standard Errors

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$, **** $p < 0.001$

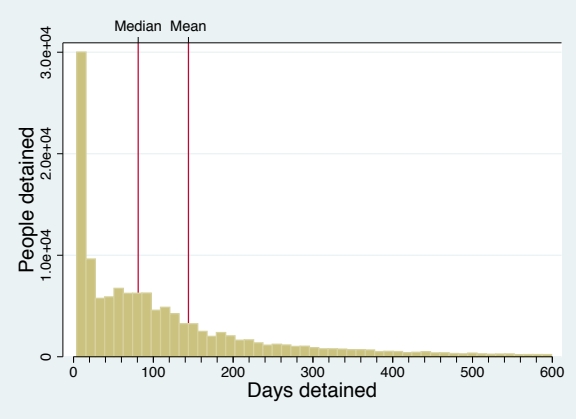
Note: The dependent variable in Column 1 is the log bail amount (plus one, to account for zeros). The dependant variable in Columns 2-4 is a dummy for being detained pretrial. The dependent variable in Columns 5 and 6 is the maximum days of the incarceration sentence. All regressions include extensive controls describing the offense, the criminal history, and the age of the defendant, as well as controls for the time and date of the bail hearing.

Figure 1: Descriptive graphs

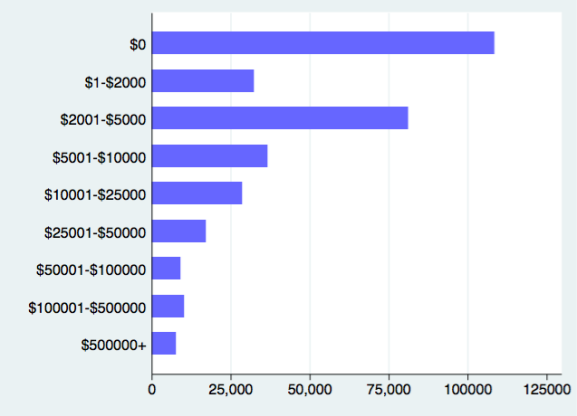
(a) Magistrate leniency and public defense



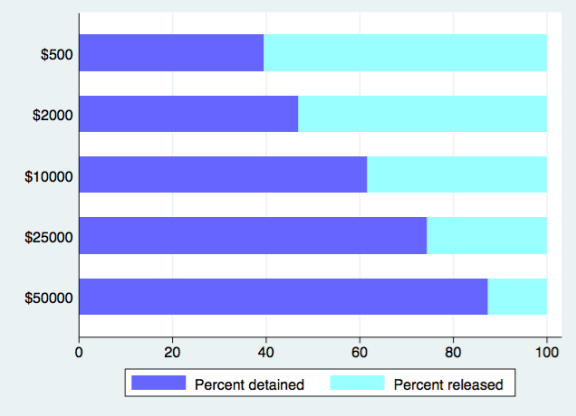
(b) Days detained pretrial, conditional on being detained more than three days



(c) Distribution of bail



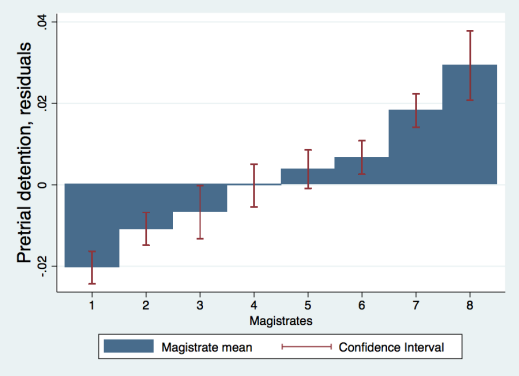
(d) Bail amounts and detention status



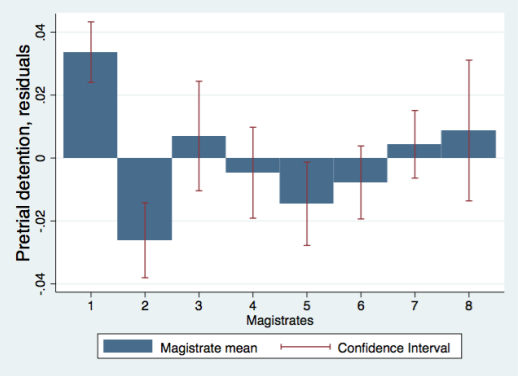
Note: Figure 1a shows the relationship between pretrial detention and having a public defender. Each dot represents the average per magistrate. Both pretrial detention and public defense have been residualized against time controls to account for the fact that some magistrates work in different time periods. Figure 1b shows the average number of days detained for those who are detained for more than three days after the bail hearing. Figure 1c shows the distribution of bail amounts. The x axis shows the number of defendants who have bail set within each interval. Figure 1d shows the percentage released and detained at a variety of bail levels among defendants who did not have a detainer placed on them (i.e. were free to leave if they posted bail).

Figure 2: Average detention rates by magistrate for different offense types

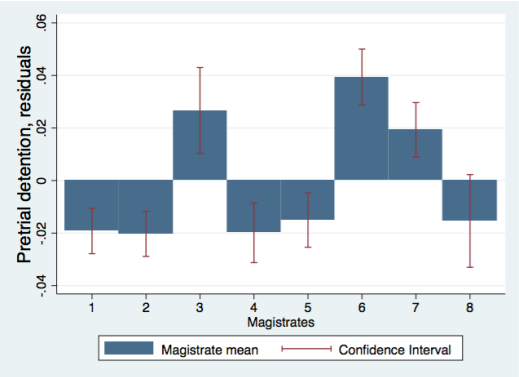
(a) All cases



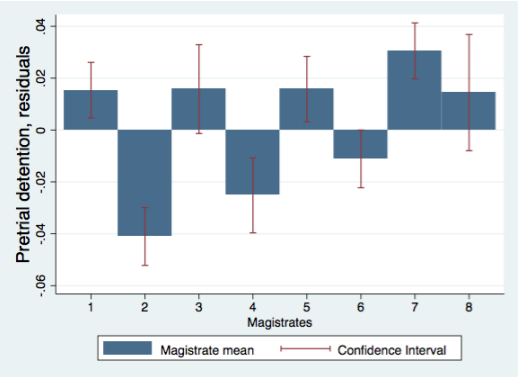
(b) Robbery



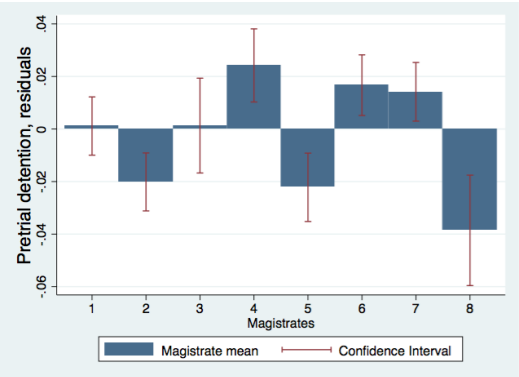
(c) DUI, 1st offense



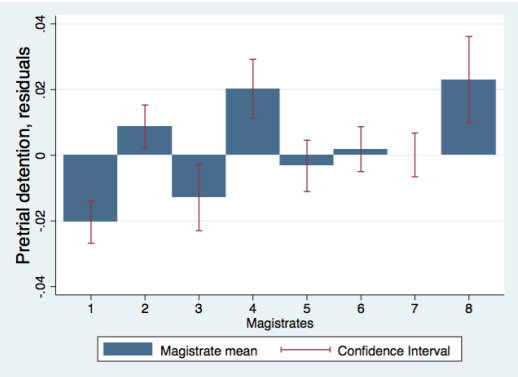
(d) Aggravated assault



(e) Drug selling



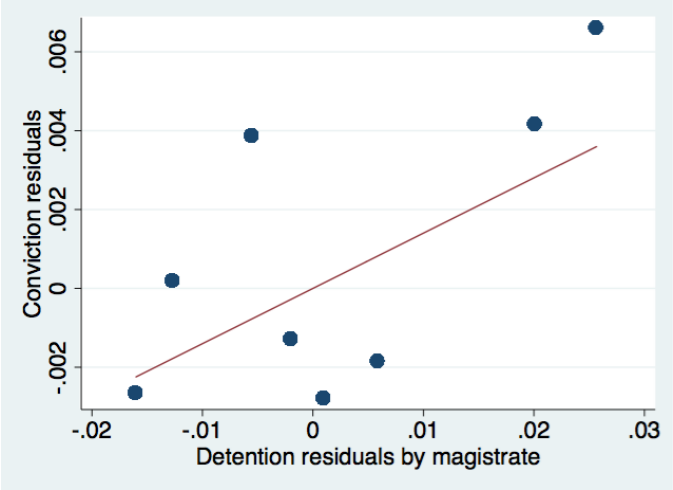
(f) Drug possession



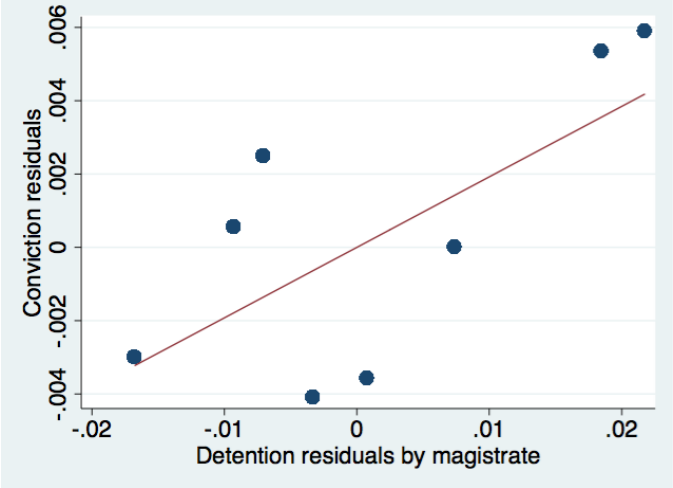
Note: This figure shows pretrial detention rates by magistrate over the whole sample (Figure 2a), and for the five most common offense categories (Figures 2b-f). The numbers 1 through 8 delineate the different magistrates. The y axes show the residuals from a regression of pretrial detention on time controls; each bar represents the per-magistrate average of the residuals. The error bars indicate the 95% confidence intervals for the mean. The numbering of the magistrates is consistent across all samples. The bar heights in Figures 2b-f are not expected to sum to the bar heights in Figure 2a, as not all offense categories are shown.

Figure 3: Visual IV

(a) Full sample – conviction rates and pretrial detention are residualized over time controls



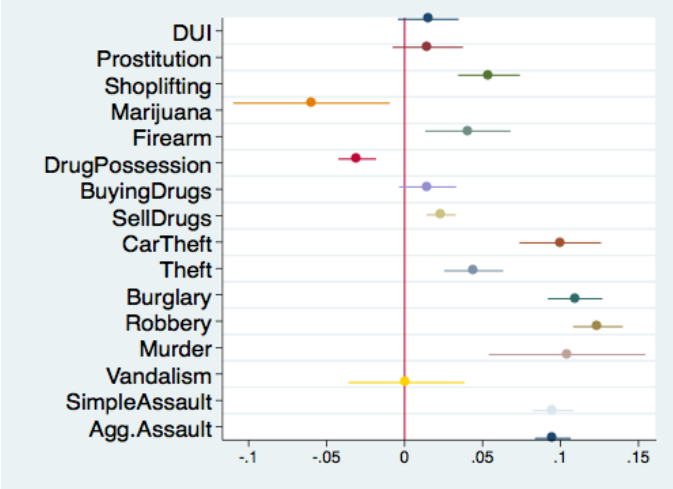
(b) Full sample – conviction rates and pretrial detention are residualized over time controls, offense, criminal history and demographics



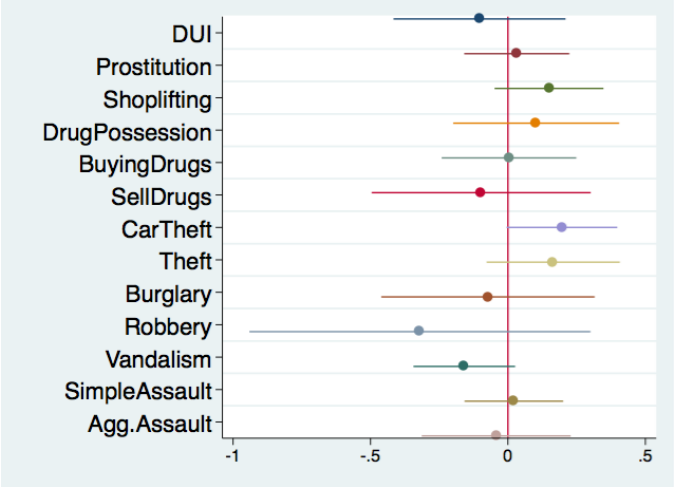
Note: The y and x axes in Figure 3a show the residuals from a regression of a dummy for conviction and pretrial detention (respectively) on controls for the time and date of the bail hearing. Figure 3b is the same, except conviction and detention have been residualized over offense, criminal history and demographic covariates as well as time controls. The circles in Figures 3a-b show the average detention and conviction residuals for each magistrate.

Figure 4: Effect sizes by offense

(a) OLS



(b) IV



Note: The above coefficient plots show the OLS and IV estimates of the impact pretrial detention has on conviction rates for different offenses, as labeled on the left. Each dot represents the estimated coefficient on pretrial detention, the line represents the 95% confidence interval. Murder, 2nd and 3rd degree illegal firearm charges, and possession of marijuana are left off of the IV plot since their wide confidence intervals make the other estimates hard to see.

Appendix

A Randomization test

For each of 70 covariates describing the offense, criminal history, and demographics of the defendant I run the following regression:

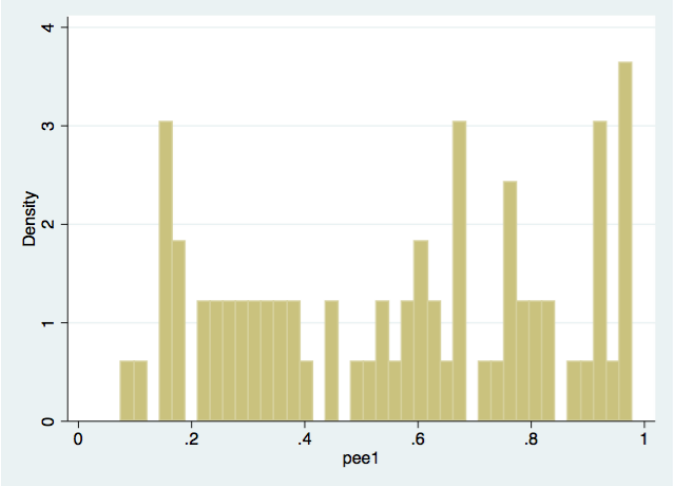
$$Cov_i = \alpha + Magistrate_i * \beta + Time_i * \psi + e_i$$

I collect and store the F statistic from a test of joint significance on β. I then build 500 'false' work schedules for the magistrates.[32] The false schedules follow parameters similar to the real schedules: each magistrate works five days on each shift, there are three shifts per day, and each magistrate works only one shift per day. Within these constraints, magistrates are randomly assigned to different shifts. With each of the false work schedules I regress each covariate on fixed effects for the magistrate predicted to work under the false schedule, again controlling for the time and date of the bail hearing. I collect and store the F statistic from the false-schedule magistrate fixed effects and use these to build an empirical distribution of the F statistic under five-day-per-shift work schedules. This F distribution represents the range of F values that are likely to be seen if there is no strategic behavior from defendants to be assigned a lenient magistrate. I then compare the F statistic from the real data to the empirical distribution of the F statistic. The fraction of false-schedule F statistics which are greater than the real F statistic is the empirical p value. The distribution of the empirical p values is shown in Figure 1A. They are evenly distributed between 0 and 1; if anything, the F statistics from the false-schedules are slightly larger, on average, than the F statistic from the real data.

Table 1A shows the real-data F statistics next to the empirical p values for three summary statistics: the predicted likelihood of pretrial detention, the predicted likelihood of pleading guilty, and the predicted likelihood of conviction. Each predicted likelihood is the fitted value from a regression of detention, pleading guilty, and conviction (respectively) on all of the rest of the covariates and time controls. In essence, they are a weighted average of the covariates that most strongly predict each outcome. The empirical p values suggest that there is no strategic behavior by defendants hoping to receive a lenient magistrate; the slight covariate imbalance across the magistrates is no more than would be expected by chance.

[32]The process is computationally expensive across which is why I only build 500 false-schedules.

Figure 1A: Empirical distribution of p values in permuted randomization test



Note: This figure shows a histogram of 'empirical p values' from a permutation test. The permutation test involves regressing various covariates on magistrate dummies under false work schedules. The F statistic on the magistrate dummies using the real data is compared to the distribution of F statistics on false-schedule magistrate dummies. The empirical p value is the fraction of the false-schedule F statistics that are greater than the true-schedule F statistic. The results for 70 covariates plus three summary statistics (the predicted likelihood of being detained, convicted and pleading guilty) are shown.

Table 1A: Permutation test for randomization

Summary statistics for defendant characteristics	F statistic	Empirical p value
Predicted likelihood of pretrial detention	2.50	0.670
Predicted likelihood of pleading guilty	3.29	0.267
Predicted likelihood of conviction	2.14	0.554

Note: The dependent variables in the left column are the predicted values from a regression of pretrial detention, pleading guilty, and conviction, respectively, on offense, criminal history, demographics and time controls. The middle column shows the F statistics in a test of joint significance of eight magistrate dummies. Controls for the time and date of the bail hearing are included in each regression. The numerator and denominator degrees of freedom are 7 and 331,946 respectively. The empirical p values are the fraction of 'false' F statistics larger than the true F statistic in a permutation test.

Table 1B: Alternative specifications

Panel A: The impacts of the bail amount on case outcomes (IV)						
	(1) Conv-iction	(2) Guilty plea	(3) Court Fees	(4) Incarc-eration	(5) Max days	(6) Min days
Bail (in thousands)	0.000532*	0.000368	0.879**	0.000457*	-0.242	-0.319
	(0.000281)	(0.000234)	(0.373)	(0.000254)	(1.916)	(1.775)
Observations	331971	331971	331971	331971	331971	331971
Panel B: The impacts of non-monetary release on case outcomes (IV)						
	(1) Conv-iction	(2) Guilty plea	(3) Court Fees	(4) Incarc-eration	(5) Max days	(6) Min days
Non-financial release	-0.0118	-0.00394	-113.1****	-0.00408	38.34	17.82
	(0.0148)	(0.0131)	(19.72)	(0.0131)	(26.36)	(21.04)
Observations	331971	331971	331971	331971	331971	331971
Panel C: Controlling for phone call-ins (IV)						
	(1) Conv-iction	(2) Guilty plea	(3) Court Fees	(4) Incarc-eration	(5) Max days	(6) Min days
Phone call-ins	-0.00840	0.0109	-18.41*	-0.0163**	5.470	21.35
	(0.0114)	(0.00949)	(10.78)	(0.00828)	(17.61)	(14.49)
Pretrial detention	0.0524	0.0594**	108.5***	-0.0000721	131.0	160.8**
	(0.0325)	(0.0291)	(37.51)	(0.0276)	(86.19)	(72.40)
Observations	331971	331971	331971	331971	331971	331971

Standard errors in parentheses

Heteroskedastic-Robust Standard Errors

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$, **** $p < 0.001$

Note: Panel A estimates the impact of the bail amount (in thousands of dollars) on case outcomes. Panel B estimates the impact of non-financial release on case outcomes. Panel C instruments for two endogenous variables: pretrial detention and a dummy which is equal to one if the defendant is given a non-monetary release with the condition of needing to make weekly or bi-weekly phone calls to an automated voice system. The outcome variables are dummies for being convicted/pleading guilty, total non-bail court fees in dollars, receiving an incarceration sentence, the maximum days of that incarceration sentence and the minimum days the defendant must serve before being eligible for parole. In all specifications magistrate preferences are allowed to vary across three time periods and according to offense, criminal history and demographics of defendants. All regressions include the full set of controls as described in Section 5.

Table 1C: Comparing results across defendant race

	(1) Conv-iction	(2) Guilty plea	(3) Court Fees	(4) Incarc-eration	(5) Max days	(6) Min days
Panel A: White defendants (IV)						
Pretrial detention	0.0802	0.0223	88.64	-0.0285	195.8	236.4**
	(0.0590)	(0.0549)	(75.38)	(0.0532)	(135.4)	(109.8)
Panel B: White defendants (OLS with controls)						
Pretrial detention	0.0355****	0.0505****	-115.9****	0.102****	147.1****	74.99****
	(0.00371)	(0.00351)	(5.315)	(0.00334)	(6.037)	(4.019)
Observations	94076	94076	94076	94076	94076	94076
Mean dep. var.	0.55	0.29	$361	0.27	254	124
Panel C: Black defendants (IV)						
Pretrial detention	0.0664*	0.0204	113.8***	-0.00911	53.83	107.0
	(0.0392)	(0.0353)	(44.05)	(0.0338)	(112.6)	(95.66)
Panel D: Black defendants (OLS with controls)						
Pretrial detention	0.0393****	0.0599****	-99.68****	0.0964****	132.0****	66.45****
	(0.00258)	(0.00234)	(3.337)	(0.00216)	(4.718)	(3.520)
Observations	191379	191379	191379	191379	191378	191378
Mean dep. var.	0.49	0.25	$296	0.25	357	196

Standard errors in parentheses

Heteroskedastic-Robust Standard Errors

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$, **** $p < 0.001$

Note: This table shows effect sizes among white defendants (Panels A and B) and black defendants (Panels C and D). The outcome variables are dummies for being convicted/pleading guilty, total non-bail court fees in dollars, a dummy for whether or not the defendant receives an incarceration sentence, the maximum days of that incarceration sentence and the minimum days the defendant must serve before being eligible for parole. In all of the IV specifications magistrate preferences are allowed to vary across three time periods and according to offense, criminal history and demographics of defendants.

Table 1D: Comparing results across defendant age

	(1) Conv-iction	(2) Guilty plea	(3) Court Fees	(4) Incarc-eration	(5) Max days	(6) Min days
Panel A: Defendants under 30 (IV)						
Pretrial detention	0.0359	0.0608	82.73	-0.00439	264.3	245.3
	(0.0636)	(0.0578)	(76.43)	(0.0556)	(209.4)	(182.4)
Panel B: Defendants under 30 (OLS with controls)						
Pretrial detention	0.0362****	0.0551****	-120.3****	0.0990****	139.4****	69.39****
	(0.00281)	(0.00259)	(3.817)	(0.00239)	(5.401)	(4.155)
Observations	167586	167586	167586	167586	167585	167585
Mean dep. var.	0.47	0.27	$304	0.24	348	193
Panel C: Defendants over 30 (IV)						
Pretrial detention	0.0716**	0.0521	179.0****	0.0217	28.99	57.72
	(0.0358)	(0.0324)	(40.79)	(0.0306)	(76.78)	(62.86)
Panel D: Defendants over 30 (OLS with controls)						
Pretrial detention	0.0322****	0.0585****	-84.30****	0.0948****	126.6****	67.27****
	(0.00278)	(0.00254)	(3.600)	(0.00233)	(4.272)	(2.833)
Observations	164356	164356	164356	164356	164355	164355
Mean dep. var.	0.51	0.25	$320	0.24	235	117

Standard errors in parentheses

Heteroskedastic-Robust Standard Errors

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$, **** $p < 0.001$

Note: This table shows effect sizes among defendants under 30 (Panels A and B) and defendants over 30 (Panels C and D). The outcome variables are dummies for being convicted/pleading guilty, total non-bail court fees in dollars, a dummy for whether or not the defendant receives an incarceration sentence, the maximum days of that incarceration sentence and the minimum days the defendant must serve before being eligible for parole. In all of the IV specifications magistrate preferences are allowed to vary across three time periods and according to offense, criminal history and demographics of defendants.

Table 1E: Comparing results across defendants' history of arrest

	(1) Conv-iction	(2) Guilty plea	(3) Court Fees	(4) Incarc-eration	(5) Max days	(6) Min days
Panel A: Defendants with zero or one prior arrests (IV)						
Pretrial detention	0.118	0.0916	40.44	-0.123**	169.7	245.2
	(0.0788)	(0.0727)	(105.1)	(0.0624)	(213.0)	(173.5)
Panel B: Defendants with zero or one prior arrests (OLS with controls)						
Pretrial detention	0.0192****	0.0470****	-103.9****	0.0837****	136.5****	72.49****
	(0.00338)	(0.00311)	(4.637)	(0.00259)	(5.494)	(3.896)
Observations	124344	124344	124344	124344	124342	124342
Mean dep. var.	0.42	0.24	$320	0.17	200	107
Panel F: Defendants with two or more prior arrests (IV)						
Pretrial detention	0.0625**	0.0445	151.8****	0.0721**	183.6**	181.8***
	(0.0317)	(0.0284)	(35.15)	(0.0284)	(78.48)	(66.94)
Panel G: Defendants with two or more prior arrests (OLS with controls)						
Pretrial detention	0.0450****	0.0551****	-100.8****	0.101****	131.9****	66.81****
	(0.00244)	(0.00224)	(3.217)	(0.00216)	(4.302)	(3.145)
Observations	207627	207627	207627	207627	207627	207627
Mean dep. var.	0.53	0.27	$307	0.28	347	184

Standard errors in parentheses

Heteroskedastic-Robust Standard Errors

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$, **** $p < 0.001$

Note: This table shows effect sizes among defendants with zero or one prior arrests (Panels A and B) and defendants with two or more prior arrests (Panels C and D). The outcome variables are dummies for being convicted/pleading guilty, total non-bail court fees in dollars, a dummy for whether or not the defendant receives an incarceration sentence, the maximum days of that incarceration sentence and the minimum days the defendant must serve before being eligible for parole. In all of the IV specifications magistrate preferences are allowed to vary across three time periods and according to offense, criminal history and demographics of defendants.

For the Record

An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System

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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:

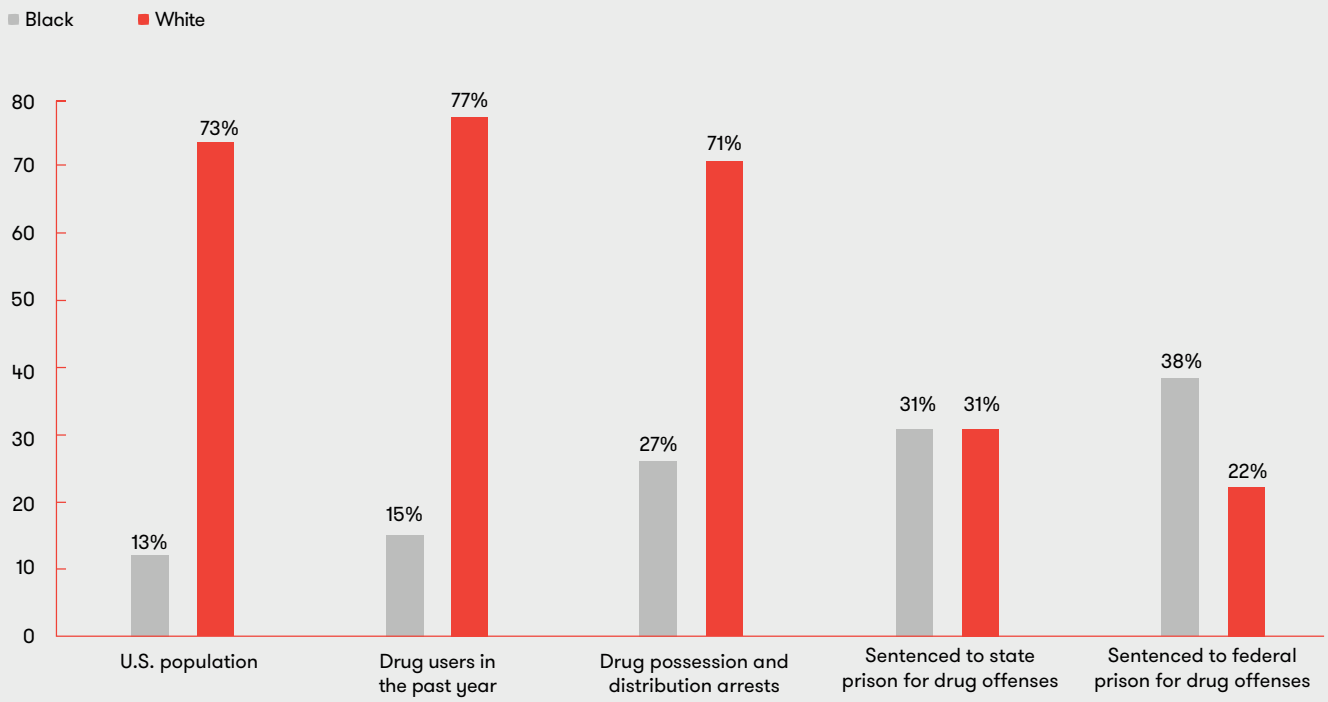
- The number of people incarcerated for drug offenses in New York State grew from 1,488 to 22,266 between 1973 and 1999—a nearly 15-fold increase—due in part to these laws.[45]
- That impact did not fall equally on people of all races. In 2001, for every one white male aged 21 to 44 incarcerated under 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

Bobo, Lawrence D. 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.

Butler, Paul. Chokehold: Policing Black Men. New York: The New Press, 2017.

Davis, Angela J., ed. Policing the Black Man: Arrest, Prosecution, Imprisonment. New York: Pantheon, 2017.

Hinton, Elizabeth. From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America. Cambridge, MA: Harvard University Press, 2016.

Muhammad, Khalil Gibran. The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America. Cambridge, MA: Harvard University Press, 2011.

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.

Western, Bruce. Punishment and Inequality in America. New York: Russell Sage Foundation, 2006.

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.

58 The Sentencing Project, *Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System* (Washington, DC: The Sentencing Project, 2017), 10, https://perma.cc/U4H9-TSZ9. For an in-depth discussion of investigatory police stops and their relationship with race, see Charles R. Epp, Steven Maynard-Moody, and Donald P. Haider-Markel, *Pulled Over: How Police Stops Define Race and Citizenship* (Chicago: University of Chicago Press, 2014).

59 Police Accountability Task Force, "Recommendations for Reform: Restoring Trust between the Chicago Police and the Communities They Serve" (Chicago: Police Accountability Task Force, 2016), 8, https://perma.cc/QNC8-HY5E

60 Researchers at Stanford University developed a new measurement test called the "threshold test"—a statistically rigorous way to quantify the threshold at which officers become suspicious enough to initiate searches. After analyzing data from 4.5 million traffic stops in 100 North Carolina cities, researchers found that black and Latino drivers are subjected to a lower search threshold than whites, suggestive of widespread discrimination against these groups. See Edmund Andrews, "Stanford Researchers Develop New Statistical Test that Shows Racial Profiling in Police Traffic Stops," Stanford News, June 28, 2016, https://perma.cc/5FQ4-CTF8; and Camelia Simoiu, Sam Corbett-Davies, and Sharad Goel, "The Problem of Infra-marginality in Outcome Tests for Discrimination" (unpublished paper, July 18, 2016), https://perma.cc/Z887-URAH.

61 Andrew Gelman, Jeffrey Fagan, and Alex Kiss, "An Analysis of the New York City Police Department's 'Stop-and-Frisk' Policy in the Context of Claims of Racial Bias," *Journal of the American Statistical Association* 102, no. 479 (2007), 813-23, 821-22, https://perma.cc/T2LZ-2ZLX .

62 Ibid. at 821.

63 Tammy Rinehart Kochel, David B. Wilson, and Stephen D. Mastrofski, "Effect of Suspect Race on Officers' Arrest Decisions," *Criminology* 49, no. 2 (2011), 473-512, 490 & 495-96.

64 Ojmarrh Mitchell and Michael S. Caudy, "Examining Racial Disparities in Drug Arrests," *Justice Quarterly* 32, no. 2 (2013), 288-313, 309-10, https://perma.cc/T3XU-JZVF.

65 Ezekiel Edwards, Will Bunting, and Lynda Garcia, *The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests* (Washington, DC: ACLU, 2013), 9, 21-22 & 47, https://perma.cc/G4QP-9K9P.

66 For an overview of the discretionary powers of prosecutors and their impact on the criminal justice process, see Vera Institute of Justice, "The Discretionary Power of Prosecutors," https://perma.cc/YM5X-B7DX.

67 See M. Marit Rehavi and Sonja B. Starr, "Racial Disparity in Federal Criminal Sentences," *Journal of Political Economy* 122, no. 6 (2014), 1320-54, 1326 ("Legal scholars, judges and practitioners broadly agree that prosecutorial decisions play a dominant role in determining sentences"), https://perma.cc/365A-NM73; Birte Englich, "Blind or Biased? Justitia's Susceptibility to Anchoring Effects in the Courtroom Based on Given Numerical Representations," *Law and Policy* 28, no. 4 (2006), 497-514; and Birte Englich and Thomas Mussweiler, "Sentencing Under Uncertainty: Anchoring Effects in the Courtroom," *Journal of Applied Social Psychology* 31, no. 7 (2001), 1535-51. Also see Colin Miller, "Anchors Away: Why the Anchoring Effect Suggests that Judges Should Be Able to Participate in Plea Discussions," *Boston College Law Review* 54, no. 4 (2013), 1667-1725, https://perma.cc/ED2L-427M; and Joshua A. Haby and Eve M. Brank, "The Role of Anchoring in Plea Bargains," *Monitor on Psychology* 44, no. 4 (2013), 30, https://perma.cc/KF2U-BYRX.

68 Robert J. Smith and Justin D. Levinson, "The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion," *Seattle University Law Review* 35, no. 3 (2012), 795-826, https://perma.cc/377Y-UNMZ. Bias may also impact the decisions of defense attorneys. L. Song Richardson and Phillip Atiba Goff, "Implicit Racial Bias in Public Defender Triage," *Yale Law Journal* 122, no. 8 (2013), 2626-49, 2648 ("Despite the fact that many public defenders are committed to zealous and effective advocacy, there is abundant reason for concern that implicit racial biases may affect their decisions"), https://perma.cc/3WQA-9KZ4.

69 Besiki Kutateladze, Vanessa Lynn, and Edward Liang, *Do Race and Ethnicity Matter in Prosecution?: A Review of Empirical Studies* (New York: Vera Institute of Justice, 2012), https://perma.cc/A3SY-GTE3.

70 Ibid. This finding did not hold across the board. Researchers also found proof of prosecutors treating white defendants more harshly for certain offenses and at certain discretion points. Ibid. at 9-10. Also see Celesta A. Albonetti and John R. Hepburn, "Prosecutorial Discretion to Defer Criminalization: The Effects of Defendant's Ascribed and Achieved Status Characteristics," *Journal of Quantitative Criminology* 12, no. 1 (1996), 63-81 (discussing factors that may influence diversion decisions to a greater extent than race, although some of these factors (such as prior record) can be inextricably intertwined with race); Travis W. Franklin. "The

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").

71 Sonja B. Starr and M. Marit Rehavi, "Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of *Booker*," *Yale Law Journal* 123, no. 1 (2013), 1-265, https://perma.cc/29KP-EB5G. Ethnicity can also impact the severity of a sentence. A study in Pennsylvania found that while prosecutors choose to apply mandatory minimum sentences in a minority of cases (about 18 percent), Latino men were almost twice as likely to receive a mandatory sentence as their white counterparts. Jeffery T. Ulmer, Megan C. Kurlychek, and John H. Kramer, "Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences," *Journal of Research in Crime and Delinquency* 44, no. 4 (2007), 427-58, 442.

72 Charles Crawford, Ted Chiricos, and Gary Kleck, "Race, Racial Threat, and Sentencing of Habitual Offenders," *Criminology* 36, no. 3 (2006), 481-512, 503.

74 Carlos Berdejó, "Criminalizing Race: Racial Disparities in Plea Bargaining," Boston College Law Review 59 (2018) (forthcoming), 3, draft available at https://perma.cc/3FZ9-JC6Y

75 Ibid. at 3-4.

76 Jeffrey J. Rachlinski, Sheri Johnson, Andrew J. Wistrich, and Chris Guthrie, "Does Unconscious Racial Bias Affect Trial Judges?" Notre Dame Law Review, 84, no. 3 (2008-2009), 1195-1246, 1223, https://perma.cc/2GRH-97X4.

77 In order to assess the role of implicit bias in the decision-making process of judges, the researchers in the study calculated the implicit bias score of each judge using an implicit associations test (IAT). An IAT score reflects a preference toward black or white people and is a method of measuring a person's implicit bias. Each judge was then presented with three hypothetical cases. Researchers measured whether a judges' IAT score correlated with any racially disparate outcomes in each of the three scenarios. In the first scenario, when primed with black-associated words that implied the defendant was black, judges with a white preference in the IAT gave slightly harsher sentences to defendants. Judges with a black preference on the IAT, on the other hand, gave less harsh sentences. See ibid. at 1214-16. Fourteen million people had taken the IAT as of 2013, and 75 percent showed implicit racial biases that favor white people. Cynthia Lee, "Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society," North Carolina Law Review 91, no. 5 (2013), 101-157, 117-18, https://perma.cc/4U36-LMX2.

78 Matthew Clair and Alix S. Winter, "How Judges Think about Racial Disparities: Situational Decision-Making in the Criminal Justice System," Criminology 54, no. 2 (2016), 332-59, 352-54, https://perma.cc/2EET-Y23Q.

79 Cassia Spohn, "Race, Sex, and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage," Kansas Law Review 57, no. 4 (2009), 879-901, 888-89 & 895, https://perma.cc/LF72-WTPE.

80 Cynthia E. Jones, "'Give Us Free': Addressing Racial Disparities in Bail Determinations," New York University Journal of Legislation and Public Policy 16, no. 4 (2013), 919-62, 938-39, https://perma.cc/manage/create?folder=13469-16845-29608-41698.

81 Cassia Spohn, "Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process," in Policies, Processes, and Decisions of the Criminal Justice System—Vol. 3 (Washington, DC: U.S. Department of Justice, 2000), 427-501, 429 & 474-75, https://perma.cc/849X-VQW9. Also see U.S. Sentencing Commission, Demographic Differences in Sentencing: An Update to the 2012 Booker Report (Washington, DC: U.S. Sentencing Commission, 2017), 2 (in analysis of federal sentencing data from October 1, 2011 to September 30, 2016, finding that black men received sentences on average 19.1 percent longer than similarly situated white men), https://perma.cc/M6Z6-XUGB.

82 Tushar Kansal, Racial Disparity in Sentencing: A Review of the Literature (Washington, DC: The Sentencing Project, 2005), 4-5, https://perma.cc/67L2-2C7S.

83 Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns, and Sheri Lynn Johnson, "Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes," Psychological Science 17, no. 5 (2006), 383-86, 384-85, https://perma.cc/2RZ4-R5AX. In this study, researchers showed subjects a series of photographs of black men and had them rate the appearance of their features—such as lips, nose, hair texture, and skin tone—as more or less "stereotypically black." Researchers then compiled these findings into a determination of which features were considered most "stereotypically black."

84 Jennifer L. Hochschild and Vesla Weaver, "The Skin Color Paradox and the American Racial Order," Social Forces, 86, no. 2 (2007), 643-70, 649, https://perma.cc/P4H5-22XV.

85 Traci Burch, "Skin Color and the Criminal Justice System: Beyond

Black-White Disparities in Sentencing," Journal of Empirical Legal Studies 12, no. 3 (2015), 395-420, 408. The study also found that light-skinned black men received sentences 20 days shorter than white men. Ibid.

86 John R. Sutton, "Structural Bias in the Sentencing of Felony Defendants," Social Science Research 42 no. 5 (2013), 1207-21, 1214-16 & 1218-19, https://perma.cc/9E9M-MHPG.

87 Samuel R. Sommers and Phoebe C. Ellsworth, "How Much Do We Really Know about Race and Juries? A Review of Social Science Theory and Research," Chicago-Kent Law Review 78, no. 3 (2003), 997-1031, 997-1005 (noting the obstacles and benefits of each method of analysis), https://perma.cc/J532-4ZAS; and Nancy J. King, "Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions," Michigan Law Review 92, no. 1 (1993), 63-130, 75-77, https://perma.cc/5HJS-N592.

88 Such bias is not limited to white jurors. Studies have found that both black and white mock jurors demonstrate "ingroup/outgroup" bias, judging same-race defendants more favorably than other-race defendants. See studies collected in Sommers and Ellsworth, "How Much Do We Really Know about Race and Juries? " (2003), at 1017-18. Other studies have found evidence of same-race leniency among black mock jurors. Ibid. at 1019-20.

89 Sommers and Ellsworth, "How Much Do We Really Know about Race and Juries? " (2003), at 1013-14 ("Psychologists have suggested that racial bias among [w]hites is more likely when salient norms regarding racism are absent. In such situations, [w]hite perceivers often let their guard down, allowing their behavior to be influenced by anti-[b]lack attitudes and prejudice.") In two experiments conducted by the authors, the white jurors were significantly more likely to vote to convict a black person accused in a case involving a non-race salient fact pattern than in one involving a race salient fact pattern. Ibid. at 1014-16.

90 Tara L. Mitchell, Ryann M. Haw, Jeffrey E. Pfeifer, and Christian A. Meissner, "Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment," Law and Human Behavior 29, no. 6 (2005), 621-37, 627-28. Also see Sommers and Ellsworth, "How Much Do We Really Know about Race and Juries?" (2003).

91 Joshua D. Levinson and Danielle Young, "Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence," West Virginia Law Review 112 (2010), 307-50, 310-11. In this study, researchers showed mock jurors security camera footage of either a light-skinned or dark-skinned perpetrator, then presented trial evidence and asked them to evaluate just "how much each piece of evidence tended to indicate whether the defendant was guilty or not guilty." They found that mock jurors who viewed the photo of the dark-skinned perpetrator adjudged the evidence as more indicative of guilt compared to those who viewed the photo of the light-skinned perpetrator.

92 See Douglas S. Massey and Nancy A. Denton, American Apartheid: Segregation and the Making of the Underclass, (Cambridge, MA: Harvard University Press, 1993); and William Julius Wilson, The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy (Chicago, IL: University of Chicago Press, 1987).

93 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); Robert J. Sampson and William Julius Wilson, "Toward a Theory of Race, Crime, and Urban Inequality," in Crime and Inequality, edited by John Hagan and Ruth D. Peterson (Stanford, CA: Stanford University Press, 1995), 37-56; and Tommie Shelby, Dark Ghettos: Injustice, Dissent, and Reform (Cambridge, MA: Harvard University Press, 2016).

94 Danielle Corinne Kuhl, Lauren J. Krivo, and Ruth D. Peterson, "Segregation, Racial Structure, and Neighborhood Violent Crime," American Journal of Sociology 114, no. 6 (2009), 1765-1802.

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.

97 Black people are arrested at higher rates for violent and property crimes. In 2015, they accounted for 36 percent of violent crime arrests, 28 percent of property crime arrests, and 51 percent of murder and

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).

98 On education: While 5 percent of white children grow up with a parent who did not graduate from high school, 12 percent of black and 40 percent of Latino children grow up with a parent who did not graduate from high school. American Psychological Association Presidential Task Force on Educational Disparities, Ethnic and Racial Disparities in Education: Psychology's Contributions to Understanding and Reducing Disparities (Washington, DC: American Psychological Association, 2012), 17, https://perma.cc/G87C-X8GB. The quality of education sometimes differs based on the racial composition of a school. A 2007 study showed that white students on average attend schools where 77 percent of the children are white, while black or Latino students typically attend schools where at approximately two-thirds of the students are also black or Latino. Gary Orfield and Chungmei Lee, Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies (Los Angeles: The Civil Rights Project/ Proyecto Derechos Civiles, UCLA, 2007), 24-26, https://perma.cc/7ZQH-TS2Y. Approximately two-thirds of teachers in predominantly white schools are certified to teach in their subject areas, while only about half of teachers in predominantly black or Latino schools are so certified. APA Task Force, Ethnic and Racial Disparities, (2012), at 17. On unemployment: The unemployment rate for black people in 2016 averaged 8.4 percent, compared to 4.3 percent for white people and 5.8 percent for Latino people. Bureau of Labor Statistics, "Unemployment Rate and Employment-Population Ratio Vary by Race and Ethnicity," January 13, 2017, https://perma.cc/CD29-ZLTE. Unemployment in particular has been linked to a greater likelihood of incarceration, particularly for unemployed black men. Theodore G. Chiricos and William D. Bales, "Unemployment and Punishment: An Empirical Assessment" Criminology 29, no. 4 (1991), 701-24. On household wealth: The median household income for black families in 2016 was just $39,490, compared to $65,041 for white, non-Latino families. Semega, Fontenot, and Kollar, Income and Poverty 2016 (2017), at 5.

99 Christopher Wildeman, "Parental Imprisonment, the Prison Boom, and the Concentration of Childhood Disadvantage," Demography 46, no. 2 (2009), 265-80, 270-71.

100 Eric Martin, "Hidden Consequences: The Impact of Incarceration on Dependent Children," National Institutes of Justice Journal No. 278, March 2017, https://perma.cc/NN9J-ABF2.

101 Todd R. Clear, "The Effects of High Imprisonment Rates on Communities," Crime and Justice 37, no. 1 (2008), 97-132, 111.

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.

103 "Collateral consequences are legal and regulatory sanctions and restrictions that limit or prohibit people with criminal records from accessing employment, occupational licensing, housing, voting, education, and other opportunities." Council of State Governments Justice Center, "National Inventory of the Collateral Consequences of Conviction," https://perma.cc/VRZ2-PTH7. On collateral consequences and reentry, see Ram Subramanian, Rebecka Moreno, and Sophia Gebreselassie, Relief in Sight? States Rethink the Collateral Consequences of Criminal Conviction, 2009-2014 (New York: Vera Institute of Justice, 2014), 8 (when issues like mental illness, substance abuse, or lack of vocational skills or education are left unaddressed, the risk of recidivism increases), https://perma.cc/2PTX-QCD7; Michael Pinard, "Reflections and Perspectives on Reentry and Collateral Consequences," Journal of Law and Criminology 100, no. 3 (2010), 1213-24, 1218-22, https://perma.cc/KBN2-2KKQ; and Michael Pinard, "An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals," Boston University Law Review 86, no. 3 (2006), 623-690, https://perma.cc/ZS9L-7BYU. On the negative impact of a criminal record on employment chances, see Devah Pager, "The Mark of a Criminal Record," American Journal of Sociology 108, no. 5 (2003), 937-75, https://perma.cc/27YT-2WEV. Moreover, black men without a record are less likely to find employment than white men with a record, highlighting the way that racial discrimination continues to influence black people outside of the confines of the criminal justice system. See Pager, Western, and Sugie, "Sequencing Disadvantage" (2009); Pager, Marked: Race, Crime and Finding Work (Chicago: University Of Chicago Press, 2009); and Pager, "The Mark of a Criminal Record" (2003).

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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No. 16-10521-HH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MAURICE WALKER, on behalf of himself
and others similarly situated,

Plaintiff-Appellee

v.

CITY OF CALHOUN, GEORGIA,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLEE AND URGING AFFIRMANCE ON THE ISSUE ADDRESSED HEREIN

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Case No. 16-10521-HH

Maurice Walker v. *City of Calhoun, Georgia*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, *Amicus Curiae* United States certifies that, in addition to the persons and entities identified in the briefs of defendant-appellant, plaintiff-appellee, and all of the *amici curiae*, the following persons may have an interest in the outcome of this case:

1. Calderon, Tovah R., United States Department of Justice, Civil Rights Division, counsel for *amicus curiae* United States;

2. Foster, Lisa, United States Department of Justice, Office for Access to Justice, counsel for *amicus curiae* United States;

3. Gupta, Vanita, United States Department of Justice, Civil Rights Division, counsel for *amicus curiae* United States;

4. Horn, John A., United States Attorney, Northern District of Georgia, counsel for *amicus curiae* United States;

5. Ku, Christine H., United States Department of Justice, Civil Rights Division, counsel for *amicus curiae* United States.

s/ Christine H. Ku
CHRISTINE H. KU
Attorney

Date: August 18, 2016

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INTEREST OF THE UNITED STATES

The United States has a strong interest in ensuring that criminal justice systems, including bail practices within those systems, are fair and nondiscriminatory. In March 2010, the Department of Justice (Department or DOJ) established the Office for Access to Justice, whose mission is to help criminal and civil justice systems efficiently deliver fair and accessible outcomes, irrespective of wealth and status. The Department also has authority to investigate

unlawful criminal justice practices, including the problematic use of fines and fees and bond procedures. See, *e.g.*, Consent Decree at 1-2, 83, 86-87 (Doc. 41), *United States* v. *City of Ferguson*, No. 4:16-cv-180 (E.D. Mo. Apr. 19, 2016) (consent decree effectuated pursuant to the Department's authority under 42 U.S.C. 14141). By encouraging practices that avoid unnecessary and excessive incarceration, the Department strives to reduce the risk of unconstitutional conditions of confinement, which the Attorney General is authorized to address under the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. 1997 *et seq.*

In the context of bail, the Department has promoted practices that do not discriminate against the poor. From the National Symposium on Pretrial Justice, which the Department's Office of Justice Programs helped convene in 2011, to the White House and DOJ Convening on the Cycle of Incarceration: Prison, Debt and Bail Practices in 2015, the Department has sought to call attention to the problem of discriminatory bail practices in state and local courts. At the White House convening, Attorney General Lynch discussed discriminatory bail practices, reiterating the Department's commitment "[t]o ensur[e] that in the United States

there is indeed no price tag on justice."[1] In addition, the Department's Bureau of Justice Assistance funds the National Task Force on Fines, Fees and Bail Practices, a joint project of the Conference of Chief Justices and the Conference of State Court Administrators, along with a $2.5 million grant program entitled *The Price of Justice: Rethinking the Consequences of Justice Fines and Fees*.[2] Both are intended to encourage state and local court reforms aimed at ending practices, including bail practices, that unfairly discriminate against the poor. These recent initiatives build upon DOJ's efforts since the 1960s to help reform bail practices. See pp. 5-6, *infra*.

In February 2015, the Department filed a statement of interest (SOI) arguing that bail practices that incarcerate indigent individuals before trial solely because of their inability to pay for their release violates the Fourteenth Amendment. See U.S. SOI, *Varden* v. *City of Clanton*, No. 2:15-cv-34, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015). And in March 2016, the Department issued a Dear Colleague

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[1] *Attorney General Loretta E. Lynch Delivers Remarks at White House Convening on Incarceration and Poverty* (Dec. 3, 2015), available at https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-white-house-convening-incarceration-and.

[2] See *Justice Department Announces Resources to Assist State and Local Reform of Fine and Fee Practices* (Mar. 14, 2016), available at https://www.justice.gov/opa/pr/justice-department-announces-resources-assist-state-and-local-reform-fine-and-fee-practices.

Letter advising state and local courts that due process and equal protection principles require that, among other things, they "must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release."[3]

STATEMENT OF THE ISSUE

The United States will address the following question only:

Whether a bail practice that results in the incarceration of indigent individuals without meaningful consideration of their ability to pay and alternative methods of assuring their appearance at trial violates the Fourteenth Amendment.[4]

STATEMENT OF THE CASE

1. Overview Of Bail In The United States

"In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States* v. *Salerno*, 481 U.S. 739, 755 (1987). Courts have recognized that it is within this limited exception that conditions can be imposed, or in rare circumstances, release can be denied, to

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[3] Letter from Vanita Gupta, Principal Deputy Assistant Attorney General, Civil Rights Div., Dep't of Justice, and Lisa Foster, Director, Office for Access to Justice, to Colleagues 2 (Mar. 14, 2016), available at https://www.justice.gov/crt/file/832461/download.

[4] The United States takes no position on the facts of this case or on any other issue raised in appellant's brief.

achieve legitimate goals like preventing the flight of defendants before trial or protecting the public from future danger. See *id.* at 754-755. Future appearance in court and public safety often can be assured through the imposition of nonmonetary conditions, such as supervised release or reasonable restrictions on activities and movements. See ABA Standards for Criminal Justice: Pretrial Release 10-1.4, 10-5.2 (3d ed. 2007).[5] Financial conditions (often referred to simply as "bail"), however, "should be used only when no other conditions will ensure appearance." *Id.* 10-1.4(c). This is because "[a] primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants." *Salerno*, 481 U.S. at 753; see also *Pugh* v. *Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc) (recognizing bail's limited function "of assuring the presence of [the] defendant").

Until the reform of the federal bail system in the 1960s, however, pretrial detention was effectively the norm rather than the exception for indigent federal defendants. Federal courts routinely set monetary bail conditions without regard for indigence, and "often the sole consideration in fixing bail [was] the nature of

[5] Available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk.html#10-1.1.

the crime."[6] In 1962, Attorney General Robert F. Kennedy called national attention to the "problem of bail," pointing out that pretrial detention "is directly influenced by how wealthy [a defendant] is."[7] In testifying to Congress about the problems associated with bail systems that fail to account for indigence, Attorney General Kennedy told the story of an individual who spent 54 days in jail because he could not afford the $300 bail amount for a traffic offense for which the maximum penalty was only five days in jail. See *Testimony by RFK* 3. Under Attorney General Kennedy's leadership, the Department pressed for expansive reforms that culminated in the Attorney General's National Conference on Bail and Criminal Justice in 1964 and the Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214.

The Bail Reform Act abolished the use of bail conditions that discriminate against indigent arrestees in the federal system. The Act's purpose was to revise federal bail practices "to assure that all persons, regardless of their financial status,

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[6] *Testimony by Attorney General Robert F. Kennedy on Bail Legislation Before the Subcomms. on Constitutional Rights and Improvements in Judicial Machinery of the S. Judiciary Comm.* 2 (Aug. 4, 1964) (*Testimony by RFK*), available at http://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-04-1964.pdf.

[7] Department of Justice, *Address by Attorney General Robert F. Kennedy, American Bar Association House of Delegates* (Aug. 6, 1962), available at https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-06-1962%20Pro.pdf.

shall not needlessly be detained pending their appearance * * * when detention serves neither the ends of justice nor the public interest." Bail Reform Act of 1966 § 2; see also *Allen* v. *United States*, 386 F.2d 634, 637 (D.C. Cir. 1967) (Bazelon, J., dissenting) ("It plainly appears from the language and history of the Bail Reform Act that its central purpose was to prevent pretrial detention because of indigency."). In 1984, the Act was amended to make clear that a "judicial officer may not impose a financial condition that results in the pretrial detention of the person." 18 U.S.C. 3142(c)(2); see H.R. Rep. No. 98-1121, 98th Cong., 2d Sess. 12 (1984). This express mandate helps ensure that federal courts base pretrial detention decisions on an individualized assessment of dangerousness and risk of flight and that indigent defendants are not detained without meaningful consideration of an individual's ability to pay and alternative methods of achieving the government's interests. See also 18 U.S.C. 3142(g) (listing factors that judicial officers should consider to "reasonably assure" the appearance of an individual in court and the safety of others).

Many other jurisdictions, however, still maintain bail systems that incarcerate people without regard for indigency.[8] But as noted above, the

[8] Indeed, the use of monetary bail has increased substantially since 1990. See Ram Subramaniam, *et al.*, Vera Institute of Justice, *Incarceration's Front Door: The Misuse of Jails in America* 29 (updated July 29, 2015), available at

(continued…)

Department is working with state and local courts to reform their systems and promote constitutional bail practices. In *Varden*, after the Department filed its SOI, the parties reached a settlement agreeing to a bail policy that allows for release on an unsecured bond as the norm rather than the exception. See *Varden* v. *City of Clanton*, No. 2:15-cv-34, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015); see also Consent Decree, *City of Ferguson*, *supra*. Lawsuits challenging bail practices in other local jurisdictions have also been resolved by agreement or court order. See, *e.g.*, *Pierce* v. *City of Velda City*, No. 4:15-cv-570, 2015 WL 10013006 (E.D. Mo. June 3, 2015) (adopting a settlement agreeing to a new bail policy and declaring that, under the Equal Protection Clause, no defendant can be held in custody based solely on inability to post a monetary bond); *Snow* v. *Lambert*, No. 3:15-cv-567 (M.D. La. Sept. 3, 2015) (accepting a settlement prohibiting use of a secured monetary bond to hold misdemeanor arrestees in jail who cannot afford the bond).

2. Relevant Facts And Procedural History

a. Plaintiff Maurice Walker is a 54-year old man who was arrested by the Calhoun Police Department for being a pedestrian under the influence and was

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(…continued)
http://archive.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report_02.pdf.

kept in jail for six nights without making bail. Doc. 29-2, at 1.[9] He filed this class action alleging that the City of Calhoun, Georgia, employs an unconstitutional bail practice that imprisons indigent defendants because of their inability to pay fixed bail amounts for misdemeanors, traffic offenses, and ordinance violations. Doc. 1, at 5-7, 13.

According to the complaint, Walker has a serious mental health disability and limited income with no assets. He lives with his sister, who manages his only income of $530 per month of Social Security disability benefits. Doc. 1, at 3. When Walker was arrested on September 3, 2015, he was informed that he would not be released unless he paid the $160 fixed cash bond amount set by the City for the misdemeanor of being a pedestrian under the influence. Georgia law provides that "at no time * * * shall any person charged with a misdemeanor be refused bail." Ga. Code Ann. § 17-6-1(b)(1) (West 2014). But Walker alleged that, contrary to state law, the City's policy and practice was to immediately release individuals arrested for minor traffic or misdemeanor offenses if they can pay preset bond amounts (which vary by offense), but to hold those who cannot afford the bond in jail until their first court appearance. See Doc. 1, at 2; Doc. 29-5, at 9-10, 12, 15 (Calhoun's Bail Schedule). By contrast, Walker contended that many

[9] Citations to "Doc. __, at __" are to documents on the district court docket sheet and relevant page numbers.

other cities provide for release of misdemeanor arrestees on recognizance or unsecured bonds. These forms of security involve promises to appear with penalties for failing to appear in court, such as an added criminal charge or a monetary fine. Doc. 1, at 5-6.

Walker alleged that because he is indigent, and because he could not afford the fixed bail amount, he was kept in jail for several nights to await his court appearance. Doc. 1, at 4-5. When this lawsuit was filed, the City held court only on non-holiday Mondays, and because Walker was arrested on the Thursday before Labor Day, he remained in jail for six days until his counsel could secure his release on his own recognizance. Doc. 29, at 2. During his pretrial detention, Walker claimed that he was unable to take his daily medication, and that he was allowed out of his cell for only one hour each day. Doc. 1, at 5. Walker also alleged that "[e]ach Monday [when court is held], there are commonly about four to six indigent defendants who were not able to pay * * * to secure their release." Doc. 1, at 7.

On behalf of himself and those similarly situated, Walker sued the City under 42 U.S.C. 1983, alleging that its bail practice violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. He sought damages on behalf of himself and declaratory and injunctive relief on behalf of the class. Doc. 1, at 3, 13-14.

b. On January 28, 2016, the district court granted Walker's motion for a preliminary injunction. The court ordered the City to implement constitutional post-arrest procedures and, in the interim, to release any misdemeanor arrestees on their own recognizance or on an unsecured bond. Doc. 40, at 72. The court held, among other things, that there was a substantial likelihood that Walker would succeed on the merits of his claim, because "[a]ny bail or bond scheme that mandates payment of pre-fixed amounts for different offenses to obtain pretrial release, without any consideration of indigence or other factors, violates the Equal Protection Clause." Doc. 40, at 49. In reaching this conclusion, the district court reviewed Supreme Court and circuit precedent recognizing that equal protection and due process principles prohibit punishing people for their poverty. The court then determined that this rule was "especially true" for pretrial detainees who had yet to be found guilty of a crime. Doc. 40, at 49-52; see also Doc. 40, at 52-56 (observing that other courts have reached similar conclusions).[10]

[10] The district court also determined that the City's new Standing Bail Order, which was adopted after the lawsuit was filed, neither mooted Walker's claims nor remedied the constitutional deficiencies in the prior bail policy. Doc. 40, at 56, 59-62. Again, the United States takes no position on these or any other issues in this case that is not addressed herein.

SUMMARY OF THE ARGUMENT

If this Court reaches the issue, it should affirm the district court's holding that a bail scheme that mandates payment of fixed amounts to obtain pretrial release, without meaningful consideration of an individual's indigence and alternatives that would serve the City's interests, violates the Fourteenth Amendment.

In a long line of cases beginning with *Griffin* v. *Illinois*, 351 U.S. 12 (1956), the Supreme Court has held that denying equal access to justice—including and especially through incarceration—without consideration of ability to pay and possible alternatives to achieve a legitimate governmental interest, violates the Fourteenth Amendment. In these cases, the Court has recognized that the proper analysis reflects both equal protection and due process principles, and has rejected use of the traditional equal protection inquiry. The appropriate inquiry focuses instead on "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose." *Bearden* v. *Georgia*, 461 U.S. 660, 666-667 (1983) (citation omitted; brackets in original).

As the district court recognized, the Supreme Court's holdings and analysis apply with special force in the bail context, where deprivations of liberty are at issue and defendants are presumed innocent. Under *Bearden* and other cases in

Griffin's progeny, a bail scheme that imposes financial conditions, without individualized consideration of ability to pay and whether such conditions are necessary to assure appearance at trial, violates the Fourteenth Amendment. Thus, as the former Fifth Circuit acknowledged, while the use of fixed bail schedules may provide a convenient way to administer pretrial release, incarcerating those who cannot afford to pay the bail amounts, without meaningful consideration of alternatives, infringes on equal protection and due process requirements. See *Pugh* v. *Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc).

In addition to violating the Fourteenth Amendment, such bail systems result in the unnecessary incarceration of people and impede the fair administration of justice for indigent arrestees. Thus, they are not only unconstitutional, but they also constitute bad public policy.

ARGUMENT

A BAIL PRACTICE VIOLATES THE FOURTEENTH AMENDMENT IF, WITHOUT CONSIDERATION OF ABILITY TO PAY AND ALTERNATIVE METHODS OF ASSURING APPEARANCE AT TRIAL, IT RESULTS IN THE PRETRIAL DETENTION OF INDIGENT DEFENDANTS

A. The Fourteenth Amendment Prohibits Incarcerating Individuals Without Meaningful Consideration Of Indigence And Alternative Methods Of Achieving A Legitimate Government Interest

The Supreme Court has long held that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin* v.

Illinois, 351 U.S. 12, 19 (1956) (plurality opinion); accord *Smith* v. *Bennett*, 365 U.S. 708, 710 (1961). As explained more fully below, in a long line of cases beginning with *Griffin*, the Court has repeatedly reaffirmed that denying access to equal justice, without meaningful consideration of indigence and alternative methods of achieving a legitimate government interest, violates the Fourteenth Amendment. Although a jurisdiction has discretion to determine which rights and penalties beyond what the Constitution minimally requires are appropriate to achieve its legitimate interests, the Fourteenth Amendment prohibits a jurisdiction from categorically imposing different criminal consequences—including and especially incarceration—on poor people without accounting for their indigence.

In *Griffin*, the Court first considered whether a State "may, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, * * * deny adequate appellate review [of a criminal conviction] to the poor while granting such review to all others." 351 U.S. at 13. The Court held that once a State decides to grant appellate rights, it may not "do so in a way that discriminates against some convicted defendants on account of their poverty." *Id*. at 18. The Court therefore found it unconstitutional to deny indigent criminal defendants appellate review by effectively requiring them to furnish appellate courts with a trial transcript, which cost money, before they could appeal their convictions. See *id*. at 18-19. In holding that "[d]estitute defendants must be afforded as adequate

appellate review as defendants who have money enough to buy transcripts," *id*. at 19, the Court declined to hold that the State "must purchase a stenographer's transcript in every case where a defendant cannot buy it," *id*. at 20. Instead, it held that the State "may find other means of affording adequate and effective appellate review to indigent defendants." *Ibid*.

In a line of cases building on *Griffin*, the Supreme Court has held that incarcerating individuals solely because of their inability to pay a fine or fee, without regard for indigence and a meaningful consideration of alternative methods of achieving the government's interests, effectively denies equal protection to one class of people within the criminal justice system while also offending due process principles. In *Williams* v. *Illinois*, 399 U.S. 235, 244 (1970), for example, the Court struck down a practice of incarcerating an indigent individual beyond the statutory maximum term because he could not pay the fine and court costs to which he had been sentenced. The Court held that "once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency." *Id.* at 241-242. The Court made clear, however, that "[t]he State is not powerless to enforce judgments against those financially unable to pay a fine." *Id*. at 244. On the contrary, nothing in the

Court's holding "limits the power of the sentencing judge to impose alternative sanctions" under state law." *Id*. at 245.

Similarly, in *Tate* v. *Short*, 401 U.S. 395, 398 (1971), the Court held that incarcerating an indigent individual convicted of fines-only offenses to "satisfy" his outstanding fines constituted unconstitutional discrimination because it "subjected [him] to imprisonment solely because of his indigency." *Id.* at 397-398. The Court explained that the scheme in *Tate* suffered from the same constitutional defect as that in *Williams*, and again emphasized that there "other alternatives to which the State may constitutionally resort to serve its concededly valid interest in enforcing payment of fines." *Id*. at 399.[11]

And in *Bearden* v. *Georgia*, 461 U.S. 660 (1983), the Court held that the Fourteenth Amendment prohibits a State from revoking an indigent defendant's probation for failure to pay a fine and restitution "without determining that [the defendant] had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist." *Id.* at 661-662. Such treatment of indigent defendants would amount to "little more than punishing a person for his poverty." *Id.* at 662.

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[11] See also *Barnett* v. *Hopper*, 548 F.2d 550, 554 (5th Cir. 1977) (relying on *Williams* and *Tate* to hold that "[t]o imprison an indigent when in the same circumstances an individual of financial means would remain free constitutes a denial of equal protection of the laws"), vacated as moot, 439 U.S. 1041 (1978).

The *Bearden* Court further explained that, because "[d]ue process and equal protection principles converge in the Court's analysis in these cases," 461 U.S. at 665, the traditional equal protection framework that usually requires analysis under a particular level of scrutiny does not apply. Because "indigency in this context is a relative term rather than a classification, fitting the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished." *Id.* at 666 n.8 (internal quotation marks omitted). "Whether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis." *Id.* at 666. Instead, the relevant analysis "requires a careful inquiry into such factors as the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose." *Id*. at 666-667 (citation and internal quotation marks omitted; brackets in original).

Although *Bearden* and other cases in *Griffin*'s progeny have arisen in the sentencing and post-conviction contexts, their holdings apply with equal, if not greater, force in the bail context. Indeed, defendants who have not been found guilty have an especially "strong interest in liberty." *United States* v. *Salerno*, 481 U.S. 739, 750, 755 (1987). Because of that liberty interest, pretrial release should be the norm, and pretrial detention "the carefully limited exception." *Ibid*. To be

sure, in certain circumstances, such as when a court finds that a defendant poses a threat to others or presents a flight risk, this fundamentally important right may be circumscribed on a case-by-case basis. See, *e.g.*, *id.* at 750-751, 754-755. If a court finds that no other conditions may reasonably assure an individual's appearance at trial, financial conditions may be constitutionally imposed—but "bail must be set by a court at a sum designed to ensure that goal, and *no more*." *Id*. at 754 (emphasis added). Although the imposition of bail in such circumstances may result in a person's incarceration, the deprivation of liberty in such circumstances is not based *solely* on inability to pay.

But fixed bail schedules that allow for the pretrial release of only those who can pay, without accounting for ability to pay and alternative methods of assuring future appearance, do not provide for such individualized determinations, and therefore unlawfully discriminate based on indigence. Under such bail schemes, arrestees who can afford to pay the fixed bail amount are promptly released whenever they are able to access sufficient funds for payment, even if they are likely to miss their assigned court date or pose a danger to others. Conversely, the use of such schedules effectively denies pretrial release to those who cannot afford to pay the fixed bail amount, even if they pose no flight risk, and even if alternative methods of assuring appearance (such as an unsecured bond or supervised release) could be imposed. Such individuals are unnecessarily kept in jail until their court

appearance often for even minor offenses, such as a traffic or ordinance violation, including violations that are not punishable by incarceration.

As the former Fifth Circuit recognized in an en banc decision, while "[u]tilization of a master bond schedule provides speedy and convenient release for those who have no difficulty in meeting its requirements," the "incarceration of those who cannot, without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." *Pugh* v. *Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc).[12] Although the court in *Pugh* found moot plaintiffs' claim challenging the use of monetary bail to incarcerate defendants pretrial without meaningful consideration of alternatives, it acknowledged "that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." *Id.* at 1056 (citing *Williams*, *supra*; *Tate*, *supra*); see also *Varden*, *supra*, at *2 (concluding that "[t]he Fourteenth Amendment prohibits punishing a person for his poverty, and this includes deprivations of liberty based on the inability to pay fixed-sum bail amounts"—a principle that "applies with special force" to pretrial defendants (internal citation and quotation marks omitted)). In fact, where fixed bail

[12] Decisions of the former Fifth Circuit rendered before October 1, 1981, serve as binding precedent of the Eleventh Circuit. See *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

schedules are used without meaningful consideration of alternatives that account for inability to pay, indigent arrestees seeking bail are faced with precisely the same type of "illusory choice" that the Supreme Court has recognized "works an invidious discrimination." *Williams*, 399 U.S. at 242.

Although fixed bail schedules appear to be neutral on their face, the Supreme Court has explained that policies that impose sanctions on only indigent individuals are not neutral in their operation. Thus, contrary to the City's argument (Appellant's Br. 45-46), its policies do not fall outside the Fourteenth Amendment's prohibition of disparate treatment. The City relies on *Washington* v. *Davis*, 426 U.S. 229, 244-245 (1976), which held that, absent evidence of a discriminatory purpose, a facially neutral law with a racially discriminatory effect does not violate equal protection. But the Supreme Court has rejected this argument with respect to policies that implicate due process concerns and discriminate against the indigent in the sanctions imposed, explaining that, because such policies "expose[] *only indigents*" to an additional sanction, they are "not merely *disproportionate* in impact. Rather, they are wholly contingent on one's ability to pay, and thus 'visi[t] different consequences on two categories of persons[]'; they apply to all indigents and do not reach anyone outside that class." *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 127 (1996) (internal citation omitted; second brackets in original); see also *Bearden*, 461 U.S. at 664 (applying "*Griffin*'s

principle of 'equal justice'" post-*Washington* v. *Davis* to prohibit revocations of probation without inquiring into ability to pay and consideration of alternatives); *Williams*, 399 U.S. at 242 ("Here the Illinois statutes as applied to Williams works an invidious discrimination solely because he is unable to pay the fine.").

In sum, under *Bearden* and other cases in *Griffin*'s progeny, 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.

B. Bail Systems That Keep Indigent Defendants In Jail Solely Because They Cannot Pay Bail Result In Unnecessary Pretrial Detention And Impede The Fair Administration Of Justice

Bail practices that do not account for indigence result in the unnecessary incarceration of numerous individuals who are presumed innocent. Of the more than 730,000 individuals incarcerated in local jails nationwide in 2011, for example, about 60% were pretrial detainees (a rate unchanged since 2005), and most of them were accused of nonviolent offenses.[13] Unnecessary pretrial detention significantly burdens the limited resources of taxpayers and state and

[13] See Richard Williams, *Bail or Jail*, State Legislatures (May 2012), available at http://www.ncsl.org/research/civil-and-criminal-justice/bail-or-jail.aspx; see also Todd D. Minton & Zhen Zeng, United States Department of Justice, Bureau of Justice Statistics, *Jail Inmates at Midyear 2014*, NCJ 248629, at 1, 3 (2015), available at http://www.bjs.gov/content/pub/pdf/jim14.pdf.

local governments. It also creates additional problems as jails become overcrowded.

The repercussions of unnecessary pretrial detention that disproportionately affect indigent individuals can reverberate in other parts of the criminal justice process and impede the fair administration of justice. The "traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction." *Pugh*, 572 F.2d at 1056-1057 (en banc) (citing *Hudson* v. *Parker*, 156 U.S. 277, 285 (1895)). But incarceration could hinder a defendant's "ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker* v. *Wingo*, 407 U.S. 514, 533 (1972). Excessive pretrial detention could also induce the innocent to plead guilty for a speedier release or result in a detention period that exceeds the expected sentence.[14] And because "[m]ost jails offer little or no recreational or rehabilitative programs," pretrial detention is not likely to reduce recidivism. *Ibid.*

---

[14] See, *e.g.*, Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 Am. Crim. L. Rev. 1123, 1154 (2005); Mary T. Phillips, New York City Criminal Justice Agency, Inc., *Bail, Detention, and Felony Case Outcomes, Research Brief No. 18*, at 7 (2008), available at http://www.nycja.org/lwdcms/doc-view.php?module=reports&module_id=597&doc_name=doc; Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2492 (2004).

Pretrial incarceration also "often means loss of a job; it disrupts family life; and it enforces idleness." *Barker*, 407 U.S. at 532; see also ABA Standards for Criminal Justice: Pretrial Release 10-1.1 ("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 instances, deprives their families of support.").[15] This impact may be exacerbated for indigent individuals who, as a consequence of their poverty, are already in vulnerable situations.[16]

In short, bail practices that fail to account for indigence are not only unconstitutional, but also conflict with sound public policy considerations.

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[15] Available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk.html#10-1.1.

[16] See Open Society Justice Initiative, *The Socioeconomic Impact of Pretrial Detention* 27-32 (2001) (examining the costs to pretrial detainees and their families as measured by income, employment, education, incarceration-related expenses, and long-term effects), available at http://www.pretrial.org/download/research/OSI%20Socioeconomic%20Impact%20Pretrial%20Detention%202011.pdf.

CONCLUSION

If this Court reaches the issue presented herein, the Court should affirm the district court's holding that a bail scheme violates the Fourteenth Amendment if, without a court's meaningful consideration of ability to pay and alternative methods of assuring appearance at trial, it results in the detention of indigent defendants pretrial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29 and 32(a)(7), because:

This brief contains 4491 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because:

This brief has been prepared in a proportionally spaced typeface using Word 2010 in 14-point Times New Roman font.

s/ Christine H. Ku
CHRISTINE H. KU
Attorney

Date: August 18, 2016

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2016, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLEE AND URGING AFFIRMANCE ON THE ISSUE ADDRESSED HEREIN with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

I certify that all participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that on August 18, 2016, I will cause seven paper copies of this brief to be sent to the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by certified U.S. mail, postage prepaid and will cause one paper copy of the same to be mailed to the following counsel by certified U.S. mail, postage prepaid:

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Ford Howard & Cornett, PC
140 S 9th ST
Gadsden, AL 35902

Lorelei Lein
Alabama League of Municipalities
535 Adams Ave
Montgomery, AL 36104-4333

s/ Christine H. Ku
CHRISTINE H. KU
Attorney

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

2017 New Misdemeanor Defender

THE ETHICS PRESENTATION

Ethics for Public Defense

Ethics for Public Defense: What are the Rules?

Attorney/Client Relationship
- Confidences
- Rights

Attorney/Others Relationship
- Honesty and Candor
- Overreaching

Rule 1.6 (a) Lawyer may not 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

Competing Obligations:

Rule 1.2 (d) - Shall not counsel a client to engage in conduct lawyer knows to be criminal or fraudulent, but may discuss the legal consequences of any proposed course of conduct.

Competing Obligations:

Rule 3.1- May not assert factually or legally frivolous positions, but a criminal defense lawyer may defend a proceeding by requiring that all element of the case be established.

Competing Obligations:

Rule 3.3 - Candor Toward Tribunal: may not make false statement of material fact or offer evidence that the lawyer knows to be false

- may refuse to offer evidence she reasonably believes to be false
- Exception: defendant's testimony

Competing Obligations:

Rule 4.1 - Truthfulness In Statements to Others. Must be truthful, but no obligation to inform opposing party of relevant facts.

Cases and Rulings

- CPR 313(lawyer may not volunteer confidential information about client's prior conviction)
- RPC 33(1988) (Attorney has no affirmative duty to disclose client's false name and record but cannot allow client to commit perjury)
- 98 FEO 5 (lawyer may remain silent when ADA misrepresents client's record but may not seek limited privilege)
- 2008 FEO 1 (lawyer may not offer evidence using undisclosed alias of client, at least in civil case)

Cases and Rulings

Rule 1.14 Client With Diminished Capacity:
(a) As far as reasonable, maintain a normal client-lawyer relationship

(b) When client is at risk of substantial physical, financial or other harm and cannot act in own interest, lawyer may take protective action

(c) Must keep client's information confidential, and is only authorized to reveal information about client to extent necessary to protect client's interests.

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]

Cases and Rulings

98 Formal Ethics Opinion 2: Attorney may explain the effects of service of process but may not advise client to evade service

Cases and Rulings

Rule 3.4 A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.

Cases and Rulings

RPC 221 (1995) – Absent legal authority, lawyer may
- take possession,
- examine,
- return evidence to its source, and
- advise source of legal consequences of possession or destruction of evidence)

Cases and Rulings

RPC 221 (1995) – Absent legal authority, 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)

Cases and Rulings

Rule 1.2(a)(1): defendant has the authority to decide
- Plead guilty/ go to trial
- Testify

after consultation with the lawyer

Cases and Rulings

Rule 1.2(a)(1): defendant has the authority to decide
- Plead guilty/ go to trial
- Testify

after consultation with the lawyer

Rule 1.4: attorney must keep client informed
- Giving client sufficient information to make informed decisions

Cases and Rulings

Rule 1.2(a)(1): defendant has the authority to decide
- Plead guilty/ go to trial
- Testify

after consultation with the lawyer

Rule 1.4: attorney 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

Cases and Rulings

Rule 1.2(a)(1): defendant has the authority to decide
- Plead guilty/ go to trial
- Testify

after consultation with the lawyer

Rule 1.4: attorney 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 unless client objects to summary

Cases and Rulings

Rule 3.4 A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.

Cases and Rulings

Rule 1.7 Conflict of Interest: Current Clients
(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) the representation of one or more clients may be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.

Cases and Rulings

Rule 1.7 Conflict of Interest: Current Clients
(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if
the lawyer:
- reasonably believes she can provide competent and diligent representation to each affected client

AND the representation is
- not prohibited by law
- does not involve a claim by one client against the other AND

AND the client
- gives written informed consent

Cases and Rulings

Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules
(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

Cases and Rulings

Rule 1.9 Duties to Former Clients
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Cases and Rulings

Rule 1.9 Duties to Former Clients
(c) A lawyer who has formerly represented a client in a matter shall not:

- use information relating to the representation to the disadvantage of the former client except as the rules allow or require, or when the information has become generally known; or
- reveal information relating to the representation except as the rules allow or require

Cases and Rulings

2010 Formal Ethics Opinion 3: A lawyer who represents a client who is a witness in a matter in which the lawyer represents another client, and to effectively represent the client on trial the lawyer must cross-examine the client-witness, then there is a concurrent conflict of interest, and that conflict cannot be waived

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

Cases and Rulings

2011 Formal Ethics Opinion 3: You may not assist client in fraudulent conduct, but under Rule 1.(d) may advise client on consequences of any proposed course of conduct. You may therefore tell client that posting bond may speed up deportation and result in dismissal of the case.

Cases and Rulings

2011 Formal Ethics Opinion 3: You may not enter a notice of appeal simply for delay or for a frivolous reasons. Seeking to enforce your client's constitutional right to a trial de novo is not simply for delay or frivolous and therefore you may enter notice of appeal

Cases and Rulings

2005 Formal Ethics Opinion 3: Attorney may not threaten to report an opposing party or witness to immigration to gain advantage in civil settlement

2009 Formal Ethics Opinion 5: Attorney may seek information about immigration status in discovery, but may not report status to ICE unless required to do so by law

Cases and Rulings

2005 Formal Ethics Opinion 3: Attorney may not threaten to report an opposing party or witness to immigration to gain advantage in civil settlement

2009 Formal Ethics Opinion 5: Attorney may seek information about immigration status in discovery, but may not report status to ICE unless required to do so by law

Cases and Rulings

Rule 4.2. (A) - During the representation of a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless with consent of other lawyer or authorized by law.

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

Cases and Rulings

Rule 3.4 - A Lawyer shall not: (f) request a person, other than a client, to refrain from voluntarily giving relevant information to another party unless that person is an employee or relative of the client and the lawyer reasonably believes the person will not be adversely affected by not giving the information

Cases and Rulings

79 DHC 10: (Censured for informing party that his client would not testify against him if other party would also plead the Fifth)

State Bar v. Graves, 50 N.C. App. 450 (1981)(although it is not unethical to advise a witness to take the Fifth, it is unethical to tell witness that if they do not testify, the defendant will also not testify)

Cases and Rulings

In re Palmer, 296 N.C. 638 - (1979)(censuring lawyer for not moving to withdraw when learned of "scheme" in which co-defendants agreed to switch who was driver in fatal accident)

State v. Rogers, 68 N.C. App. 358 - (1984)(affirming conviction of attorney for telling them they could leave court after agreeing to pay damages)

CLIENT INTERVIEWING

ESTABLISHING THE ATTORNEY-CLIENT RELATIONSHIP AND CLEAR COMMUNICATION

RELATIONSHIPS

- Establishing a good relationship early with the client is the most important thing an attorney can do!!!!!

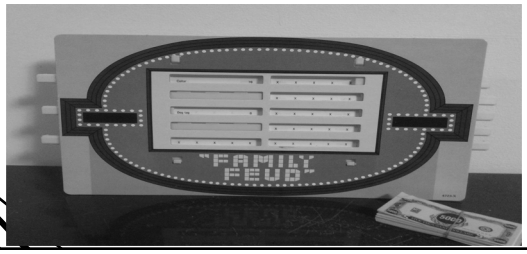
THE ATTORNEY-CLIENT RELATIONSHIP

- Establishing a good relationship from the beginning with the client is the most important thing an attorney can do!!!!!

ESTABLISHING A RELATIONSHIP WITH YOUR CLIENT

- RE-Establishing a good relationship each time you meet with the client is the most important thing an attorney can do!!!!!

Characteristics of a good relationship?



Characteristics of a Good Relationship?

- TRUST (Follows through-consistent in what they say and do)
- Good Communication
- Makes you laugh
- Honest
- Clearly Cares
- Empathetic
- Listens
- Patient

OPEN, HONEST COMMUNICATION

- RULES OF PROFESSIONAL CONDUCT 1.4 COMMUNICATION
- Start out using open-ended questions, such as: TELL ME ABOUT…WHO?WHAT?WHEN?WHERE?WHY?HOW? Once you listen, go back and clarify details with direct, focused questions.
- Be clear and direct.
- Use normal language and not legalese.
- Be patient. Explain and repeat as needed.
- Don't make promises.
- Follow through when you say you will do something.

IMAGINE:STEP INTO YOUR CLIENT's SHOES

If you were locked up and accused, how would you feel? What would you want from your lawyer?

- FIRST IMPRESSIONS MATTER: Greet your client with a warm smile.
- THIS IS INCREDIBLY STRESSFUL. SET THEM AT EASE.
- Maintain EYE contact. Give them your FULL attention.
- WATCH NON-VERBALS AND TONE.

MAKING CONTACT WITH CLIENTS BEFORE THE COURT DATE

- GETTING CLIENTS INTO THE OFFICE???? "They won't show up!"
- "Why is it that I care more about the case than my client?"
- UNDERSTANDING POVERTY ISSUES-assumptions go both ways
- GOING TO THE JAIL-"I don't have time!"

Possible ways to increase client contact and address obstacles

- Make contact at time of appointment, if possible…
- Exchange good contact information, including secondary contacts and multiple means of contact(email, text, Momma, etc…)
- Send an investigator or legal assistant out…
- Letters or other introductory handouts
- Confidential meeting space in the community.
- Establish importance early on…

ENVIRONMENT CONDUCIVE TO TALKING OPENLY

- **Some clients may need a continuance in order to get together with you after the first meeting…Some may need multiple contacts in order to feel comfortable enough to talk.**
- **MAKING SURE THE ENVIRONMENT FOR THE INTERVIEW IS AS SECURE AND CONFIDENTIAL AS POSSIBLE AND MAKES the client feel comfortable to talk with you. (Even if it is at a more private end of the hallway…)**
- **Because this is district court, realistically many of these interviews will have to be done on the fly in a short time period, possibly in less than ideal conditions. (like a hallway).**
- **WHO SHOULD BE PRESENT FOR THE CLIENT INTERVIEW? Parents do not need to join a "minor" for the interview…**

HOW DO I BEGIN?

- Introduce Yourself and your Role: Establish expectations
- Explain attorney-client privilege and the confidential nature of the relationship.
- Don't spend the time beating your client up about missing appointments or not making contact with you ahead of time. This is not about YOU. Keep your focus on your client. Court personnel get impatient and do not appreciate the need for the attorney to spend time talking with their clients, with the mistaken belief that all of that preparation happens or should have happened prior to the court date. Don't let bailiffs, clerks, ADA's, judges… pressure you. Be aware of time and report to court personnel as to status as needed and seek continuances if you need more time.

Let them TALK: YOU LISTEN

- Do not start off with the mindset that they are going to be pleading guilty. Keep an open mind until you gather all information. Don't be judgmental.
- Don't get so focused on questions that you do not follow-up on what the client is saying…
- I have had a few attorneys tell me that they can assess a case much better off of the paperwork and prefer not to talk with the client until they have assessed the entire case, because the clients just muck it up for them. They would prefer to tell the client their opinion of what they should do based on their lawyerly evaluation of the case and it saves time. Although you need to analyze all paperwork, YOU WILL NEED TO GET YOUR CLIENT's INFO BEFORE YOU CAN EFFECTIVELY NEGOTIATE, GET A BOND REDUCTION, AGREE TO A DISPOSITION, ETC…See Rules of Professional Conduct…

THE CLIENT WHO TALKS TOO MUCH!

How do you get someone focused who won't stop talking and is all over the place?

~Using a client questionnaire

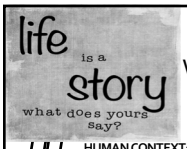
~Using some focused-leading questions to steer the conversation back on track

~Reminding the client that time is limited

~Continue and set up an appointment time to talk further

DIGGING INTO THE FACTS

- Find out what happened? Start at the very beginning…uninterrupted, if possible. Where were you? Were there witnesses? Who was there? Was there a stop? Was there a search? Did your client make any statements? Where was the statement taken? Were rights read? Was something written? Was there a search warrant? Was any property taken? What tests were performed? Slow them down and take it one fact at a time-especially important in self-defense and search and seizure issues.



What is your client's STORY? Get to know your client…

HUMAN CONTEXT: Where was client born? Where does client live? Where else has client ever lived? : Is client homeless? Does client work? What hours does client work? Who does client live with? Who does client hang around? Is client in school, for what? Does client have a license to do some type of work or a degree? Interests/hobbies? What does client want to do with their life in the future? Does client have children? How does client pay his bills, survive, get around? What access does the client have to transportation? Who influences the client? ? Is client more of a follower or a leader? Is the client in a relationship? Status of relationships? Is the client married, divorced, separated, single? Would the client be able to participate in a community service program? Treatment sessions? Get to and from? Does the client have any additional charges pending/other court dates/other pending matters? What has the client been to court for in the past, if ever? Is the client currently on probation, post-release? How is client feeling? How is the client's health? Does the client have a medical condition? Where do they get treatment? Mental health or substance abuse treatment? Has client suffered abuse, trauma in their life? Has DSS ever been involved?…

What outcome does the client want?

- What does the client want to have happen? What are the client's preferences(payment of monies, community service, probation, active sentence?) How much jail credit does the client already have? Would there be a problem if the judge orders the client not to be around a certain person?
- SET THE CLIENT UP FOR SUCCESS AND NOT FAILURE. MAKE SURE THEY UNDERSTAND WHAT COULD HAPPEN; WHAT WILL HAPPEN NEXT; AND WHAT THEIR RESPONSIBILITY WILL BE AFTER COURT.
- Try to get all matters that are pending resolved together if at all possible to limit damage to points and criminal record of client. IF cases cannot be resolved together, be sure to touch base with any other lawyers involved to ensure that the representation is as coordinated as possible.

EVALUATING CAPACITY

Evaluating capacity (deficits in maturity, special needs, intellectual disability, mental health, or impairment that interferes with ability to understand and participate) RED FLAGS: age-somebody else makes decisions for the individual; (parent/relatives/spouse can be good source of information, but that is a one-way street); in separate or special classes; lower grade-level for age or does not go to school or work/on disability-gets a check; has an Individualized Educational Plan; goes to the clinic; on medications; limited; starts talking delusional/paranoid-talking about government conspiracies, etc…; slurs speech, unsteady on feet; in DSS custody; a worker is there with them; and just does not seem to understand after repeated explanation. Have them repeat what they understand back to you and not just recite back what you just said to them.

Clients who just want the case overwith!

- Some clients may be quick to plead guilty or ask for time served in order to get out of jail or get out of the courtroom.
- Ensure that clients understand the ramifications and provide information so that they can make an informed decision.
- Don't be afraid to counsel client and make recommendations, but decision on whether to plead guilty is up to the client.

Dealing with clients who have unrealistic expectations.

It is important to talk with your client about what realistically can and cannot happen. Your job is to provide clients with information so that they can make an informed decision.

Do not dismiss the client. Explore options with the client. Set boundaries about ethical obligations and explain why and cite the reasoning.

Dealing with clients who know more than you do (or so they think)…

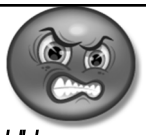
- Explaining without being condescending…Don't get offended easily…
- Dealing with the jailhouse lawyers. Clients will listen to whoever is trying to help them and that includes others who appear to be knowledgable in the jail. It is important that you establish a relationship with jail clients early so that you are the one that has provided information, rather than someone who has more "experience in the system"…

"I want a REAL lawyer!"

"Public Defenders or Court-Appointed Lawyers" don't always have the best public reputation. There is a perception that we all work for the State/the Government and not for the clients. They may have had a prior bad experience. Work to prove those myths wrong!

What if they question your experience or your win rate? Reassure them that you are not in this for the pay and that you do this because you care and that you will fight for them, without making promises that you cannot keep.

Dealing with the myth that paying somebody gets you better representation… **SEE Ethics Opinion on Private Employment of Appointed Counsel.**

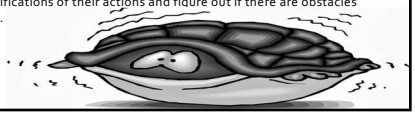


The Angry or Hostile Client

- LISTEN PATIENTLY…Dig deeper to figure out why they are angry…and acknowledge that they may have a legitimate reason to be angry…Hear them out…
- Be firm and set boundaries.
- Calmly explain without responding in kind.
- Rule 1.3 Comment (1) Diligence: Don't get discouraged or stop advocating for your client despite opposition, obstruction, or inconvenience. If you cannot zealously advocate, you need to discuss possible withdrawal under RPC 1.16.

The Avoidant Client

- The person who has had multiple continuances and is trying to avoid dealing with the case… No one wants to take responsibility and face possible punishment. IF they can put it off, they will. It is unpleasant… Sometimes, you do more to help the client by getting them to move forward, deal with it, and put it behind them.
- Sometimes the avoidant client will not show up for court and will always have an excuse or will blame someone or something for not being there. Explain the process and the ramifications of their actions and figure out if there are obstacles that can be resolved.

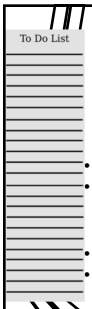


The Lying Client

- Dealing with a client who is obviously lying…Gently confronting clients (ie: this is the evidence that the DA is going to present-How are we going to deal with it when that is what the witness says on the stand? Is this you?) Do you find that believable? Do you think that a judge is going to find that believable? How are we going to present your defense? Explain your ethical responsibilities…

The Blamer (very similar to avoidant)

- Dealing with the client who blames everyone else and never takes responsibility…always has an excuse…
- ALWAYS BE UPFRONT AND HONEST WITH YOUR CLIENTS-TELL THEM LIKE IT IS…DON'T SUGAR COAT IT…Maintain professionalism. Don't withhold information because you are afraid that your client will not like it.



IDENTIFY TO-DO LIST WITH CLIENT

- Look at and possibly copy anything the client brought with them.
- RECORDS THAT YOU MAY NEED/WITNESSES TO SUBPOENA: proof about residency, work, medical conditions, pay stubs, timesheets, text messages, emails, posts, pictures, videos, school records, medical records, phone records, receipts, estimates of damages/value of property, community service hours completed, letters, etc…
- Set deadlines and have clear instructions, written.
- Releases signed or file motions and court orders, if necessary. Issue subpoenas.

STRATEGY DECISIONS WITH CLIENT

- DISCUSSIONS WITH CLIENTS ABOUT STRATEGY-pleading or going to trial; whether or not to testify, calling witnesses, presenting evidence…???
- RPC Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

COLLATERAL CONSEQUENCES
How will the disposition of this case impact your client?

- COLLATERAL CONSEQUENCES: (Citizenship, Employment/Licensure/Educational, Housing, Public Benefits, Probation/Post-Release, Driver's License, Student Loans/Financial, School Expulsion, Property Forfeiture,etc…)
- TO APPEAL OR NOT TO APPEAL?

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.

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

September 2017

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UNC School of Government

- **Notice**
  - A probationer is entitled to at least 24 hours' notice of any alleged violation of probation. G.S. 15A-1345(e). That notice usually comes via a probation violation report:
    - *Supervised probation*: DCC-10 filed by probation officer.
    - *Unsupervised*: AOC-CR-220, Notice of Hearing on Violation of Unsupervised Probation.
  - To be eligible for revocation, the defendant must receive notice of a revocation-eligible violation. State v. Lee, 232 N.C. App. 256 (2014) (holding that violation report listing charges pending against the defendant was sufficient to put him on notice of a "commit no criminal offense" violation).
- **Jurisdiction/Timing**
  - In general, a judge has power to act on a probation matter at any time before probation expires.
  - The court may act after expiration if a violation report was filed (and file stamped) before the case expired. G.S. 15A-1344(f).
  - If an earlier extension was improper and probation would have expired without it, the court lacks jurisdiction to act on the case now. *E.g.*, State v. Gorman, 221 N.C. App. 330 (2012).
- **Bail**
  - The prehearing release options for a probationer arrested for an alleged violation are generally the same as pretrial release for a criminal charge.
  - If a probationer arrested for an alleged violation also has a pending felony charge or has ever been convicted of a reportable sex crime, the judicial official shall determine whether the probationer poses a danger to the public before imposing conditions of release.
    - If the probationer is deemed dangerous, he or she shall be denied release.
    - If the probationer is not dangerous, conditions of release shall be imposed as usual.
    - If dangerousness cannot be determined, the probationer may be detained for up to seven days to obtain sufficient information.
    - After seven days, if no determination has been made, release conditions shall be imposed as usual. G.S. 15A-1345(b1); AOC-CR-272.
- **Preliminary Hearing**
  - A probationer detained for a probation violation is entitled to a preliminary hearing on the violation within seven working days of his or her arrest, unless the probationer waives it or the final violation hearing is held first.
  - If no preliminary hearing is held within seven working days, the probationer must be released pending a hearing. G.S. 15A-1345(c)–(d).

- **Final Hearing**
  - Venue: Probation violations may be heard in the district where:
    - probation was imposed,
    - the alleged violation took place, or
    - the probationer currently resides. G.S. 15A-1344(a).
    - A court on its own motion may return a probationer to the district where probation was imposed or where the probationer resides for reduction, termination, continuation, extension, modification, or revocation of probation. G.S. 15A-1344(c).
  - Confrontation: A probationer may confront and cross-examine witnesses, unless the court finds good cause for not allowing confrontation.
  - Counsel: A probationer has a right to counsel for a violation hearing. The court must comply with G.S. 15A-1242 when accepting a waiver of the right to counsel for a violation hearing.
  - Evidence:
    - The rules of evidence do not apply at a violation hearing.
    - Hearsay is admissible. State v. Murchison, 367 N.C. 461 (2014).
    - The exclusionary rule does not apply. State v. Lombardo, 74 N.C. App. 460 (1985).
  - Standard of proof: The State must present evidence proving to the judge's *reasonable satisfaction* that the probationer willfully violated a valid condition of probation.
  - Willfulness:
    - The probationer may offer evidence that a violation was not willful. If the probationer offers such evidence, the court must consider it and make written findings of fact clearly showing that it was considered.
    - If the alleged violation concerned the nonpayment of a monetary obligation, the defendant must be given an opportunity to show that the nonpayment was attributable to a good faith inability to pay.
  - Class H and I felonies pled in district court: By default, probation violation hearings for felony defendants who pled guilty in district court are in *superior court*. Hearings may be held in district court with the consent of the State and the defendant. G.S. 7A-271(e).
- **Appeals**
  - A probationer may appeal to superior court for a de novo violation hearing if a district court judge revokes probation or imposes special probation.
  - There is no right to appeal other modifications of probation, including imposition of a period of confinement in response to violation (CRV). State v. Romero, 228 N.C. App. 348 (2013).
  - There is no right to a de novo hearing in superior court if the defendant waived his or her right to a hearing in district court. G.S. 15A-1347.
  - Appeal of a violation hearing held in district court for a Class H or I felony pled in district court is to superior court for a de novo hearing. State v. Hooper, 358 N.C. 122 (2004).

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.

Negotiation

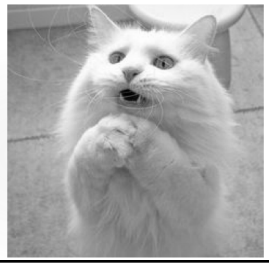
ELIZABETH HOPKINS THOMAS- MANNETTE AND THOMAS, PLLC
PREPARED BY FRAN CASTILLO- FORMER ASSISTANT CAPITAL DEFENDER

Pre-Game

- Before you begin any negotiation these are things you must do to prepare.
- Know the Law and the cast of characters

The Cast of Characters

Starring the Assistant Public Defender



The Client

The ADA (How we see them)

The ADA (How they see themselves)

Know the Law

1) Is the citation correct or are there fatal errors? (charging issues)
2) Review the elements of the offense (proof issues)
3) Practice Note: NC Secretary of State website to verify ownership

Know your Client

1) Interview your client and get all relevant information about the charge.
2) Pay close attention to the relationship between your client and the witness/victim. Is this a relationship you can leverage in negotiation? Parent/child; romantic partners; friends. How heavily invested is the other party?
3) Review the client's record. Do not rely on them for this information.

Know your Victim

- If you are trying to negotiate on your client's behalf you have to acknowledge the victim.
- Who is the victim? Store – did they get the item back? Was it in usable condition? Negotiation: there was no actual harm
- Was the victim a family member or someone known to your client? If so, what is their position? Are they out for blood? Find out their position. Negotiation: witness doesn't want to prosecute

Know your ADA

- What is their personality type?
  - Is this the dedicated DV prosecutor who hates every Defendant?
  - Is this Pollyanna who has never done anything wrong?
  - Is this your lazy ADA who never wants to try a case so they'll make a deal?
- Negotiation is all about knowing your opponent.
- If it's one of the bat-shit crazy unreasonable ADA's you might want to continue the case in order to work with someone else.
- This is about strategy, who will give you what you want.

Know your Officer

Working with your Client

- Start the conversation with your client from a position of power, ie. I have reviewed your case and because of this, this and this, we should see if we can work out a plea to this
- If you start with what do you want to happen your client is going to come back with something unreasonable so limit the expectations from the beginning
- Get your client to commit to 2 options that way you have something to negotiate with rather than being a one-trick pony

Client

- Educate your client as to the most likely outcome in their case. Give the client a choice of two.
- Know you client's bottom line. There is no need in negotiating something with the ADA & then having your client balk.
- Acknowledge your client's limitations. Don't hang them out to dry with terms they can't meet.

Getting the Deal

What Can I do to get you in this car today?

The 2 Minute Pitch

1) Prepare a pitch
a) Here's the crime
b) Here's what we can do to resolve this today. Present your reasonable offer
c) Here's why we should do this – skip trial, victim and defendant have reconciled, there was no actual harm, here's all the great stuff my client is doing, etc.

ADA

2) Have all the questions the ADA will ask already answered.
- I need to talk to the victim (I have and here's their position)
- I need to talk to my officer (done)
- Ross got the dress back and it was undamaged

** Make it easy for the ADA to do what you want by doing the legwork

Once the Deal is Done

a) Review it one final time with your client to make sure he/she understands it and is on board

b) Iron out the details – specify in the plea community service but instead of downtown which entails your client taking 2 buses it can be done at a church around the corner from their house

**make sure to memorialize all details on the shuck or deferral agreement so there's no issue when/if your client has to return for a compliance date

North Carolina Commission on Indigent Defense Services

Performance Guidelines for Indigent Defense Representation in Non-Capital Criminal Cases at the Trial Level

Adopted November 12, 2004

Guideline 5.3 Subsequent Filing and Renewal of Pretrial Motions

Counsel should be prepared to raise during the subsequent proceedings any issue that is appropriately raised pretrial, but could not have been so raised because the facts supporting the motion were unknown or not reasonably available. Further, counsel should be prepared to renew pretrial motions or file additional motions at any subsequent stage of the proceedings if new supporting information is later disclosed or made available. Counsel should also renew pretrial motions and object to the admission of challenged evidence at trial as necessary to preserve the motions and objections for appellate review.

SECTION 6:

Guideline 6.1 The Plea Negotiation Process and the Duties of Counsel

(a) After appropriate investigation and case review, counsel should explore with the client the possibility and desirability of reaching a negotiated disposition of the charges rather than proceeding to trial. In doing so, counsel should fully explain to the client the rights that would be waived by a decision to enter a plea and not proceed to trial.

(b) Counsel should keep the client fully informed of any plea discussions and negotiations, and convey to the client any offers made by the prosecution for a negotiated settlement. Counsel may not accept any plea agreement without the client's express authorization.

(c) Counsel should explain to the client those decisions that ultimately must be made by the client, as well as the advantages and disadvantages inherent in those choices. The decisions that must be made by the client after full consultation with counsel include whether to plead guilty or not guilty, whether to accept a plea agreement, and whether to testify at the plea hearing. Counsel should also explain to the client the impact of the decision to enter a guilty plea on the client's right to appeal. Although the decision to enter a plea of guilty ultimately rests with the client, if counsel believes the client's decisions are not in his or her best interest, counsel should attempt to persuade the client to change his or her position.

(d) Notwithstanding the existence of ongoing tentative plea negotiations with the prosecution, counsel should continue to prepare and investigate the case to the extent necessary to protect the client's rights and interests in the event that plea negotiations fail.

(e) Counsel should not allow a client to plead guilty based on oral conditions that are not disclosed to the court. Counsel should ensure that all conditions and promises comprising a plea arrangement between the prosecution and defense are included in writing in the transcript of plea.

Guideline 6.2 The Contents of the Negotiations

(a) In conducting plea negotiations, counsel should attempt to become familiar with any practices and policies of the particular district, judge, and prosecuting attorney that may affect the content and likely results of a negotiated plea bargain.

(b) To develop an overall negotiation plan, counsel should be fully aware of, and fully advise the client of:

(1) the maximum term of imprisonment that may be ordered under the applicable sentencing laws, including any habitual offender statutes, sentencing enhancements, mandatory minimum sentence requirements, and mandatory consecutive sentence requirements;

(2) the possibility of forfeiture of assets seized in connection with the case;

(3) any registration requirements, including sex offender registration;

(4) the likelihood that a conviction could be used for sentence enhancement in the event of future criminal cases, such as sentencing in the aggravated range, habitual offender status, or felon in possession of a firearm;

(5) the possibility of earned-time credits;

(6) the availability of appropriate diversion or rehabilitation programs;

(7) the likelihood of the court imposing financial obligations on the client, including the payment of attorney fees, court costs, fines, and restitution; and

(8) the effect on the client's appellate rights.

Counsel should also discuss with the client that there may be other potential collateral consequences of entering a plea, such as deportation or other effects on immigration status; motor vehicle or other licensing; parental rights; possession of firearms; voting rights; employment, military, and government service considerations; and the potential exposure to or impact on any federal charges.

(c) In developing a negotiation strategy, counsel should be completely familiar with:

(1) concessions that the client might offer the prosecution as part of a negotiated settlement, including but not limited to:

(A) declining to assert the right to proceed to trial on the merits of the charges;

(B) refraining from asserting or litigating any particular pretrial motion(s);

(C) agreeing to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs;

(D) providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity;

(E) waiving challenges to validity or proof of prior convictions; and

(F) waiving the right to indictment and consenting to a bill of information on a related but unindicted offense;

(2) benefits the client might obtain from a negotiated settlement, including but not limited to, an agreement:

(A) that the prosecution will not oppose the client's release on bail pending sentencing or appeal;

(B) that the client may enter a conditional plea to preserve the right to litigate and contest the denial of a suppression motion;

(C) to dismiss or reduce one or more of the charged offenses either immediately, or upon completion of a deferred prosecution agreement;

(D) that the client will not be subject to further investigation or prosecution for uncharged alleged criminal conduct;

(E) that the client will receive, with the agreement of the court, a specified sentence or sanction or a sentence or sanction within a specified range;

(F) that at the time of sentencing and/or in communications with the preparer of a sentencing services plan or presentence report, the prosecution will take, or refrain from taking, a specified position with respect to the sanction to be imposed on the client by the court; and

(G) that at the time of sentencing and/or in communications with the preparer of a sentencing services plan or presentence report, the prosecution will not present certain information;

(3) information favorable to the client concerning such matters as the offense, mitigating factors and relative culpability, prior offenses, personal background, employment record and opportunities, educational background, and family and financial status;

(4) information that would support a sentencing disposition other than incarceration, such as the potential for rehabilitation or the nonviolent nature of the crime; and

(5) information concerning the availability of treatment programs, community treatment facilities, and community service work opportunities.

(d) In conducting plea negotiations, counsel should be familiar with:

(1) the various types of pleas that may be agreed to, including a plea of guilty, a plea of *nolo contendere*, a conditional plea of guilty in which the defendant retains the right to appeal the denial of a suppression motion, and a plea in which the defendant is not required to personally acknowledge his or her guilt (*Alford* plea);

(2) the advantages and disadvantages of each available plea according to the circumstances of the case; and

(3) whether the plea agreement is binding on the court and prison authorities.

Guideline 6.3 The Decision to Enter a Plea of Guilty

(a) Counsel shall inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement, including its advantages, disadvantages, and potential consequences.

(b) When counsel reasonably believes that acceptance of a plea offer is in the client's best interests, counsel should attempt to persuade the client to accept the plea offer. However, the decision to enter a plea of guilty ultimately rests with the client.

Guideline 6.4 Entry of the Plea before the Court

(a) Prior to the entry of a plea, counsel should:

(1) fully explain to the client the rights he or she will waive by entering the plea;

(2) fully explain to the client the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences the client will be exposed to by entering a plea; and

(3) fully explain to the client the nature of the plea hearing and prepare the client for the role he or she may play in the hearing, including answering questions of the judge and providing a statement concerning the offense.

(b) When entering the plea, counsel should ensure that the full content and conditions of the plea agreement between the prosecution and defense are made part of the transcript of plea.

(c) Subsequent to the acceptance of a plea, counsel should review and explain the plea proceedings to the client, and respond to any client questions and concerns.

Chapter 15

Stops and Warrantless Searches

15.1 General Approach

A. Five Basic Steps

This chapter outlines a five-step approach for analyzing typical "street encounters" with police. It covers situations involving both pedestrians and occupants of vehicles. For a fuller discussion of warrantless searches and seizures, see WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (5th ed. 2012) [hereinafter LAFAVE, SEARCH AND SEIZURE] and ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA (UNC School of Government, 4th ed. 2011) [hereinafter FARB].

Two additional resources on North Carolina law are: Jeff Welty, *Traffic Stops* (UNC School of Government, Mar. 2013) [hereinafter Welty, *Traffic Stops*] (reviewing permissible grounds for and actions during traffic stop), *available at* http://nccriminallaw.sog.unc.edu/wp-content/uploads/2013/03/2013-03-Traffic-Stops.pdf; and Jeffrey Welty, *Motor Vehicle Checkpoints*, ADMINISTRATION OF JUSTICE BULLETIN No. 2010/04 (UNC School of Government, Sept. 2010) [hereinafter Welty, *Motor Vehicle Checkpoints*], *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1004.pdf.

The five steps are:

1. Did the officer seize the defendant?
2. Did the officer have grounds for the seizure?

3. Did the officer act within the scope of the seizure?
4. Did the officer have grounds to arrest or search?
5. Did the officer act within the scope of the arrest or search?

Generally, if an officer lacks authorization at any particular step, evidence uncovered by the officer as a result of the unauthorized action is subject to suppression. A flowchart outlining these steps is attached to this chapter as Appendix 15-1.

B. Authority to Act without Warrant

In many (although not all) of the situations described in this chapter, an officer may act without first obtaining a warrant. The courts have long expressed a preference, however, for the use of both arrest and search warrants—even in situations where a warrant is not required. *See State v. Hardy*, 339 N.C. 207, 226 (1994) ("search and seizure of property unaccompanied by prior judicial approval in the form of a warrant is per se unreasonable unless the search falls within a well-delineated exception to warrant requirement"); *State v. Nixon*, 160 N.C. App. 31, 34–35 (2003), *relying on Aguilar v. Texas*, 378 U.S. 108, 110–11 (1964) ("informed and deliberate determinations of magistrates . . . are to be preferred over the hurried action of officers" (citation omitted)), *abrogated on other grounds by Illinois v. Gates*, 462 U.S. 213 (1983); *see also Flippo v. West Virginia*, 528 U.S. 11, 13 (1999) (court states that "warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement"; court rejects any "homicide crime scene" exception to warrant requirement); *United States v. Ventresca*, 380 U.S. 102, 106 (1965) ("in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall"); *Beck v. Ohio*, 379 U.S. 89, 96 (1964) ("arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause").

C. Effect of Constitutional and State Law Violations

Most of this chapter deals with violations of the U.S. Constitution, for which the remedy is suppression of evidence that is unconstitutionally obtained.

To the extent it provides greater protection, state constitutional law provides a basis for suppression of illegally obtained evidence. In the search and seizure context, the North Carolina courts have found that protections under the North Carolina Constitution differ from federal constitutional protections in limited instances. *See State v. Carter*, 322 N.C. 709 (1988) (rejecting good faith exception to exclusionary rule under state constitution); *see also supra* "Good faith exception for constitutional violations not valid in North Carolina" in § 14.2B, Search Warrants (discussing case law and impact of recent legislation). Several states have recognized additional circumstances in which their state constitutions provide greater protections than under the U.S. Constitution. Examples are cited in this chapter. North Carolina defense counsel should remain alert to opportunities for differentiating the North Carolina Constitution from more limited federal protections.

Substantial statutory violations also may warrant suppression under Section 15A-974 of

the North Carolina General Statutes (hereinafter G.S.). In 2011, the N.C. General Assembly amended G.S. 15A-974, effective for trials and hearings commencing on or after July 1, 2011, to provide a good-faith exception to the exclusionary rule for statutory violations. *See* 2011 N.C. Sess. Laws Ch. 6 (H 3). For a further discussion of statutory violations and the effect of the 2011 legislation, see *supra* "Good faith exception for constitutional violations not valid in North Carolina" in § 14.2B, Search Warrants, and § 14.5, Substantial Violations of Criminal Procedure Act.

Violations of other states' laws, not based on federal constitutional requirements or North Carolina law, generally do not provide a basis for suppression. *See State v. Hernandez*, 208 N.C. App. 591, 604 (2010) (declining to suppress evidence for violation of New Jersey state constitution); *see also Virginia v. Moore*, 553 U.S. 164 (2008) (Virginia law enforcement officers who had probable cause to arrest defendant for a misdemeanor did not violate Fourth Amendment when they arrested him and conducted search incident to arrest although state law did not authorize an arrest); *cf. State v. Stitt*, 201 N.C. App. 233 (2009) (even if State did not fully comply with 18 U.S.C. 2703(d) of the Stored Communications Act in obtaining records pertaining to cell phones possessed by defendant, federal law did not provide for suppression remedy).

15.2 Did the Officer Seize the Defendant?

The Fourth Amendment prohibits an officer from stopping, or "seizing," a person without legally sufficient grounds, and evidence obtained by an officer after seizing a person may not be used to justify the seizure. *See* FARB at 27. It is therefore critical for Fourth Amendment purposes to determine exactly when a seizure occurs.

A. Consensual Encounters

"Free to leave" test. As a general rule, a person is seized when, in view of all of the circumstances, a reasonable person would have believed that he or she was not "free to leave." *See United States v. Mendenhall*, 446 U.S. 544 (1980); *Florida v. Royer*, 460 U.S. 491 (1983); *see also Florida v. Bostick*, 501 U.S. 429 (1991) (when a person's freedom of movement is restricted for reasons independent of police conduct, such as when a person is a passenger on a bus, the test is whether a reasonable person would have felt free to decline the officer's requests or terminate the encounter).

The "free to leave" test used to determine whether a person has been seized requires a lesser degree of restraint than the test for "custody" used to determine whether a person is entitled to *Miranda* warnings. *See State v. Buchanan*, 353 N.C. 332 (2001) (test for custody is whether there was formal arrest or restraint on freedom of movement of degree associated with formal arrest); *see also infra* § 15.4G, Does *Miranda* Apply? (discussing circumstances in which *Miranda* warnings may be required following a seizure).

A seizure clearly occurs if an officer takes a person into custody, physically restrains the person, or otherwise requires the person to submit to the officer's authority. An encounter

may be considered "consensual" and not a seizure, however, if a person willingly engages in conversation with an officer.

Factors. Factors to consider in determining whether an encounter is consensual or a seizure include:

- number of officers present,
- display of weapon by officer,
- physical touching of defendant,
- use of language or tone of voice indicating that compliance is required,
- holding a person's identification papers or property,
- blocking the person's path, and
- activation or shining of lights.

See State v. Farmer, 333 N.C. 172 (1993) (discussing factors); *see also* Jeff Welty, *Is the Use of a Blue Light a Show of Authority?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Dec. 7, 2010) (suggesting that use of blue light is "conclusive" as to existence of seizure), http://nccriminallaw.sog.unc.edu/?p=1804.

Cases finding a seizure include: *State v. Icard*, 363 N.C. 303 (2009) (defendant was seized where officer initiated encounter, telling occupants of vehicle that the area was known for drug crimes and prostitution; was armed and in uniform; called for backup assistance; illuminated vehicle in which defendant was sitting with blue lights; knocked twice on defendant's window; and when defendant did not respond opened car door and asked defendant to exit, produce identification, and bring purse; backup officer also illuminated defendant's side of vehicle with take-down lights); *State v. Harwood*, ___ N.C. App. ___, 727 S.E.2d 891 (2012) (defendant was seized when officers parked directly behind his stopped vehicle, drew their firearms, ordered the defendant and his passenger to exit the vehicle, and placed defendant on the ground and handcuffed him); *State v. Haislip*, 186 N.C. App. 275 (2007) (defendant was seized where officer fell in behind defendant, activated blue lights, and after defendant parked car, got out, and began walking away, approached her and got her attention), *vacated and remanded on other grounds*, 362 N.C. 499 (2008) (remanded to trial court for written findings of fact and conclusions of law).

Cases not finding a seizure include: *State v. Campbell*, 359 N.C. 644 (2005) (defendant was not seized when officer parked her car in lot without turning on blue light or siren, approached defendant as defendant was walking from car to store, and asked defendant if she could speak with him; after talking with defendant, officer asked defendant to "hold up" while officer transmitted defendant's name to dispatcher; assuming that this statement constituted seizure, officer had developed reasonable suspicion by then to detain defendant); *State v. Williams*, 201 N.C. App. 566, 571 (2009) (officer parked his patrol car on the opposite side of the street from the driveway in which defendant was parked, did not activate the siren or blue lights on his patrol car, did not remove his gun from its holster, or use any language or display a demeanor suggesting that defendant was not free to leave); *State v. Johnston*, 115 N.C. App. 711 (1994) (defendant was not seized

where trooper drove over to where defendant's car was already parked, defendant voluntarily stepped out of car before trooper arrived, and trooper then exited his car and walked over to defendant).

B. Chases

Even if a reasonable person would not have felt "free to leave," the U.S. Supreme Court has held that a seizure does not occur until there is a physical application of force or submission to a show of authority. *See California v. Hodari D.*, 499 U.S. 621 (1991) (when police are chasing person who is running away, person is not "seized" until person is caught or gives up chase); *State v. Eaton*, 210 N.C. App. 142 (2011) (defendant was not seized before he discarded plastic baggie containing pills); *State v. Leach*, 166 N.C. App. 711 (2004) (following *Hodari D.* and holding that officers had not seized defendant until they detained him after high speed chase); *State v. West*, 119 N.C. App. 562 (1995) (following *Hodari D.*).

For example, under *Hodari D.*, if an officer directs a car to pull over, a seizure occurs when the driver stops, thus submitting to the officer's authority. A seizure also could occur when a person tries to get away from the police in an effort to terminate a consensual encounter. *See United States v. Wilson*, 953 F.2d 116 (4th Cir. 1991) (defendant initially agreed to speak with officer and produced identification at officer's request, but then declined request for consent to search and tried to leave; officer effectively seized defendant by following defendant and repeatedly asking for consent to search); *see also infra* § 15.3D, Flight (flight from consensual or illegal encounter does not provide grounds to stop person for resisting, delaying, or obstructing officer).

Generally, evidence observed or obtained before a seizure is not subject to suppression under the Fourth Amendment. *See State v. Eaton*, 210 N.C. App. 142 (2011) (defendant was not seized before he discarded plastic baggie containing pills; because defendant abandoned baggie in public place and seizure had not yet occurred, officer's recovery of baggie did not violate Fourth Amendment). If a defendant discards property as a result of illegal police action, however, he or she may move to suppress the evidence as the fruit of illegal action. *See State v. Joe*, ___ N.C. App. ___, 730 S.E.2d 779 (2012) (officers did not have grounds to arrest defendant for resisting an officer for ignoring their command to stop; bag of cocaine cannot be held to have been voluntarily abandoned by defendant when abandonment was product of unlawful arrest; suppression motion granted), *review granted*, ___ N.C. ___ , 736 S.E.2d 187 (2013).

C. Race-Based "Consensual" Encounters

If officers select a defendant for a "consensual" encounter because of the defendant's race, evidence obtained during the encounter potentially could be suppressed on equal protection and due process grounds. *See Whren v. United States*, 517 U.S. 806 (1996) (Equal Protection prohibits selective enforcement of law based on considerations such as race); *United States v. Avery*, 137 F.3d 343 (6th Cir. 1997); *United States v. Taylor*, 956 F.2d 572 (6th Cir. 1992); *see also United States v. Washington*, 490 F.3d 765 (9th Cir.

2007) (in totality of circumstances, encounter between two white police officers and African-American defendant was not consensual, as a reasonable person in defendant's circumstances would not have felt free to leave; court relied on, among other things, strained relations between police and African-American community and reputation of police among African-Americans).

If an officer's actions amount to a stop, racial motivation also may undermine the credibility of non-racial reasons asserted by the officer as the basis for the stop. *See infra* § 15.3M, Race-Based Stops.

In recognition of the potential for racial profiling, North Carolina law requires the Division of Criminal Information of the N.C. Department of Justice to collect statistics on traffic stops by state troopers and other state law enforcement officers. *See* G.S. 114-10.01. This statute also requires the Division to collect statistics on many local law enforcement agencies. Unless a specific statutory exception exists, records maintained by state and local government agencies are public records. *See generally News and Observer Publishing Co. v. Poole*, 330 N.C. 465 (1992).

D. Selected Actions before Seizure Occurs

Running tags. *See State v. Chambers*, 203 N.C. App. 373, at *2 (2010) (unpublished) ("Defendant's license tag was displayed, as required by North Carolina law, on the back of his vehicle for all of society to view. Therefore, defendant did not have a subjective or objective reasonable expectation of privacy in his license tag. As such, the officer's actions did not constitute a search under the Fourth Amendment.").

Installation of GPS tracking device. *See United States v. Jones*, ___ U.S. ___, 132 S. Ct. 945 (2012) (Government's attachment of GPS device to vehicle to track vehicle's movements was search under the Fourth Amendment); *see also* Jeff Welty, *Advice to Officers after Jones*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jan. 30, 2012) (observing that *Jones* requires that officers ordinarily obtain prior judicial authorization to attach GPS device to vehicle), http://nccriminallaw.sog.unc.edu/?p=3250.

15.3 Did the Officer Have Grounds for the Seizure?

A. Reasonable Suspicion

Officers may make a brief investigative stop of a person—that is, they may seize a person—if they have reasonable suspicion of criminal activity by the person. *See Terry v. Ohio*, 392 U.S. 1 (1968); *see also State v. Styles*, 362 N.C. 412 (2008) (holding that U.S. Constitution allows traffic stop based on reasonable suspicion); *State v. Duncan*, 43 P.3d 513 (Wash. 2002) (holding that although *Terry* authorizes stop based on reasonable suspicion of criminal offense and possibility of noncriminal traffic violation, it does not authorize stop based on reasonable suspicion of other noncriminal infractions). For a further discussion of the standard for traffic stops, see *infra* § 15.3E, Traffic Stops.

Factors to consider in determining reasonable suspicion include:

- the officer's personal observations,
- information the officer receives from others,
- time of day or night,
- the suspect's proximity to where a crime was recently committed,
- the suspect's reaction to the officer's presence, including flight, and
- the officer's knowledge of the suspect's prior criminal record

See also United States v. Foster, 634 F.3d 243, 248 (4th Cir. 2011) (in holding that stop was not supported by reasonable suspicion, court stated, "[w]e also note our concern about the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity" and "we are deeply troubled by the way in which the Government attempts to spin these largely mundane acts into a web of deception").

B. High Crime or Drug Areas

Presence in a high crime or drug area, standing alone, does not constitute reasonable suspicion. Other factors providing reasonable suspicion must be present. *See Brown v. Texas*, 443 U.S. 47 (1979) (defendant's presence with others on a corner known for drug-related activity did not justify investigatory stop); *State v. Fleming*, 106 N.C. App. 165 (1992) (following *Brown*); *see also United States v. Massenburg*, 654 F.3d 480, 488 (4th Cir. 2011) (disallowing stop and frisk of person based on generic anonymous tip; court states that allowing officer's actions "would be tantamount to permitting a regime of general searches of virtually any individual residing in or found in high-crime neighborhoods").

Although not extensively discussed in the North Carolina cases, some courts have questioned the characterization of a neighborhood as a high crime area and have required the State to make an appropriate factual showing. For example, the First Circuit Court of Appeals has held that, when considering an officer's testimony that a stop occurred in a "high crime area," the court must identify the relationship between the charged offense and the type of crime the area is known for, the geographic boundaries of the allegedly "high crime area," and the temporal proximity between the evidence of criminal activity and the observations allegedly giving rise to reasonable suspicion. *United States v. Wright*, 485 F.3d 45 (1st Cir. 2007), *cited with approval in United States v. Swain*, 324 F. App'x. 219, at *222 (4th Cir. 2009) (unpublished) ("Reasonable suspicion is a context-driven inquiry and the high-crime-area factor, like most others, can be implicated to varying degrees. For example, an open-air drug market location presents a different situation than a parking lot where an occasional drug deal might occur."); *see also United States v. Montero-Camargo*, 208 F.3d 1122, 1138 (9th Cir. 2000) ("[t]he citing of an area as 'high-crime' requires careful examination by the court, because such a description, unless properly limited and factually based, can easily serve as a proxy for race or ethnicity").

Cases finding a stop in a "high-crime" area not to be based on reasonable suspicion include:

State v. White, ___ N.C. App. ___, 712 S.E.2d 921, 928 (2011) (reasonable suspicion did not exist where officers responded to a complaint of loud music in a location they regarded as a high crime area but officers did not see the defendant engaged in any suspicious activity and did not see any device capable of producing loud music; that the defendant was running in the neighborhood did not establish reasonable suspicion; "[t]o conclude the officers were justified in effectuating an investigatory stop, on these facts, would render any person who is unfortunate enough to live in a high-crime area subject to an investigatory stop merely for the act of running")

State v. Hayes, 188 N.C. App. 313 (2008) (reasonable suspicion did not exist where defendant and another man were in area where drug-related arrests had been made in past, they were walking back and forth on a sidewalk in a residential neighborhood on a Sunday afternoon, the officer did not believe they lived in the neighborhood, and the officer observed in the car they had exited a gun under the seat of the defendant's companion but not of the defendant)

Cases finding a stop in a "high-crime" area to be justified by additional factors showing reasonable suspicion include:

State v. Butler, 331 N.C. 227 (1992) (presence of an individual on a corner specifically known for drug activity and the scene of multiple recent arrests for drugs, coupled with evasive actions by defendant, were sufficient to form reasonable suspicion to stop)

State v. Mello, 200 N.C. App. 437 (2009) (holding that the defendant's presence in a high-drug area, coupled with evasive action on the part of individuals seen interacting with defendant, provided reasonable suspicion to support a stop), *aff'd per curiam*, 364 N.C. 421 (2010)

In re I.R.T., 184 N.C. App. 579 (2007) (discussing factors relevant to whether an officer had reasonable suspicion)

C. Proximity to Crime Scenes or Crime Suspects

A factor similar to presence in a high-crime area, discussed in subsection B., above, is proximity to a crime scene. Without more, this factor does not establish reasonable suspicion. *See State v. Brown*, ___ N.C. App. ___, 720 S.E.2d 446 (2011) (proximity to area in which robbery occurred four hours earlier insufficient to justify stop); *State v. Chlopek*, 209 N.C. App. 358 (2011) (no reasonable suspicion to stop truck that drove into subdivision under construction and drove out thirty minutes later at a time of night when copper thefts had been reported in other parts of the county); *State v. Murray*, 192 N.C. App. 684 (2008) (officer did not have reasonable suspicion to stop vehicle when officer was on patrol at 4:00 a.m. in area where there had been recent break-ins; vehicle was not breaking any traffic laws, officer did not see any indication of any damage or break-in

that night, vehicle was on public street and was not leaving parking lot of any business, and officer found no irregularities on check of vehicle's license plate); *State v. Cooper*, 186 N.C. App. 100 (2007) (no reasonable suspicion where defendant, a black male, was in vicinity of crime scene and suspect was described as a black male); *compare State v. Campbell*, 188 N.C. App. 701 (2008) (court states that proximity to crime scene, time of day, and absence of other suspects in vicinity do not, by themselves, establish reasonable suspicion; however, noting other factors, court finds that reasonable suspicion existed in all the circumstances of the case).

Likewise, proximity to a person suspected of a crime or wanted for arrest, without more, does not establish reasonable suspicion. *See State v. Washington*, 193 N.C. App. 670 (2008) (defendant drove to and entered home of person who was wanted for several felonies; defendant and person came out of house a few minutes later and drove to nearby gas station, parked in lot, and got out of car, where officers arrested other person and ordered defendant to stop; trial court's finding that officer had right to make investigative stop of defendant because he transported wanted person was erroneous as matter of law).

D. Flight

Generally. In *Illinois v. Wardlow*, 528 U.S. 119 (2000), the U.S. Supreme Court held that the defendant's headlong flight on seeing the officers, along with his presence in an area of heavy narcotics trafficking, constituted reasonable suspicion to stop. The Court reaffirmed that mere presence in a high drug area does not constitute reasonable suspicion and cautioned that reasonable suspicion is based on the totality of the circumstances, not any single factor. *See also In re J.L.B.M.*, 176 N.C. App. 613 (2006) (officer did not have reasonable suspicion to stop in following circumstances: officer received police dispatch of suspicious person, described as Hispanic male, at gas station; when officer drove up, he saw a Hispanic male in baggy clothes, who spoke to someone in another car and then walked away from location of officer's patrol car).

Flight from consensual or illegal encounter not RDO. If an officer has grounds to seize a person, the person's flight may constitute resisting, delaying, or obstructing an officer in the lawful performance of his or her duties (RDO). *See, e.g., State v. Lynch*, 94 N.C. App. 330 (1989). If the initial encounter between an officer and defendant is consensual and not a seizure, however, a defendant's attempt to leave would not constitute RDO. *See, e.g.*, *State v. Joe*, ___ N.C. App. ___, 730 S.E.2d 779 (2012), *review granted*, ___ N.C. ___, 736 S.E.2d 187 (2013); *State v. White*, __ N.C. App. __, 712 S.E.2d 921, 927–28 (2011) (so holding); *In re A.J. M.-B.*, 212 N.C. App. 586 (2011) (same); *State v. Sinclair*, 191 N.C. App. 485, 490–91 (2008) ("Although Defendant's subsequent flight may have contributed to a reasonable suspicion that criminal activity was afoot thereby justifying an investigatory stop, Defendant's flight from a consensual encounter cannot be used as evidence that Defendant was resisting, delaying, or obstructing [the officer] in the performance of his duties."); *compare State v. Washington*, 193 N.C. App. 670 (2008) (officer had reasonable suspicion to stop defendant, so defendant's flight constituted RDO). For a discussion of the difference between consensual encounters and seizures, see *supra* § 15.2A, Consensual Encounters.

Likewise, if an officer illegally stops a person, the person's attempt to leave thereafter ordinarily would not give the officer grounds to stop the person and charge him or her with RDO. *See, e.g.*, *White*¸ ___ N.C. App. ___, 712 S.E.2d 921 (if officer is attempting to effect unlawful stop, defendant's flight is not RDO because officer is not discharging a lawful duty); *Sinclair*, 191 N.C. App. 485 (same); *State v. Swift*, 105 N.C. App. 550 (1992) (recognizing that person may flee illegal stop or arrest); JOHN RUBIN, THE LAW OF SELF-DEFENSE IN NORTH CAROLINA 137–38 (UNC Institute of Government, 1996) (person has limited right to resist illegal stop). *But cf. State v. Branch*, 194 N.C. App. 173 (2008) (officer had reasonable suspicion to stop defendant but did not have grounds to continue detention after completing purpose of stop; defendant had right to resist continued detention but used more force than reasonably necessary by driving away while officer was reaching into vehicle; officer therefore had probable cause to arrest defendant for assault); *In re J.L.B.M.*, 176 N.C. App. 613 (2006) (juvenile could be adjudicated delinquent of obstructing officer for giving false name to officer during illegal stop).

E. Traffic Stops

Standard for making stop. An officer may not randomly stop motorists to check their driver's license or vehicle registration; an officer must have at least reasonable suspicion of criminal activity. *See Delaware v. Prouse*, 440 U.S. 648 (1979). Police may establish systematic checkpoints, without individualized suspicion, under certain conditions. *See infra* § 15.3J, Motor Vehicle Checkpoints.

The N.C. Court of Appeals previously held in several opinions that when an officer makes a traffic stop based on a readily observed traffic violation, such as speeding or running a red light, the stop had to be supported by probable cause. In contrast, according to these decisions, reasonable suspicion was sufficient if the suspected violation was one that could be verified only by stopping the vehicle, such as impaired driving or driving with a revoked license. *See State v. Baublitz*, 172 N.C. App. 801 (2005) and cases cited therein; *see also State v. Ivey*, 360 N.C. 562 (2006) (suggesting under U.S. and N.C. constitutions that probable cause may be required to stop for any traffic violation). The N.C. Supreme Court has since held that reasonable suspicion, not probable cause, is sufficient for a traffic stop, regardless of whether the traffic violation is readily observed or merely suspected. *See State v. Styles*, 362 N.C. 412 (2008). *But cf.* G.S. 15A-1113(b) (an officer who has probable cause of a noncriminal infraction may detain the person to issue and serve a citation); *State v. Day*, 168 P.3d 1265 (Wash. 2007) (officer may not make investigatory stop for parking violation); *State v. Holmes*, 569 N.W.2d 181 (Minn. 1997) (to same effect).

Standing of passenger to challenge stop. In *Brendlin v. California*, 551 U.S. 249 (2007), the U.S. Supreme Court held that a passenger in a car is seized under the Fourth Amendment when the police make a traffic stop, and the passenger may challenge the stop's constitutionality. *Accord State v. Canty*, ___ N.C. App. ___, 736 S.E.2d 532 (2012). Consequently, when evidence incriminating a passenger is obtained following an illegal stop, the passenger has standing to move to suppress the evidence. This ruling

overrules any contrary authority in North Carolina. *See State v. Smith*, 117 N.C. App. 671 (1995) (suggesting that a passenger did not have standing to move to suppress). The North Carolina Court of Appeals has recognized under *Brendlin* that a passenger also has standing to challenge the duration of a stop. *See State v. Jackson*, 199 N.C. App. 236 (2009).

If a stop is valid, a passenger's standing to challenge actions taken during the stop (such as frisks or searches) will depend on whether the officer's actions infringe on the passenger's rights. *See State v. Franklin*, ___ N.C. App. ___, 736 S.E.2d 218 (2012) (although a passenger who has no possessory interest in a vehicle has standing to challenge a stop of the vehicle, that passenger does not have standing to challenge a search of the vehicle).

F. Selected Reasons for Traffic Stops

Delay at light. *Compare, e.g., State v. Barnard*, 362 N.C. 244 (2008) (driver's unexplained thirty-second delay before proceeding through green traffic light gave rise to reasonable suspicion of impaired driving in all the circumstances), *with State v. Roberson*, 163 N.C. App. 129 (2004) (defendant's eight to ten second delay after light turned green did not give officer reasonable suspicion to stop for impaired driving).

Failure to use turn signal. *Compare, e.g., State v. Ivey*, 360 N.C. 562 (2006) (failure to use turn signal when making turn did not give officer grounds to stop; failure to signal did not affect operation of any other vehicle or any pedestrian), *and State v. Watkins*, ___ N.C. App. ___, 725 S.E.2d 400 (2012) (suggesting that unsignaled lane change was insufficient to justify stop), *with State v. Styles*, 362 N.C. 412 (2008) (failure to use turn signal gave officer grounds to stop because failure could affect operation of another vehicle, in this case vehicle driven by officer, which was directly behind defendant), *and State v. McRae*, 203 N.C. App. 319 (2010) (similar).

Speeding or slowing. *See, e.g., State v. Canty*, ___ N.C. App. ___, 736 S.E.2d 532 (2012) (no reasonable suspicion; car touched fog line and slowed to 59 m.p.h. in 65 m.p.h. when officers passed car, and driver and passengers appeared nervous and failed to make eye contact with passing officer); *State v. Royster*, ___ N.C. App. ___, 737 S.E.2d 400 (2012) (officer had sufficient time to form opinion that defendant was speeding); *State v. Barnhill*, 166 N.C. App. 228 (2004) (officer's estimate that defendant was going 40 m.p.h. in 25 m.p.h. zone justified stop); *State v. Aubin*, 100 N.C. App. 628 (1990) (driving excessively slowly and weaving in own lane justified stop); *see also* Welty, *Traffic Stops*, at 3 (noting that "if a vehicle is speeding only slightly, an officer's visual estimate of speed may be insufficiently reliable and accurate to support a traffic stop"; citing cases), *available at* http://nccriminallaw.sog.unc.edu/wp-content/uploads/2013/03/2013-03-Traffic-Stops.pdf.

Weaving. Numerous cases address "weaving" in one's own lane. While weaving is not a traffic violation and alone may not provide reasonable suspicion, it may provide reasonable suspicion to stop when combined with other factors or when severe. *See also* Jeff Welty, *Weaving and Reasonable Suspicion*, N.C. CRIM. L., UNC SCH. OF GOV'T

BLOG (June 19, 2012), http://nccriminallaw.sog.unc.edu/?p=3677.

Cases not finding grounds for a stop include: *State v. Canty*, ___ N.C. App. ___, 736 S.E.2d 532 (2012) (no reasonable suspicion; car touched fog line and slowed to 59 m.p.h. in 65 m.p.h. when officers passed car and driver and passengers appeared nervous and failed to make eye contact with passing officer); *State v. Peele*, 196 N.C. App. 668 (2009) (single instance of weaving in own lane, without more, did not constitute reasonable suspicion to stop; officer's reliance on dispatcher's report of impaired driving in the area, in addition to officer's observation of weaving, did not provide reasonable suspicion; dispatcher's report was treated as based on anonymous tip, as State provided no evidence that report of bad driving came from identified caller); *State v. Fields*, 195 N.C. App. 740 (2009) (weaving in own lane three times, without more, did not establish reasonable suspicion to stop for impaired driving; defendant violated no other traffic laws, was driving at 4:00 p.m. in afternoon, which was not unusual hour, and was not near places that furnished alcohol); *see also State v. Tarvin*, 972 S.W.2d 910 (Tex. App. 1998) (trial court granted motion to suppress, observing that driving a car, in and of itself, is "controlled weaving"; appellate court upholds suppression of stop).

Cases finding grounds for a stop include: *State v. Kochuk*, ___ N.C. ___, 742 S.E.2d 801 (2013), *rev'g per curiam for reasons stated in dissenting opinion*, ___ N.C. App. ___, 741 S.E.2d 327 (2012); *State v. Otto*, 366 N.C. 134 (2012) (traffic stop justified by the defendant's "constant and continual" weaving for three quarters of a mile at 11:00 p.m. on Friday night); *State v. Fields*, ___ N.C. App. ___, ___, 723 S.E.2d 777, 778 (2012) (officer followed defendant for three quarters of a mile and saw him "weaving in his own lane . . . sufficiently frequent[ly] and erratic[ally] to prompt evasive maneuvers from other drivers"); *State v. Simmons*, 205 N.C. App. 509, 525 (2010) (stop was supported by reasonable suspicion where the defendant "was not only weaving within his lane, but was also weaving across and outside the lanes of travel, and at one point actually ran off the road"); *State v. Jacobs*, 162 N.C. App. 251, 255 (2004) (court recognizes that "defendant's weaving within his lane was not a crime," but finds that all of the facts—slowly weaving within own lane for three-quarters of a mile, late at night, in area near bars—justified stop); *State v. Thompson*, 154 N.C. App. 194 (2002) (weaving within the lane and touching the centerline with both left tires, combined with speeding and other factors, justified stop); *State v. Watson*, 122 N.C. App. 596 (1996) (driving on center line and weaving in own lane at 2:30 a.m. near nightclub justified stop); *State v. Aubin*, 100 N.C. App. 628 (1990) (driving excessively slowly and weaving in own lane justified stop); *see also State v. Hudson*, 206 N.C. App. 482 (2010) (crossing center line and fog line twice provided probable cause for stop for violation of G.S. 20-146(a), which requires driving on right side of highway).

Proximity to bars. *See, e.g.*, *State v. Roberson*, 163 N.C. App. 129 (2004) (driving at 4:30 a.m. in area with several bars and restaurants did not increase level of suspicion and justify stop; by law, those establishments must stop serving alcohol at 2:00 a.m.); *State v. Watson*, 122 N.C. App. 596 (1996) (proximity to nightclub at 2:30 a.m., combined with driving on center line and weaving in own lane, justified stop).

Anonymous tip of impaired driving. *See infra* § 15.3G, Anonymous Tips.

Ownership and registration. *See, e.g., State v. Burke*, 212 N.C. App. 654 (2011) (stop based merely on low number of temporary tag not supported by reasonable suspicion), *aff'd per curiam*, 365 N.C. 415 (2012); *State v. Hess*, 185 N.C. App. 530 (2007) (owner of car had suspended license; absent evidence that owner was not driving car, officer had reasonable suspicion to stop car to determine whether owner was driving); *State v. Hudson*, 103 N.C. App. 708 (1991) (officer had reasonable suspicion that faded, temporary registration had expired and that vehicle was improperly registered); *see also United States v. Wilson*, 205 F.3d 720 (4th Cir. 2000) (Fourth Amendment does not allow traffic stop simply because vehicle had temporary tags and officer could not read expiration date while driving behind defendant at night).

For a discussion of limitations on an officer's actions after discovering that a car was not improperly registered, *see infra* § 15.3L, Mistaken Belief by Officer.

Seatbelt violations. *See, e.g., State v. Villeda*, 165 N.C. App. 431 (2004) (trooper did not have grounds to stop defendant for seat belt violation; evidence indicated that trooper could not see inside vehicles driving in front of him at night on stretch of road on which defendant was stopped).

G. Anonymous Tips

General test. Information from informants is evaluated under the "totality of the circumstances," but the most critical factors are the reliability of the informant and the basis of the informant's knowledge. *See Alabama v. White*, 496 U.S. 325 (1990).

When a tip is anonymous, the reliability of the informant is difficult to assess, and the tip is insufficient to justify a stop unless the tip itself contains strong indicia of reliability or independent police work corroborates significant details of the tip. *See State v. Johnson*, 204 N.C. App. 259, 260–61 (2010) (finding tip insufficient under these principles; anonymous caller merely alleged that black male wearing a white shirt in a blue Mitsubishi with a certain license plate number was selling guns and drugs at certain street corner); *see also State v. Watkins*, 337 N.C. 437 (1994) (upholding stop based on corroboration), *rev'g* 111 N.C. App. 766 (1993); *State v. Harwood*, ___ N.C. App. ___, ___, 727 S.E.2d 891, 899 (2012) (uncorroborated, anonymous tip did not provide basis for stop; "tip in question simply provided that Defendant would be selling marijuana at a certain location on a certain day and would be driving a white vehicle"); *State v. Peele*, 196 N.C. App. 668 (2009) (officer's reliance on dispatcher's report of impaired driving in the area along with observation of single instance of weaving did not provide reasonable suspicion; dispatcher's report was treated as based on anonymous tip, as State provided no evidence that report of bad driving came from identified caller); *see also State v. Coleman*, ___ N.C. App. ___, 743 S.E.2d 62 (2013) (even though caller gave her name, court concluded that information that defendant had open container of alcohol was no more reliable than information provided by anonymous tipster; caller did not identify or describe the defendant, did not provide any way for the officer to assess her credibility,

failed to explain the basis of her knowledge, and did not include any information concerning defendant's future actions).

A tip from a person whom the police fail to identify might not be considered anonymous, or at least not completely anonymous, if the tipster has put his or her anonymity sufficiently at risk. *See State v. Maready*, 362 N.C. 614 (2008) (driver who approached officers in person to report erratic driving was not completely anonymous informant even though officers did not take the time to get her name; also, informant had little time to fabricate allegations); *State v. Allen*, 197 N.C. App. 208 (2009) (tip was not anonymous; victim had face-to-face encounter with police when reporting alleged assault); *State v. Hudgins*, 195 N.C. App. 430 (2009) (caller, although not identified, placed his anonymity at risk; he remained on his cell phone with the dispatcher for eight minutes, gave detailed information about the person who was following him, followed the dispatcher's instructions, which allowed an officer to intercept the person who was following the caller, and remained at scene long enough to identify person stopped by the officer).

Weapons offenses. In *Florida v. J.L.*, 529 U.S. 266 (2000), the Court found that an anonymous tip—stating that a young black male was at a particular bus stop wearing a plaid shirt and carrying a gun—did not give officers reasonable suspicion to stop. The tip lacked sufficient indicia of reliability and provided no predictive information about the person's conduct. The Court refused to adopt a "firearm exception," under which a tip alleging possession of an illegal firearm would justify a stop and frisk even if the tip fails the standard test for reasonable suspicion. *See also State v. Hughes*, 353 N.C. 200 (2000) (following *Florida v. J.L.*, court finds anonymous tip insufficient to support stop); *State v. Brown*, 142 N.C. App. 332 (2001) (to same effect).

Impaired driving cases. *Florida v. J.L.* indicates that the standard for evaluating anonymous tips should be the same regardless of the type of offense involved, with possible exceptions for certain offenses (such as offenses involving explosives).

In cases in North Carolina in which the police have received a tip about impaired or erratic driving, the courts have applied the same standard for assessing reasonable suspicion as in cases involving other offenses. They have not recognized an exception for impaired driving. *See State v. Maready*, 362 N.C. 614 (2008) (finding in totality of circumstances that tip about erratic driving and other information gave officers reasonable suspicion to stop); *State v. Peele*, 196 N.C. App. 668 (2009) (following *Maready*, court finds that tip about erratic driving and other information did not give officers reasonable suspicion to stop). However, a tip might not be treated as completely anonymous if the tipster placed his or her anonymity sufficiently at risk. *See supra* "General test" in this subsection G.

Drug cases. An anonymous tip to police that a person is involved in illegal drug sales is not sufficient, without more, to justify an investigatory stop. *See State v. McArn*, 159 N.C. App. 209 (2003) (anonymous tip that drugs were being sold from particular vehicle was not sufficient to justify stop of vehicle); *compare State v. Sutton*, 167 N.C. App. 242 (2004) (tip from pharmacist with whom officer had been working on ongoing basis to

uncover illegal activity involving prescriptions, combined with officer's own observations, provided reasonable suspicion to stop defendant after defendant left pharmacy).

H. Information from Other Officers

Generally. An officer may stop a person based on the request of another officer if:

- the officer making the stop has reasonable suspicion for the stop based on his or her personal observations;
- the officer making the stop received a request to stop the defendant from another officer who, before making the request, had reasonable suspicion for the stop; or
- the officer making the stop received information from another officer before the stop, which when combined with the stopping officer's observations constituted reasonable suspicion.

See State v. Battle, 109 N.C. App. 367, 371 (1993) (discussing general standard for stops based on collective knowledge); *State v. Bowman*, 193 N.C. App. 104 (2008) (collective knowledge of team of officers investigating defendant imputed to officer who conducted search of vehicle); *State v. Watkins*, 120 N.C. App. 804 (1995) (information fabricated by one officer and supplied to stopping officer may not be used to show reasonable suspicion, even if stopping officer did not know that the information was fabricated); *see also State v. Harwood*, ___ N.C. App. ___, 727 S.E.2d 891 (2012) (anonymous tip did not provide basis for stop; court appears to reject argument that officers could rely on outstanding arrest warrant unknown to stopping officers when they stopped defendant); Jeff Welty, *Fascinating Footnote 3*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Aug. 13, 2012) (discussing *Harwood*), http://nccriminallaw.sog.unc.edu/?p=3815.

Police broadcasts. Police broadcasts may or may not be based on an officer's observations. Without any showing as to the basis of the broadcast, it should be given no more weight than an anonymous tip. *See State v. Peele*, 196 N.C. App. 668 (2009) (dispatcher's report of impaired driving was treated as based on anonymous tip, as State provided no evidence that report of driving came from identified caller); *see also supra* § 15.3G, Anonymous Tips.

I. Pretext

In some instances, a court may find that a stop or search is unconstitutional because the purported justification for the stop or search is a pretext for an impermissible reason.

Stops based on individualized suspicion. The U.S. Supreme Court has significantly cut back the pretext doctrine. Generally, an officer's subjective motivation in stopping a person or vehicle is irrelevant under the Fourth Amendment if the officer has probable cause to make the stop. In *Whren v. United States*, 517 U.S. 806 (1996), the Court held that an officer's actual motivation in making a stop (for example, to investigate for drugs) is generally irrelevant if the officer has probable cause for the stop and could have

stopped the person for that reason (for example, the person committed a traffic violation). *Accord State v. McClendon*, 350 N.C. 630 (1999) (adopting *Whren* under state constitution); *State v. Hamilton*, 125 N.C. App. 396 (1997) (court recognizes effect of *Whren* under U.S. Constitution); *compare State v. Ladson*, 979 P.2d 833 (Wash. 1999) (rejecting *Whren* under state constitution). Before *Whren*, the test in many jurisdictions, including North Carolina, was what a reasonable officer "would have" done in a similar circumstance, not what an officer lawfully "could have" done. *See State v. Hunter*, 107 N.C. App. 402 (1992) (stating former standard), *overruled on other grounds by State v. Pipkins*, 337 N.C. 431 (1994); *State v. Morocco*, 99 N.C. App. 421 (1990) (to same effect).

Whren did not specifically address whether a defendant may challenge as pretextual a stop based on reasonable suspicion. *See also Hamilton*, 125 N.C. App. 396 (dissent notes that *Whren* left this question open). It seems unlikely, however, that *Whren* would not apply to circumstances in which officers have reasonable suspicion to stop, a lesser degree of proof than probable cause but still a form of individualized suspicion. *See Ashcroft v. al-Kidd*, ___ U.S. ___, 131 S. Ct. 2074 (2011) (in upholding validity of material-witness arrest warrant requiring less than probable cause for issuance, Court states that subjective intent is pertinent only in cases not involving individualized suspicion).

Facts known to officer. *Whren* and cases following it consider the objective facts supporting a stop. Consequently, if the facts known to an officer amount to a violation of the law, the stop is valid even though the officer may have made the stop for a different reason. *See State v. Barnard*, 362 N.C. 244 (2008) (based on defendant's thirty-second delay after traffic light turned green, officer stopped defendant for impaired driving, for which there was reasonable suspicion, and for impeding traffic, which was not a traffic violation; court upholds stop, reasoning that its constitutionality depends on the objective facts observed by officer, not the officer's subjective motivation); *State v. Osterhoudt*, ___ N.C. App. ___, 731 S.E.2d 454 (2012) (trooper had reasonable, articulable suspicion to stop defendant based on observed traffic violations notwithstanding his mistaken belief that defendant violated different traffic law).

Relatedly, facts unknown to the officer at the time of the stop do not provide a basis for a stop. *See Devenpeck v. Alford*, 543 U.S. 146, 152 (2004) ("[w]hether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest"; officer's subjective reason for making arrest need not be criminal offense as to which known facts provide probable cause); *see also* 2 LAFAVE, SEARCH AND SEIZURE § 3.2(d), at 57–58 (for actions without warrant, information to be considered is totality of facts available to officer). For a discussion of reliance on the collective knowledge of the investigating officers, see *supra* § 15.3H, Information from Other Officers.

Accordingly, if the facts known to an officer do not satisfy the State's burden of showing grounds for the stop, the stop is invalid. This result does not depend on whether the stop was or was not pretextual, although as a practical matter judges may scrutinize more

closely whether grounds existed for the stop if they believe an officer acted for a pretextual reason. *See infra* § 15.3M, Race Based Stops (discussing cases); *see also State v. Franklin*, ___ N.C. App. ___, 736 S.E.2d 218 (2013) (Elmore, J., dissenting) (finding that evidence failed to show that officer observed seat belt violation and therefore failed to show officer possessed probable cause for stop).

Exceptions. There are some limits to *Whren*.

- *Whren* itself stated that a defendant may challenge as pretextual inventory searches or administrative inspections because they are not based on individualized suspicion.
- Likewise, a defendant may challenge as pretextual a license or other checkpoint when the real purpose is impermissible. *See infra* "Pretextual checkpoints" in § 15.3J, Motor Vehicle Checkpoints.
- A stop for a traffic violation or other matter still violates the Fourth Amendment if the officer exceeds the scope of the stop—for example, the officer unduly detains the defendant about a matter unrelated to the purpose of the stop without additional grounds to do so. *See infra* § 15.4E, Nature, Length, and Purpose of Detention.
- If an officer stops a defendant because of his or her race, the stop may violate equal protection regardless of whether probable cause exists. *See supra* § 15.2C, Race-Based "Consensual" Encounters. Or, the racial motivation may undermine the credibility of the officer's stated reason for the stop. *See infra* § 15.3M, Race-Based Stops.

Effect of not issuing citation. The failure of an officer to issue a citation for the traffic violation that was the basis of a traffic stop does not affect the stop's validity if objective circumstances indicate that the defendant committed a violation. *See State v. Baublitz*, 172 N.C. App. 801 (2005) (officer's "objective observation" that defendant's vehicle twice crossed center line of highway provided officer with probable cause to stop for traffic violation, regardless of officer's subjective motivation for making stop; court finds it irrelevant that officer did not issue traffic ticket to defendant after arresting him for possession of cocaine).

Nevertheless, a stop would be unlawful if the circumstances indicate that the officer did not have grounds for the stop—for example, the officer could not have observed the alleged traffic or other violation. *See State v. Villeda*, 165 N.C. App. 431 (2004) (trooper did not have probable cause to stop defendant for seat belt violation; evidence indicated that trooper could not see inside vehicles driving in front of him at night on stretch of road on which defendant was stopped). The failure to issue a citation, along with other factors, may bear on the credibility of the officer's claimed observation of a violation. *See State v. Parker*, 183 N.C. App. 1, 8 (2007) (noting rule in *Baublitz* that failure to issue citation for violation that was basis of stop does not affect validity of stop if objective circumstances support stop, but also noting holding in *Villeda* that evidence may not support officer's claimed observations).

J. Motor Vehicle Checkpoints

The discussion below reviews selected principles governing motor vehicle checkpoints. For an in-depth discussion of checkpoints as well as additional information on some of the issues discussed below, see Welty, *Motor Vehicle Checkpoints*, *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1004.pdf.

License and registration checkpoints. In *Delaware v. Prouse*, 440 U.S. 648 (1979), the U.S. Supreme Court held that officers may not randomly stop motorists to check their driver's license or vehicle registration; the Court indicated, however, that checkpoints at which drivers' licenses and registrations are systematically checked may be permissible. *See also State v. Sanders*, 112 N.C. App. 477 (1993) (upholding license checkpoint under authority of *Prouse*). Motor vehicle checkpoints are authorized in North Carolina under G.S. 20-16.3A, which allows checkpoints for the purpose of determining compliance with G.S. Chapter 20. The N.C. Court of Appeals has questioned whether it is constitutionally permissible to set up a checkpoint to check for "any and all" motor vehicle violations; subsequent decisions have not specifically addressed the question. *State v. Veazey*, 191 N.C. App. 181, 189 (2008) (questioning whether it is constitutionally permissible to set up a checkpoint to check for "any and all" motor vehicle violations), *appeal after remand*, 201 N.C. App. 398 (2009) (finding that checkpoint was for lawful purpose of checking licenses and that checkpoint was tailored to that purpose); *see also* 5 LAFAVE, SEARCH AND SEIZURE § 10.8(b), at 420–22 (suggesting that vehicle safety checkpoints may be permissible if they do not involve unrestrained discretion and are not a subterfuge for other purposes). *But cf. infra* § 15.3K, Drug and Other Checkpoints (noting disapproval of general crime control checkpoints).

A license and registration checkpoint must comply with both constitutional limitations and the procedures in G.S. 20-16.3A. For a further discussion of these limitations, see Welty, *Motor Vehicle Checkpoints*, *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1004.pdf.

DWI checkpoints. The U.S. Supreme Court has upheld the constitutionality of impaired-driving checkpoints conducted under guidelines regulating officers' discretion. *See Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990). Impaired-driving checkpoints in North Carolina must comply with both constitutional limitations and the procedures in G.S. 20-16.3A. For a further discussion of these limitations, see Welty, *Motor Vehicle Checkpoints*.

Pretextual checkpoints. A license or impaired-driving checkpoint is subject to challenge as pretextual under the Fourth Amendment. *See City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (checkpoint is unconstitutional if primary purpose is unlawful; checkpoint was unlawful in this case because primary purpose was to investigate for drugs).

Avoiding checkpoint. In *State v. Foreman*, 351 N.C. 627 (2000), the North Carolina Supreme Court held that avoidance of a lawful checkpoint constituted reasonable suspicion to stop to inquire why the defendant turned away from the checkpoint. Cases since *Foreman* have looked at the totality of the circumstances, implicitly recognizing

that turning away from a checkpoint may not always constitute reasonable suspicion to stop. *See State v. Griffin*, ___ N.C. ___, ___ S.E.2d ___ (2013) (defendant made three-point turn in middle of road, not at intersection, to avoid checkpoint where police lights were visible; court states that "even a legal turn, when viewed in the totality of the circumstances, may give rise to reasonable suspicion" and finds that "place and manner of defendant's turn in conjunction with his proximity to the checkpoint" provided reasonable suspicion to stop); *White v. Tippett*, 187 N.C. App. 285 (2007) (from a combination of the driver's evasion of the checkpoint, odor of alcohol surrounding the driver, and brief conversation with the driver, the officer had reasonable grounds to believe that the driver had committed an implied-consent offense); *State v. Bowden*, 177 N.C. App. 718 (2006) (defendant broke hard before checkpoint, causing front of car to dip, abruptly turned into parking lot, pulled in and out of parking space, headed toward exit, and pulled into another space when officer drove up; totality of circumstances justified officer in pursuing and stopping defendant's car).

Challenge to illegal checkpoint by person who turns away. The N.C. Court of Appeals has held that the illegality of a checkpoint is not relevant when a driver turns away from the checkpoint because the checkpoint is not the basis for the stop in those circumstances. *See State v. Collins*, ___ N.C. App. ___, 724 S.E.2d 82 (2012); *see also White v. Tippett*, 187 N.C. App. 285 (2007) (so stating in civil license proceedings). (These decisions are inconsistent with the decision of another panel of the court of appeals, but the decision of that panel was vacated and remanded for other reasons. *See State v. Haislip*, 186 N.C. App. 275 (2007) (if checkpoint is unconstitutional, turning away from checkpoint would not be grounds to stop defendant), *vacated and remanded on other grounds*, 362 N.C. 499 (2008) (remanded to trial court for written findings of fact and conclusions of law).)

The above principle does not necessarily end the inquiry. In remanding the case for further findings, the court in *Collins* recognized that an officer must have reasonable suspicion to stop a defendant who turns away from an unconstitutional checkpoint; mere turning away may not be sufficient. *See also State v. Griffin*, ___ N.C. ___, ___ S.E.2d ___ (2013) (stating that court did not need to address alleged unconstitutionality of checkpoint because in circumstances of case officer had reasonable suspicion to stop defendant). Also at play is the principle that a person has the right to avoid an illegal action. Turning away from an illegal checkpoint, along with other factors, may provide reasonable suspicion, just as running on foot from an unlawful stop, along with other factors, may provide reasonable suspicion. Without more, however, merely failing to obey an unlawful action by the police may not constitute reasonable suspicion. *See supra* § 15.3D, Flight; *see also* Jeff Welty, *Ruse Checkpoints*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 1, 2011) (citing cases holding that a person's avoidance of a "ruse" checkpoint—that is, one in which officers put up signs warning of a checkpoint ahead that does not actually exist or that is illegal so that officers may observe drivers' reactions—does not without more provide reasonable suspicion to stop), http://nccriminallaw.sog.unc.edu/?p=2516.

Limits on detention at checkpoint. Although motorists may be briefly stopped at an impaired driving checkpoint, detention of a particular motorist for more extensive

investigation, such as field sobriety testing, requires satisfaction of an individualized suspicion standard. *See Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 451 (1990). For a further discussion of these issues, see Welty, *Motor Vehicle Checkpoints*, at 6–7 (questions 10 and 11), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1004.pdf.

K. Drug and Other Checkpoints

Drug and general crime control checkpoints. Drug checkpoints and general crime control checkpoints are not permissible. *See City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

Information-seeking checkpoints. Distinguishing *Edmond*, 531 U.S. 32, which found drug checkpoints unconstitutional, the Court held that brief stops of motorists at a highway checkpoint at which police sought information about a recent fatal hit-and-run accident on that highway were not presumptively invalid under the Fourth Amendment. *See Illinois v. Lidster*, 540 U.S. 419 (2004).

Public housing checkpoints. *See State v. Hayes*, 188 S.W.3d 505 (Tenn. 2006) (identification checkpoint at entrance to public housing development violated Fourth Amendment where goal was to reduce crime, exclude trespassers, and enforce lease agreement provisions to decrease crime and drug use; checkpoint was aimed at general crime control); *Wilson v. Commonwealth*, 509 S.E.2d 540 (Va. Ct. App. 1999) (drug checkpoint inside entrance to public housing project unconstitutional).

L. Mistaken Belief by Officer

A mistaken belief by an officer may or may not justify a stop depending on the nature of the belief. If a mistake of "law," the mistake generally does not justify a stop; if a mistake of "fact," the mistake may not invalidate the stop. Distinguishing between a mistake of law and mistake of fact may be difficult in some cases.

Mistake of law. Generally, a stop based on observed facts that do not amount to a violation of the law—a mistake of "law"—violates the Fourth Amendment. *See State v. McLamb*, 186 N.C. App. 124 (2007) (officer stopped defendant for speeding for going 30 m.p.h. in what the officer thought was a 20 m.p.h. zone; speed limit was actually 55 m.p.h., and stop violated Fourth Amendment); *State v. Schiffer*, 132 N.C. App. 22 (1999) (officer was mistaken in believing that out-of-state vehicle was subject to North Carolina's window-tinting restrictions; however, officer had reasonable suspicion to stop vehicle for violation of North Carolina's windshield-tinting restrictions, which do apply to out-of-state vehicles); *see also State v. Hopper*, 205 N.C. App. 175, 182–83 (2010) (upholding trial court's finding that defendant was driving on public street and therefore was subject to traffic laws; therefore, case was distinguishable "from the line of decisions holding that a law enforcement officer's mistaken belief that a defendant had committed a traffic violation is constitutionally insufficient to support a traffic stop" [this opinion supersedes the court of appeals' prior opinion in this case, which was withdrawn, discussing whether the officer made a mistake of law or fact about whether the defendant

was on a public street]); *cf. State v. Osterhoudt*, ___ N.C. App. ___, 731 S.E.2d 454 (2012) (trooper had reasonable suspicion to stop vehicle based on observed traffic violations even where trooper was mistaken about which motor vehicle statute had been violated).

In a 4 to 3 decision, the N.C. Supreme Court recognized an exception to the rule that a mistake of law will not support a stop. The Court held that if an officer makes a stop based on an objectively reasonable mistake of law, the stop is not invalid because of the mistake. *See State v. Heien*, 366 N.C. 271 (2012) (holding that although law requires vehicle to have only one working brake light, stop by officer based on mistaken belief that vehicles must have two working brake lights was objectively reasonable). This decision may have a limited impact. The court in *Heien* noted that North Carolina's brake light requirements were particularly ambiguous and, until this case, had not been interpreted by the appellate courts. In cases in which the legal requirements are clearer or more established, an officer's mistake would not meet the standard announced in *Heien*. *See State v. Coleman*, ___ N.C. App. ___, 743 S.E.2d 62 (2013) (finding that mistake of law about lawfulness of possession of open container of alcohol in public vehicular area was not reasonable).

The dissenters in *Heien* argued that the majority's decision is inconsistent with North Carolina cases refusing to recognizing a good faith exception to the exclusionary rule in search warrant cases and other instances in which the police rely on official records. The majority did not overrule or question that line of cases, however. *See supra* "Good faith exception for constitutional violations not valid in North Carolina" in § 14.2B, Search Warrants (discussing case law and impact of recent legislation).

Mistake of fact. A stop based on an officer's incorrect assessment of the facts—that is, a mistake of fact—does not violate the Fourth Amendment *if* the officer's mistake was reasonable. *See State v. Smith*, 192 N.C. App. 690 (2008) (so holding); *see also State v. Williams*, 209 N.C. App. 255 (2011) (officers had reasonable suspicion to stop a vehicle in which defendant was a passenger based on the officers' good faith belief that the driver had a revoked license and information about the defendant's drug sales, corroborated by the officers, from three reliable informants; the officer's mistake about who was driving the vehicle was reasonable under the circumstances).

Once the officer realizes his or her mistake, the officer must terminate the encounter unless he or she has developed additional reasonable suspicion for the stop. *See, e.g.*, *State v. Diaz*, 850 So. 2d 435 (Fla. 2003) (once officer determined that temporary license tag on defendant's automobile was valid, any further detention violated defendant's Fourth Amendment rights); *McGaughey v. State*, 37 P.3d 130 (Okla. Crim. App. 2001) (although initial stop of truck was permissible based on officer's belief that truck's taillights were not working, officer could not continue to detain truck once officer saw that both taillights were working); *State v. Lopez*, 631 N.W.2d 810 (Minn. Ct. App. 2001) (officer, who stopped car for having no license plates but then discovered when approaching car that car had lawful temporary sticker, could continue stop long enough to

explain to driver that he was free to go; when officer approached driver, odor of alcohol coming from interior of car provided officer with reasonable suspicion to continue detention and investigate).

M. Race-Based Stops

The North Carolina appellate courts have taken a closer look at stops that may have been motivated by the defendant's race. Although the Fourth Amendment does not prohibit a stop if the objective facts known to the officer justify the stop (*see supra* "Facts known to officer" in § 15.3I, Pretext), the courts have sometimes found that an officer's asserted, non-racial basis for the stop was not credible or not sufficient to support the stop. *See State v. Ivey*, 360 N.C. 562, 564 (2006) (court states that it could not determine whether stop of car driven by black male was "selective enforcement of the law based upon race," which would be a violation of equal protection; court states, however, that it "will not tolerate discriminatory application of the law" based on race and finds that officer did not have grounds to stop defendant for failure to use turn signal), *abrogated on other grounds by State v. Styles*, 362 N.C. 412 (2008); *In re J.L.B.M.*, 176 N.C. App. 613 (2006) (officer did not have reasonable suspicion to stop in following circumstances: officer received police dispatch of suspicious person, described as Hispanic male, at gas station; when officer drove up, he saw Hispanic male in baggy clothes, who spoke to someone in another car and then walked away from location of officer's patrol car); *State v. Villeda*, 165 N.C. App. 431 (2004) (court reviews at length evidence that trooper's stop of Hispanic driver was racially motivated; court upholds trial court's finding that trooper was not able to observe whether driver was wearing seat belt).

A stop based on race also may violate Equal Protection. *See supra* § 15.2C, Race-Based "Consensual" Encounters.

N. Limits on Officer's Territorial Jurisdiction

If an officer acts outside his or her territorial jurisdiction, the actions may constitute a substantial statutory violation under G.S. 15A-974 and warrant the exclusion of any evidence discovered. *See generally* FARB at 14–17, 89–90 (discussing territorial jurisdiction of city officers, campus officers, and others, and cases addressing motions to suppress); G.S. 20-38.2 ("[a] law enforcement officer who is investigating an implied-consent offense or a vehicle crash that occurred in the officer's territorial jurisdiction is authorized to investigate and seek evidence of the driver's impairment anywhere in-state or out-of-state, and to make arrests at any place within the State"); *cf. Parker v. Hyatt*, 196 N.C. App. 489 (2009) (State wildlife officer had authority to make warrantless stop for impaired driving).

A statutory violation by an officer may be excused if based on an objectively reasonable, good faith belief in the lawfulness of the action. *See* G.S. 15A-974(a); *see also supra* § 14.5, Substantial Violations of Criminal Procedure Act.

O. Community Caretaking

A detention may be constitutionally permissible if it is reasonably conducted in furtherance of the government agent's community caretaking function and is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *See Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) (defendant, who was police officer and was apparently drunk, was in car accident and was taken to local hospital; permissible for other officers to return to car, which had been towed to garage and left outside on street, to look for and retrieve defendant's service revolver from car as public safety measure; *State v. Maddox*, 54 P.3d 464 (Idaho Ct. App. 2002) (stop of motorist not justified by community caretaking function; evidence did not show that motorist needed assistance); *see also* G.S. 15A-285 (authorizing non-law-enforcement actions when urgently necessary); *State v. Hocutt*, 177 N.C. App. 341 (2006) (officers were authorized to take defendant to jail to "sober up" under G.S. 122C-303; defendant was very intoxicated and was staggering, barefoot, dirty, and very scratched up on shoulder of highway in isolated area late at night).

15.4 Did the Officer Act within the Scope of the Seizure?

This part concentrates on the restrictions on an officer's investigation following a stop of a person based on reasonable suspicion. The same principles generally apply to stops for traffic violations, whether based on reasonable suspicion or probable cause. *See Arizona v. Johnson*, 555 U.S. 323, 330 (2009) ("most traffic stops . . . resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*" (citations omitted)); *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) ("the usual traffic stop is more analogous to a so-called 'Terry stop' . . . than to a formal arrest"); *State v. Styles*, 362 N.C. 412, 414 (2008) ("Traffic stops have 'been historically reviewed under the investigatory detention framework first articulated in *Terry*." (citation omitted)).

A. Frisks for Weapons

Grounds for frisk. An officer who has reasonable suspicion to stop a person does not automatically have the right to frisk the person for weapons. The officer must have reasonable suspicion that the person has a weapon and presents a danger to the officer or others. *See Terry v. Ohio*, 392 U.S. 1 (1968); *State v. Morton*, 363 N.C. 737 (2009) (per curiam) (finding frisk permissible for reasons stated in section one of dissenting opinion from court of appeals), *rev'g* 198 N.C. App. 206 (2009); *State v. Pearson*, 348 N.C. 272 (1998) (officer did not have grounds for weapons frisk during traffic stop; defendant's consent to search of car did not authorize frisk of person); *State v. Phifer*, ___ N.C. App. ___, 741 S.E.2d 446, 449 (2013) ("nervous pacing of a suspect, temporarily detained by an officer to warn him not to walk in the street," was insufficient to warrant further detention and frisk for weapons); *State v. Rhyne*, 124 N.C. App. 84 (1996) (insufficient grounds for weapons frisk; drugs discovered during frisk suppressed); *State v. Artis*, 123 N.C. App. 114 (1996) (suppressing evidence for same reason); *see also United States v.*

Burton, 228 F.3d 524 (4th Cir. 2000) (in absence of reasonable suspicion, officer may not frisk person merely because officer feels uneasy for his or her safety).

Factors. Circumstances to consider include:

- the nature of the suspected offense,
- a bulge in the person's clothing,
- observation of an object that appears to be a weapon,
- sudden, unexplained movements by the person,
- failure to remove a hand from a pocket, and
- the person's prior criminal record and history of dangerousness

Other protective measures. Whether officers may take other protective measures in connection with a weapons frisk depends on the circumstances of the case. *See State v. Carrouthers*, ___ N.C. App. ___, 714 S.E.2d 460 (2011) (handcuffing permissible during stop if special circumstances exist and handcuffing is least intrusive means reasonably necessary to carry out purpose of investigatory stop); *State v. Campbell*, 188 N.C. App. 701 (2008) (handcuffing reasonable in light of previous occasions in which defendant had fled from law enforcement); *State v. Smith*, 150 N.C. App. 317 (lifting of long shirt to expose pants pocket during frisk was reasonable under circumstances), *aff'd per curiam*, 356 N.C. 605 (2002); *State v. Sanchez*, 147 N.C. App. 619 (2001) (multiple occupants of vehicle were briefly handcuffed while officers frisked for weapons and then handcuffs were removed; handcuffing did not exceed scope of stop and convert stop into arrest); *see also State v. Gay*, 748 N.W.2d 408 (N.D. 2008) (although officer had reasonable grounds to handcuff defendant initially, officer acted unreasonably by failing to remove handcuffs once frisk revealed no weapons and the officer's concerns were dissipated; evidence discovered thereafter was subject to suppression); *People v. Delaware*, 731 N.E.2d 904 (Ill. App. Ct. 2000) (stop was converted into arrest, requiring probable cause, when officers kept defendant handcuffed after patdown search revealed no weapons).

If protective measures are excessive, the stop may become a de facto arrest, for which probable cause is required. *See Carrouthers*, ___ N.C. App. at ___, 714 S.E.2d at 464 (so stating). If probable cause does not exist, evidence discovered following a de facto arrest is subject to suppression.

An officer likely does not have the authority to direct a suspect to empty his or her pockets as part of the officer's authority to frisk or take other protective action during a stop. *See In re V.C.R.*, ___ N.C. App. ___, 742 S.E.2d 566 (2013) (directing juvenile to empty pockets was unlawful, nonconsensual search); Jeff Welty, *Empty Your Pockets*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 29, 2011), http://nccriminallaw.sog.unc.edu/?p=2924. A frisk during a consensual encounter likewise would be unauthorized in most circumstances. *See* Jeff Welty, *Terry Frisk During a Consensual Encounter?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Dec. 22, 2009), http://nccriminallaw.sog.unc.edu/?p=937.

B. Vehicles

Ordering driver to exit vehicle. On a stop based on reasonable suspicion, an officer may require the driver to exit the vehicle without specifically showing that requiring such an action was necessary for the officer's protection. *See Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *see generally* 5 LAFAVE, SEARCH AND SEIZURE § 10.8(d), at 450–51 (in context of impaired-driving checkpoints, there is not automatically a need for self-protective measures and therefore an officer may not order a motorist out of a vehicle at such a checkpoint either as a matter of routine or on a hunch); Jeff Welty, *Traffic Stops, Part II*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Oct. 28, 2009) (questioning whether officer may routinely require occupant of vehicle to sit in patrol car during stop), http://nccriminallaw.sog.unc.edu/?p=811.

Ordering passengers to exit or remain in vehicle; frisking of passengers. Under earlier decisions, officers could require passengers to exit the vehicle only if the officers had grounds to do so. *See State v. Hudson*, 103 N.C. App. 708 (1991) (officer had reasonable belief that passenger might be armed); *State v. Adkerson*, 90 N.C. App. 333 (1988) (officer arrested defendant for driving while impaired and had right to require passenger to exit vehicle so officer could search vehicle incident to arrest of driver). In *Maryland v. Wilson*, 519 U.S. 408 (1997), the Court held that an officer making a traffic stop may order the passengers out of the car, without specific grounds, pending completion of the stop. *Compare Commonwealth v. Gonsalves*, 711 N.E.2d 108 (Mass. 1999) (based on state constitution, court rejects rule that officer may automatically order driver or passenger to exit vehicle).

The Court in *Maryland v. Wilson* expressed no opinion on whether an officer may automatically detain a passenger during the duration of the stop. *See Wilson*, 519 U.S. at 415 n.3. In *Arizona v. Johnson*, 555 U.S. 323 (2009), the Court indicated that officers may detain passengers to frisk them if they reasonably believe the passengers are armed and dangerous, observing that officers are not constitutionally obligated to allow a passenger to depart without first ensuring that they are not "permitting a dangerous person to get behind" them. *Id.* at 334; *see also Owens v. Kentucky*, ___ U.S. ___, 129 S. Ct. 2155 (2009) (court summarily vacates state court decision authorizing automatic pat down of passengers when officers arrest a vehicle occupant and are preparing to conduct search incident to arrest; case remanded). Relatedly, officers may order a passenger to remain temporarily in the vehicle for safety reasons. *State v. Shearin*, 170 N.C. App. 222 (2005) (majority finds that officer had grounds to order passenger to remain temporarily inside vehicle).

These decisions do not resolve whether officers may continue to detain passengers once they have addressed safety concerns. Cases after *Wilson*, although before *Johnson*, indicate that an officer must have reasonable suspicion to do so. *See State v. Brewington*, 170 N.C. App. 264 (2005) (officer had reasonable suspicion of criminal activity by passenger to require that passenger remain at scene); *Shearin*, 170 N.C. App. at 235 (Wynn, J., concurring) (concurring judge disagrees with majority opinion to extent it suggests that officer may require passenger to remain in vehicle during traffic stop

without any reason to believe that passenger poses threat to safety or is engaged in criminal activity).

Regardless whether officers may detain a passenger during a stop, a passenger may challenge the validity and duration of the stop and thus may suppress the results of any investigation after an invalid stop or unduly extended stop. *See supra* "Standing of passenger to challenge stop" in § 15.3E, Traffic Stops.

Other actions involving passengers. *See Arizona v. Johnson*, 555 U.S. 323 (2009) (questioning of passengers during traffic stop that did not relate to justification for stop did not measurably lengthen stop and was constitutionally permissible); *Illinois v. Harris*, 543 U.S. 1135 (2005) (court summarily vacates Illinois Supreme Court decision, which found that officers could not run warrant check on passenger that did not prolong otherwise valid traffic stop).

Sweep of interior of vehicle. Officers may conduct a protective sweep of the passenger compartment of a vehicle in areas where a weapon may be located—in other words, they may conduct a "vehicle frisk" but not a search for evidence—if the officers reasonably believe that the suspect is dangerous and may gain immediate control of a weapon. *See Michigan v. Long*, 463 U.S. 1032 (1983) (stating standard); *State v. Minor*, 132 N.C. App. 478 (1999) (officer had insufficient grounds to search car for weapons); *State v. Green*, 103 N.C. App. 38 (1991) (officer could not look in glove compartment of defendant's car as part of protective weapons search; officer had already placed defendant in patrol car and defendant could not obtain any weapon or other item from car); *State v. Braxton*, 90 N.C. App. 204 (1988) (facts did not warrant belief that suspect was dangerous and could gain control of weapon); *see also infra* § 15.6B, Search Incident to Arrest (discussing *Arizona v. Gant*, 556 U.S. 332 (2009), which precludes search of vehicle incident to arrest of occupant if purpose is to prevent occupant from obtaining weapon or destroying evidence and occupant has already been secured by officers).

For a further discussion of car sweeps, see Welty, *Traffic Stops*, at 7 (reviewing cases and observing that "North Carolina's appellate courts have been fairly demanding regarding reasonable suspicion in this context, several times finding ambiguously furtive movements, standing alone, to be insufficient"), http://nccriminallaw.sog.unc.edu/wp-content/uploads/2013/03/2013-03-Traffic-Stops.pdf.

License, warrant, and record checks. *See* Welty, *Traffic Stops*, at 7 (reviewing authorities and observing that "courts have generally viewed these checks, and the associated brief delays, as permissible" during a traffic stop); *see also infra* § 15.4E, Nature, Length, and Purpose of Detention.

C. Plain View

Generally, observations by officers of things in "plain view" do not constitute a search. Under the Fourth Amendment, a seizure is lawful under the plain view doctrine if the officer is lawfully in a position to observe the items and it is immediately apparent to the

officer that the items are evidence of a crime, contraband, or otherwise subject to seizure. *See Horton v. California*, 496 U.S. 128 (1990) (discovery of evidence need not be inadvertent if these two conditions are met). *But see* G.S. 15A-253 (under North Carolina law, discovery of evidence in plain view during execution of search warrant must be inadvertent).

Shining a flashlight into a vehicle that has been lawfully stopped is ordinarily not considered a search, so objects that officers observe thereby are considered to be in plain view. *See Texas v. Brown*, 460 U.S. 730 (1983); *see also* 1 LAFAVE, SEARCH AND SEIZURE § 2.2(b), at 617–18 (discussing limits on this doctrine—for example, officer may not open door to shine flashlight into car unless officer has grounds to open door); *Kyllo v. United States*, 533 U.S. 27 (2001) (use of sense-enhancing technology—in this case, a thermal imager that detected relative amounts of heat within home—constituted search).

A defendant still may have grounds to suppress plain-view observations if the initial stop was invalid or, at the time of the observation, the officer was engaged in activity beyond the scope of the stop.

D. "Plain Feel" and Frisks for Evidence

General prohibition. An officer who stops a person on reasonable suspicion may not frisk the person for evidence. *See Ybarra v. Illinois*, 444 U.S. 85 (1979).

"Plain feel" exception. Under what has come to be known as the "plain feel" doctrine, when an officer conducts a proper weapons frisk and has probable cause to believe that an object is evidence of a crime, then the officer may remove it. But, if an officer does not *immediately* recognize that the object is evidence of a crime, he or she may not manipulate or explore the object further; such action constitutes a search, which is not authorized as part of a weapons frisk. *See Minnesota v. Dickerson*, 508 U.S. 366 (1993) (officer's continued exploration of lump until he developed probable cause to believe it was cocaine was an unlawful search); *In re D.B.*, ___ N.C. App. ___, 714 S.E.2d 522 (2011) (during frisk of juvenile for weapons, officer's removal of credit card, which turned out to be stolen, was not permissible; officer could not seize card on basis that juvenile did not identify himself and officer believed that card was identification card); *State v. Williams*, 195 N.C. App. 554 (2009) (under "plain feel" doctrine, officer must have probable cause to believe object is contraband; reasonable suspicion is insufficient); *State v. Wise*, 117 N.C. App. 105 (1994) (officer lawfully stopped vehicle for speeding and lawfully patted down defendant, but officer lacked probable cause to open non-transparent aspirin bottle that officer found on defendant); *State v. Beveridge*, 112 N.C. App. 688 (1993) (in frisking defendant for weapons, officer noticed cylindrical bulge that felt like plastic baggie; once officer determined that bulge was not weapon, he could not continue to search defendant to determine whether baggie contained illegal drugs), *aff'd per curiam*, 336 N.C. 601 (1994); *see also State v. Graves*, 135 N.C. App. 216 (1999) (warrantless search of wads of brown paper that fell from defendant's clothing not justified under plain view doctrine because it was not immediately apparent that wads contained contraband); *State v. Sapatch*, 108 N.C. App. 321 (1992) (under plain view

doctrine, officers did not have probable cause to believe film canisters contained evidence of crime and, therefore, were not justified in opening canisters); *compare State v. Robinson*, 189 N.C. App. 454 (2008) (it was immediately apparent to officer that film canister contained crack cocaine).

Even if an officer has probable cause to remove an object when frisking a person for weapons, the officer may need a search warrant before inspecting the interior of the object. *See infra* "Containers" in § 15.6D, Probable Cause to Search Person.

E. Nature, Length, and Purpose of Detention

Generally. As a general rule, an investigative detention must be temporary and last no longer than necessary to effectuate the purpose of the stop. *See Florida v. Royer*, 460 U.S. 491 (1983) (officers exceeded limits of *Terry*-stop and required probable cause); *see also* G.S. 15A-1113(b) (an officer who has probable cause to believe a person has committed an infraction may detain the person for a reasonable period of time to issue and serve citation). Whether an officer has exceeded this general limit has been the subject of considerable litigation, discussed below.

Requests for consent and questioning. Numerous cases have addressed whether an officer's questioning of a defendant or request for consent to search are permissible during a stop based on reasonable suspicion. In arguing that questioning or a request for consent were beyond the permissible scope of the stop, and therefore that evidence and information discovered as a result must be suppressed, the defendant is in the strongest position if the following factors are present: (1) the detention had not ended (that is, a reasonable person would not have felt free to leave) at the time of the request for consent or questioning; (2) the request or questions were not related to the basis for the stop; (3) the request or questions unduly prolonged the detention beyond what was necessary to effectuate the purpose of the stop; and (4) the officer had not developed reasonable suspicion of additional criminal activity. *See State v. Jackson*, 199 N.C. App. 236 (2009) (driver and passengers were detained when officers had not yet returned license and registration to driver; request for consent to search after reason for stop had ended unconstitutionally prolonged stop); *State v. Myles*, 188 N.C. App. 42 (2008) (nervousness of defendant and other passenger did not justify continued detention, questioning, and request for consent to search after officer considered traffic stop complete; search of defendant's car was unlawful), *aff'd per curiam*, 362 N.C. 344 (2008); *State v. Parker*, 183 N.C. App. 1, 9 (2007) ("[w]ithout additional reasonable articulable suspicion of additional criminal activity, the officer's request for consent exceeds the scope of the traffic stop and the prolonged detention violates the Fourth Amendment"; in this case, officer had reasonable suspicion to request that passenger consent to search of her purse after discovering what appeared to be a controlled substance in the door of the car next to where passenger was sitting); *State v. Hernandez*, 170 N.C. App. 299 (2005) (trooper expanded scope of stop for seat belt violation by asking defendant about contraband and weapons, but reasonable suspicion of criminal activity supported further detention); *State v. Sutton*, 167 N.C. App. 242 (2004) (questioning of defendant during stop was permissible; questions were brief and directly related to suspicion that gave rise to stop);

State v. Jacobs, 162 N.C. App. 251 (2004) (after traffic stop for erratic driving, officer developed reasonable suspicion that other criminal activity may have been afoot; officer could continue to detain defendant and ask for consent to search for drugs, and officer need not have had specific reasonable suspicion for requesting consent); *State v. Castellon*, 151 N.C. App. 675 (2002) (during traffic stop officer developed reasonable suspicion that defendant was engaged in illegal drug activity and was justified in asking for permission to search vehicle); *State v. Beveridge*, 112 N.C. App. 688 (1993) (once officer had frisked defendant for weapons, officer could not continue to search or question defendant), *aff'd per curiam*, 336 N.C. 601 (1994).

Whether questioning or a request for consent unduly prolongs a detention has become particularly important. This area of law is continuing to develop. In *Muehler v. Mena*, 544 U.S. 93 (2005), the Court held that it was not unconstitutional during the execution of a search warrant for officers to question a lawfully detained person about her immigration status. The Court reasoned that the officers did not require reasonable suspicion to ask the person for identifying information because the questioning did not prolong the detention. In *Arizona v. Johnson*, 555 U.S. 323 (2009), the Court held that an officer's questioning of passengers on matters unrelated to the justification for the traffic stop was constitutionally permissible because it did not measurably extend the duration of the stop. *See also infra* "Drug dog sniff during traffic stop" in § 15.4F, Drug Dogs (discussing cases in which courts have permitted de minimus delay for drug dog sniff during traffic stop).

Applying *Muehler* and *Johnson*, the Fourth Circuit Court of Appeals has recognized an important qualification on the duration of a traffic stop. The lawfulness of a delay in completing a stop depends not only on the length of the delay but also on whether the officer diligently pursued investigation of the purpose of the stop. If an officer abandons pursuit of the justification for the traffic stop and embarks on a sustained course of investigation into unrelated matters, the delay violates the Fourth Amendment and renders inadmissible evidence discovered during the unlawful detention. *United States v. Guijon-Ortiz*, 660 F.3d 757 (4th Cir. 2011); *United States v. Digiovanni*, 650 F.3d 498 (4th Cir. 2011).

The North Carolina appellate courts may treat requests for consent to search differently than questioning during a traffic stop, requiring reasonable suspicion to support a request for consent unrelated to the purpose of the stop. *See State v. Parker*, 183 N.C. App. 1, 9 (2007) (so stating).

The U.S. Supreme Court has declined to impose a time limit on the length of an investigative stop. *See United States v. Sharpe*, 470 U.S. 675 (1985). One writer suggests that, unless circumstances warrant a longer stop, "an officer normally should not detain a suspect the officer has stopped longer than twenty minutes." FARB at 43–44.

Consent after detention has ended. If the detention has ended and the person is free to leave, an officer generally may request consent to search. *See State v. Heien*, ___ N.C. App. ___, 741 S.E.2d 1 (2013) (over a dissent, majority concluded that after return of

documentation by police during traffic stop, defendant was aware that purpose of initial stop had been concluded and that further conversation, including request for and consent to search, was consensual); *State v. Morocco*, 99 N.C. App. 421 (1990) (trooper did not detain defendant in patrol car longer than necessary to write citation, and after detention ended defendant consented to search); *see also State v. Kincaid*, 147 N.C. App. 94 (2001) (questioning unrelated to traffic stop was permissible where defendant consented to being questioned after detention had ended).

In *Ohio v. Robinette*, 519 U.S. 33 (1996), the state supreme court held that officers must clearly inform a motorist that a traffic stop has ended and that the motorist is free to go before requesting consent to search on an unrelated matter. Without this warning, the state court held, the motorist's consent is involuntary. The U.S. Supreme Court rejected such a requirement, holding that the voluntariness of a motorist's consent is evaluated under the totality of circumstances. *Robinette* does not affect the law on the permissible duration of a stop. If an officer detains a person longer than necessary to effectuate the purpose of the stop, a request for consent to search may exceed the scope of the stop and violate the Fourth Amendment. *See, e.g., State v. Robinette*, 685 N.E.2d 762 (Ohio 1997) (on remand from U.S. Supreme Court, state supreme court found that officer exceeded scope of stop and that consent was therefore invalid). Any consent given must also be voluntary. *See infra* § 15.5D, Consent.

The return of paperwork to a driver may signal the end of a traffic stop, but it is not necessarily dispositive. *See* Welty, *Traffic Stops*, at 10 (so stating and reviewing North Carolina decisions and other authorities), *available at* http://nccriminallaw.sog.unc.edu/wp-content/uploads/2013/03/2013-03-Traffic-Stops.pdf.

F. Drug Dogs

When a drug dog sniff is a search. Walking a drug dog around a vehicle during a lawful traffic stop (discussed further below) is generally not considered a search. *See Illinois v. Caballes*, 543 U.S. 405 (2005); *State v. Branch*, 177 N.C. App. 104 (2006) (following *Caballes*); *United States v. Place*, 462 U.S. 696 (1983) (use of a drug dog to sniff luggage in public place was not a search under Fourth Amendment). *But cf. Florida v. Jardines*, 569 U.S. ___, 133 S. Ct. 1409 (2013) (entering homeowner's property and using drug-sniffing dog on homeowner's porch to investigate contents of home is a "search" within the meaning of the Fourth Amendment). These and other cases suggest that a drug dog sniff of a person would generally be subject to Fourth Amendment limitations. *See* Shea Denning, *Dog Sniffs of People and the Fourth Amendment*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Oct. 9, 2012), http://nccriminallaw.sog.unc.edu/?p=3911; 1 LAFAVE, SEARCH AND SEIZURE § 2.2(g), at 703–04 (discussing issue).

Effect of alert. An "alert" by a drug dog to a vehicle may constitute probable cause to search the vehicle if a sufficient showing is made as to the dog's reliability to detect the presence of particular contraband. *See Florida v. Harris*, 568 U.S. ___, 133 S. Ct. 1050 (2013) (holding that dog sniff provided probable cause to search vehicle and refusing to set inflexible evidentiary requirements regarding a dog's reliability; also indicating that

certification of dog by bona fide organization creates presumption of reliability, which defendant may rebut by other evidence); *see also* Jeff Welty, *Supreme Court: Alert by a Trained or Certified Drug Dog Normally Provides Probable Cause*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Feb. 20, 2013), http://nccriminallaw.sog.unc.edu/?p=4111; LeAnn Melton, *Drug Dogs—Reliability Issues and Case Law: How Good is that Doggie's Nose?* (North Carolina Fall Public Defender Seminar, Nov. 29, 2007), *available at* www.ncids.org/Defender%20Training/2007%20Fall%20Conference/DrugDogs.pdf.

A drug dog's positive alert to a vehicle does not give officers probable cause to search recent occupants of the vehicle. *State v. Smith*, ___ N.C. App. ___, 729 S.E.2d 120 (2012). For a discussion of related issues, see *infra* "Drug cases" in § 15.6E, Probable Cause to Search Vehicle.

Drug dog sniff during traffic stop. Although a drug dog sniff of the exterior of a vehicle is generally not considered a search, use of a drug dog is impermissible if it unduly prolongs the stop and the officer does not have reasonable suspicion to justify the delay. *See State v. McClendon*, 350 N.C. 630 (1999) (canine unit did not arrive until 15 to 20 minutes after conclusion of traffic stop, but officer had reasonable suspicion beyond basis for traffic stop); *State v. Sellars*, ___ N.C. App. ___, 730 S.E.2d 208 (2012) (four-minute, 37-second delay to conduct drug dog sniff did not unduly prolong stop); *State v. James Branch*, 194 N.C. App. 173 (2008) (officer did not have grounds to detain defendant for canine unit to arrive after officer finished checking defendant's license and registration); *State v. Brimmer*, 187 N.C. App. 451 (2007) (ninety-second delay for dog sniff was de minimus extension of traffic stop and did not require additional reasonable suspicion); *State v. Euceda-Valle*, 182 N.C. App. 268 (2007) (relying on *McClendon*, court finds that officer had reasonable suspicion to detain defendant for canine sniff of exterior of vehicle after officer handed defendant warning ticket and traffic stop ended); *State v. Monica Branch*, 177 N.C. App. 104, 107 n.1 (2006) (suggesting that if drug dog sniff extends duration of stop, it may be unconstitutional); *State v. Fisher*, 141 N.C. App. 448 (2000) (detaining defendant after traffic stop for drug dog sniff exceeded scope of stop); *State v. Falana*, 129 N.C. App. 813 (1998) (officer exceeded scope of traffic stop by detaining defendant for dog to do drug sniff).

As with questioning and requests for consent during a traffic stop (*see supra* "Requests for consent and questioning" in § 15.4E, Nature, Length, and Purpose of Detention), the length of detention has become a significant factor in evaluating the lawfulness of drug dog sniffs unrelated to the purpose of a traffic stop. This area of law is continuing to develop. The Fourth Circuit Court of Appeals has recognized an important qualification on the duration of a traffic stop. The lawfulness of a delay in completing a stop depends not only on the length of the delay but also on whether the officer diligently pursued investigation of the purpose of the stop. If an officer abandons pursuit of the justification for the traffic stop and embarks on a sustained course of investigation into unrelated matters, the delay violates the Fourth Amendment and renders inadmissible evidence discovered during the unlawful detention. *United States v. Guijon-Ortiz*, 660 F.3d 757 (4th Cir. 2011); *United States v. Digiovanni*, 650 F.3d 498 (4th Cir. 2011).

A drug dog sniff is also impermissible if it intrudes into protected areas—for example, the sniff is of the interior of the vehicle or of an occupant. If conducted at a license checkpoint, a drug dog sniff may indicate that the purpose of the checkpoint is general criminal investigation and thus impermissible. *See supra* § 15.3J, Motor Vehicle Checkpoints; § 15.3K, Drug and Other Checkpoints.

G. Does *Miranda* Apply?

A person generally is not entitled to *Miranda* warnings on a stop. *See Berkemer v. McCarty*, 468 U.S. 420 (1984); *State v. Braswell*, ___ N.C. App. ___, 729 S.E.2d 697 (2012) (traffic stops are typically non-coercive in nature and do not amount to custodial interrogations). Once taken into custody, a person is entitled to *Miranda* warnings before police questioning. *See Pennsylvania v. Muniz*, 496 U.S. 582 (1990) (in case involving allegedly impaired driver who had been taken into custody, *Miranda* warnings were required for police question calling for testimonial response).

Some stops may amount to custody for *Miranda* purposes even though the person may not be under arrest. *See* Mark A. Godsey, *When* Terry *Met* Miranda: *Two Constitutional Doctrines Collide*, 63 FORDHAM L. REV. 715 (1994); *see also State v. Buchanan*, 353 N.C. 332 (2001) (test for custody is whether there was formal arrest or restraint on freedom of movement of degree associated with formal arrest); *State v. Washington*, 330 N.C. 188 (1991) (on facts presented, defendant was in custody for *Miranda* purposes when officer placed him in back seat of patrol car), *rev'g* 102 N.C. App. 535 (1991); *State v. Hemphill*, ___ N.C. App. ___, 723 S.E.2d 142, 147 (2012) (holding that "a reasonable person in Defendant's position, having been forced to the ground by an officer with a taser drawn and in the process of being handcuffed, would have felt his freedom of movement had been restrained to a degree associated with formal arrest"); *State v. Johnston*, 154 N.C. App. 500 (2002) (defendant who was ordered out of his vehicle at gun point, handcuffed, placed in the back of a patrol car, and questioned by detectives was in custody for *Miranda* purposes).

H. Field Sobriety Tests

North Carolina cases have assumed (although have not specifically decided) that during a stop based on reasonable suspicion of impaired driving, field sobriety tests and questioning related to possible impairment are within the scope of the stop. *See generally Blasi v. State*, 893 A.2d 1152 (Md. Ct. Spec. App. 2006) (finding field sobriety tests permissible on traffic stop if officer has reasonable suspicion that driver is under the influence of alcohol); *see also State v. Worwood*, 164 P.3d 397 (Utah 2007) (off-duty officer had reasonable suspicion to stop driver for impaired driving, but stop became de facto arrest and violated Fourth Amendment when off-duty officer transported driver more than a mile away from the scene for on-duty officer to conduct field sobriety tests).

Conversely, if officers do not have reasonable suspicion of impaired driving, field sobriety tests are not within the permissible scope of the stop. *See* Jeff Welty, *Field Sobriety Tests During Traffic Stops*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG **(**Apr. 14, 2009) (reviewing

cases from other jurisdictions), http://nccriminallaw.sog.unc.edu/?p=245.

Once the defendant is considered to be in custody, *Miranda* warnings are required for questions calling for a testimonial response. *See supra* § 15.4G, Does *Miranda* Apply? Field sobriety tests may not require a testimonial response, however. *See State v. Flannery*, 31 N.C. App. 617, 623–24 (1976) ("the physical dexterity tests are not evidence of a testimonial or communicative nature . . . and are not within the scope of the *Miranda* decision"; court therefore holds that admitting evidence of defendant's refusal to do tests did not violate his Fifth Amendment right against self-incrimination; court also notes that *Miranda* warnings are not required for similar reasons before a breath test); *see also State v. White*, 84 N.C. App. 111, 115–16 (1987) (*Miranda* warnings not required before administering a breath test because results not testimonial).

I. Defendant's Name

In *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004), the U.S. Supreme Court upheld a defendant's conviction under a state statute requiring an individual stopped by police on the basis of reasonable suspicion to identify himself or herself. The Court stated, "Although it is well established that an officer may ask a suspect to identify himself in the course of a *Terry* stop, it has been an open question whether the suspect can be arrested and prosecuted for refusal to answer." *Id.* at 186–87. The Court held in this case that the stop was justified and the request for the defendant's name was reasonably related in scope to the circumstances that justified the stop (a suspected assault); therefore, enforcement of the state law requirement that the defendant give his name during the stop did not violate the Fourth Amendment. The Court also found no violation of the defendant's Fifth Amendment privilege against self-incrimination because in this case the defendant's refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him or would furnish a link in the chain of evidence needed to prosecute him.

North Carolina does not have a statute comparable to Nevada's statute requiring a person who is the subject of an investigative stop, other than a person driving a vehicle, to disclose his or her name. *See* G.S. 20-29 (person operating motor vehicle may be required to give his or her name). "Officers who lawfully stop someone for investigation may ask the person a moderate number of questions to determine his identity . . . ." *State v. Steen*, 352 N.C. 227, 239 (2000) (citing *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)). However, a person's mere refusal to disclose his or her name (when the person is not driving a vehicle) would appear insufficient to support a charge of violating G.S. 14-223 (resisting, delaying, or obstructing officer). *See also In re D.B.*, __ N.C. App. __, 714 S.E.2d 522 (2011) (officers may not search person during investigative stop to determine his or her identity).

J. VIN Checks

Officers may make a limited warrantless search of a vehicle when they need to determine its ownership. *See New York v. Class*, 475 U.S. 106 (1986) (check of vehicle

identification number valid); *State v. Green*, 103 N.C. App. 38 (1991) (check invalid on facts of case).

15.5 Did the Officer Have Grounds to Arrest or Search?

A. Probable Cause

Required for arrest or search. Although reasonable suspicion may be sufficient to support an officer's initial stop and certain investigative actions during the stop, an officer must have probable cause to make an arrest or probable cause or consent to search for evidence. *See, e.g.*, *State v. Joe*, ___ N.C. App. ___, 730 S.E.2d 779 (2012) (officers did not have probable cause to arrest, and evidence discovered as a result of illegal arrest suppressed), *review granted*, ___ N.C. ___ , 736 S.E.2d 187 (2013); *State v. Wise*, 117 N.C. App. 105 (1994) (officer lawfully stopped vehicle for speeding and lawfully patted down defendant, but officer lacked probable cause to open non-transparent aspirin bottle that officer found on defendant); *State v. Pittman*, 111 N.C. App. 808 (1993) (initial encounter was consensual and subsequent stop was supported by reasonable suspicion, but officers did not have probable cause to search). *Compare Maryland v. Pringle*, 540 U.S. 366 (2003) (police officer had probable cause to believe that defendant, who was the front-seat passenger in vehicle, committed the crime of possession of cocaine, either solely or jointly with other occupants of vehicle; defendant was one of three men riding in the vehicle at 3:16 a.m., $763 of rolled-up cash was found in the glove compartment directly in front of defendant, five plastic baggies of cocaine were behind the back-seat armrest and accessible to all three vehicle occupants, and the three men failed to offer any information with respect to the ownership of the cocaine or money; defendant's admissions to police after lawful arrest and *Miranda* warnings not subject to suppression).

Scope of search. The permissible scope of a search depends on whether the officers have probable cause to arrest or probable cause to search. For a further discussion of whether officers have probable cause to arrest or search and the permissible scope of the search, including in drug cases, see *infra* § 15.6, Did the Officer Act within the Scope of the Arrest or Search?

B. Circumstances Requiring Arrest Warrant and Other Limits on Arrest Authority

Arrest warrant. Usually, when an officer develops probable cause to arrest during a stop, the officer may make the arrest without a warrant. In some instances, however, a warrant may be required. An officer who has probable cause to arrest for a criminal offense may make an arrest without a warrant in the following circumstances: (a) the crime is committed in the officer's presence; or (b) the crime was not committed by the person in the officer's presence but (i) the crime is a felony; (ii) the crime is one of certain listed misdemeanors; or (iii) the crime is a misdemeanor and, unless arrested immediately, the person will not be apprehended or may cause physical injury or property damage. *See*

G.S. 15A-401(b) (also authorizing warrantless arrest for violation of pretrial release conditions).

Violations not subject to arrest. The U.S. Supreme Court has held that officers do not violate the Fourth Amendment if they have probable cause to make an arrest for a criminal offense even if state law does not authorize an arrest for that offense. *See Virginia v. Moore*, 553 U.S. 164 (2008) (Virginia law enforcement officers who had probable cause to arrest defendant for a misdemeanor did not violate Fourth Amendment when they arrested him and conducted search incident to arrest although state law did not authorize an arrest); *see also Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (Fourth Amendment does not bar officer from making warrantless arrest for criminal offense punishable by fine only, in this case a seat belt violation, a misdemeanor under Texas law).

An arrest permitted by the U.S. Constitution but in violation of North Carolina law may still be subject to suppression under G.S. 15A-974. Under North Carolina law, an officer has no authority to arrest for infractions, such as seat belt violations, which are noncriminal violations of law in North Carolina. *See* G.S. 15A-1113; FARB at 82 (noting limitation). An arrest for a noncriminal infraction also may violate the U.S. Constitution. *See Moore*, 553 U.S. 164 (U.S. Constitution authorizes arrest for minor misdemeanors; Court does not address noncriminal infractions).

An officer has no authority to arrest for a wildlife violation, whether a misdemeanor or infraction, by an out-of-state resident if the other state is a member of the interstate wildlife compact, the person agrees to comply with the terms of any citation, and the person provides adequate identification. *See* G.S. 113-300.6, art. III.

For a further discussion of the effect of state law violations, see *supra* § 14.5, Substantial Violations of Criminal Procedure Act.

C. Circumstances Requiring Search Warrant

For search of person. If officers have probable cause to arrest a person, they may search the person incident to arrest without a warrant. For cases discussing probable cause to arrest and potential limits on a search of a person incident to arrest, see *infra* § 15.6B, Search Incident to Arrest; § 15.6C, Other Limits on Searches Incident to Arrest.

If officers have probable cause to search a person, but not arrest him or her, the officers must have exigent circumstances to conduct the search without a warrant. For a discussion of exigent circumstances and potential limits on searches, see *infra* § 15.6D, Probable Cause to Search Person.

For search of vehicle. Generally, if officers have probable cause to search a vehicle, they may search without a warrant. For a discussion of probable cause to search a vehicle and limits on such searches, see *infra* § 15.6E, Probable Cause to Search Vehicle.

D. Consent

Officers may search without probable cause and without a warrant if they obtain consent. For various reasons a purported consent to search may be invalid or insufficient.

Effect of illegal detention. If a person is detained illegally, a consent to search obtained thereafter is subject to suppression on two potential grounds. First, the consent is generally considered the fruit of the poisonous tree because the consent is obtained as a result of the illegal seizure. *See generally Wong Sun v. United States*, 371 U.S. 471 (1963); *see also supra* § 14.2F, "Fruits" of Illegal Search or Arrest. Second, the consent may be involuntary in the totality of the circumstances, including the circumstances surrounding the illegal detention.

Length of detention. Officers may not unduly detain a person for the purpose of requesting consent to search. *See supra* § 15.4E, Nature, Length, and Purpose of Detention.

Clarity of consent. "There must be a clear and unequivocal consent" to authorize a consent search. *State v. Pearson*, 348 N.C. 272, 277 (1988) (consent to search of car was not consent to search of person; acquiescence to frisk when officer told defendant he was going to frisk him also was not consent to search).

Voluntariness of consent. Consent must be voluntary. *See Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (voluntariness determined from totality of circumstances); *State v. Crenshaw*, 144 N.C. App. 574 (2001) (State has burden of proving voluntariness); *United States v. Guerrero*, 374 F.3d 584 (8th Cir. 2004) (reasonable officer would not have believed that Spanish-speaking driver knowingly and voluntarily consented to search of his car; driver's signature on consent-to-search form written in Spanish was not sufficient); *United States v. Worley*, 193 F.3d 380 (6th Cir. 1999) (defendant did not give voluntary consent when he said, "You've got the badge, I guess you can" in response to officer's request to search); *see also supra* § 14.2H, Invalid Consent.

A threat to obtain a search warrant may affect the voluntariness of consent in some circumstances. *See* Jeff Welty, *Consent to Search under Threat of Search Warrant*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Nov. 10, 2010) (observing that threat alone may not render consent involuntary but may be considered as part of totality of circumstances), http://nccriminallaw.sog.unc.edu/?p=1741; 4 LAFAVE, SEARCH AND SEIZURE § 8.2(c), at 92–100 (indicating circumstances in which such a threat may render a consent involuntary).

Miranda warnings are not required on a request for consent to search. *See State v. Cummings*, 188 N.C. App. 598 (2008) (so holding in reliance on federal cases, in which courts reasoned that request for consent to search does not constitute interrogation for *Miranda* purposes because the giving of consent is not an incriminating statement).

Authority to consent. The person must have authority to consent or, at least, the officer

must reasonably believe the person has authority. *See Illinois v. Rodriguez*, 497 U.S. 177 (1990) (officers must reasonably believe person has authority to give consent); G.S. 15A-222 (to same effect); *compare State v. McLees*, 994 P.2d 683 (Mont. 2000) (rejecting apparent authority doctrine under state constitution; for consent to be valid against defendant, third party must have actual authority to give consent to search); *State v. Lopez*, 896 P.2d 889 (Haw. 1995) (to same effect).

Whether an officer's belief is reasonable depends on the facts of each case. *See State v. Jones*, 161 N.C. App. 615 (2003) (after seeing police, defendant entered car, removed his jacket, put it on back seat, and then exited, wearing t-shirt in freezing winter weather; driver had authority to give consent to search entire car, including jacket left by defendant); *State v. McDaniels*, 103 N.C. App. 175 (1991) (passenger failed to object when driver consented to search of car and contents; search of contents upheld), *aff'd per curiam*, 331 N.C. 112 (1992); *compare United States v. Purcell*, 526 F.3d 953 (6th Cir. 2008) (female's apparent authority to consent to search of luggage dissipated once officers realized that luggage contained only male's effects); *State v. Frank*, 650 N.W.2d 213 (Minn. Ct. App. 2002) (driver lacked authority to consent to search of defendant's suitcase in trunk of driver's car; officer has obligation to ascertain ownership of items not owned by or within control of the person purportedly giving consent when circumstances do not clearly indicate that the person is the owner or controls item to be searched); *State v. Matejka*, 621 N.W.2d 891, 894 n.3 (Wis. 2001) (collecting cases on consent to search passenger's belongings); *People v. James*, 645 N.E.2d 195 (Ill. 1994) (driver consented to search outside of hearing of defendant-passenger; consent did not authorize police to search purse on passenger's seat). *See also* 4 LAFAVE, SEARCH AND SEIZURE § 8.3(g), at 232–52 (discussing significance of reasonable but mistaken belief by police that third party has authority over place searched).

See also infra "Passenger belongings" in § 15.6C, Other Limits on Searches Incident to Arrest; "Passenger belongings" in § 15.6E, Probable Cause to Search Vehicle.

Scope of consent. General consent does not necessarily extend to all places within the area to be searched. *See Florida v. Jimeno*, 500 U.S. 248 (1991) (consent to general search of car would lead reasonable officer to believe that consent extended to unlocked containers that might hold object of search); *State v. Stone*, 362 N.C. 50 (2007) (officer exceeded scope of consent by pulling sweat pants away from defendant's body and shining flashlight on defendant's groin area); *State v. Pearson*, 348 N.C. 272 (1998) (defendant's consent to search of car did not authorize search of his person); *State v. Neal*, 190 N.C. App. 453 (2008) (female defendant knowingly and voluntarily consented to strip search by female officer); *State v. Johnson*, 177 N.C. App. 122 (2006) (consent to search of van did not authorize officer to pry open wall panel of van; general consent did not include intentional infliction of damage to vehicle), *vacated in part on other grounds*, 360 N.C. 541 (2006) (vacating portion of opinion finding that officers lacked probable cause, independent of consent, to pry open wall panel and remanding case to trial court for further findings of fact). *See also* Jeff Welty, *Scope of Consent to Search a Vehicle*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Mar. 15, 2012) (suggesting that consent to search vehicle does not authorize damaging of vehicle), http://nccriminallaw.sog.unc.edu/?p=3402.

Withdrawal of consent. A person may withdraw consent at any time before completion of the search. *See* 4 LAFAVE, SEARCH AND SEIZURE § 8.1(c), at 57–65. Before withdrawal of consent, however, officers may have uncovered sufficient evidence to justify continuing the search regardless of the presence or absence of consent.

15.6 Did the Officer Act within the Scope of the Arrest or Search?

A. Questioning Following Arrest

Following a lawful arrest, officers must give an in-custody defendant *Miranda* warnings before questioning him or her. For a discussion of *Miranda* principles, see *supra* § 14.3B, *Miranda* Violations.

B. Search Incident to Arrest

Of person. Officers may search a person incident to a lawful arrest of that person. *See United States v. Robinson*, 414 U.S. 218 (1973). Whether officers may search containers in the person's possession is discussed further *infra* in "Containers" in § 15.6C, Other Limits on Searches Incident to Arrest.

Of vehicle. Previously, officers could search the passenger compartment of a vehicle, including containers found within, incident to a lawful arrest of an occupant. *See State v. Logner*, 148 N.C. App. 135 (2001) (warrantless search of defendant's vehicle proper incident to arrest of passenger). The stated rationale for this rule was that officers needed a bright-line rule allowing them to search in areas where an arrestee might be able to use a weapon or destroy evidence. *See New York v. Belton*, 453 U.S. 454 (1981) (stating basic rule); *see also State v. Andrews*, 306 N.C. 144 (1982) (applying *Belton* principles to search of vehicle incident to arrest); *State v. Cooper*, 304 N.C. 701 (1982) (to same effect).

In *Arizona v. Gant*, 556 U.S. 332 (2009), the U.S. Supreme Court held that lower courts had read *Belton* too broadly and ruled that the permissible scope of a search of a vehicle incident to the arrest of an occupant of the vehicle was much narrower. The Court ruled that an officer may search the passenger compartment of a vehicle incident to the arrest of an occupant only if (1) the arrestee is within reaching distance of the passenger compartment and thus able to obtain a weapon or destroy evidence or (2) it is reasonable to believe evidence relevant to the crime of arrest may be found. *Gant* overrules North Carolina decisions allowing an unlimited search of the passenger compartment of a vehicle incident to arrest of an occupant of the vehicle. *See State v. Carter*, 191 N.C. App. 152 (2008) (holding that *Belton* does not require that search incident to arrest of occupant of vehicle be only for evidence connected to the crime charged), *vacated and remanded*, ___ U.S. ___, 129 S. Ct. 2158 (2009), *on remand*, 200 N.C. App. 47 (2009) (suppressing evidence in light of *Gant* and lack of any other ground to uphold search).

Generally, once officers have secured an arrestee—by, for example, handcuffing the

arrestee—they may not search the vehicle based on the first ground identified in *Gant.* Most post-*Gant* cases have therefore involved the second ground for a search of a vehicle and focused on whether it was reasonable for the officer to believe evidence of the crime of arrest would be in the vehicle. *See State v. Mbacke*, 365 N.C.403 (2012) (analogizing the "reasonable to believe" standard in the second prong of *Gant* to the "reasonable suspicion" standard of a *Terry* stop).

Typically, an arrest for a motor vehicle offense will not justify a search incident to arrest on the second *Gant* ground because it will not be reasonable for an officer to believe that evidence relevant to the motor vehicle offense may be found in the vehicle. *See* FARB at 225–26 (so stating). A number of cases have reached this result. *See Meister v. Indiana*, ___ U.S. ___, 129 S. Ct. 2155 (2009) (court summarily vacates state court decision allowing search of vehicle incident to arrest of driver for suspended driver's license; case remanded for reconsideration in light of *Gant*); *State v. Johnson*, 204 N.C. App. 259 (2010) (disallowing search following arrest for suspended license); *State v. Carter*, 200 N.C. App. 47 (2009) (disallowing search following arrest for driving with expired registration tag and failing to notify Division of Motor Vehicles of change of address).

It is also unlikely that officers would have grounds to search a vehicle incident to arrest of an occupant for an outstanding arrest warrant. *See* FARB at 226.

In cases involving gun and drug offenses, courts have found that the officers had a reasonable basis to believe evidence of the offense of arrest could be found in the vehicle. The N.C. Supreme Court has cautioned, however, that a search of a vehicle incident to arrest of an occupant may "not routinely be based on the nature or type of the offense of arrest and that the circumstances of each case ordinarily will determine the propriety of any vehicular searches conducted incident to an arrest." *See State v. Mbacke*, 365 N.C. 403 (2012) (upholding search following arrest for carrying concealed weapon); *State v. Watkins*, ___ N.C. App. ___, 725 S.E.2d 400 (2012) (upholding search following arrest for possession of drug paraphernalia); *State v. Foy*, 208 N.C. App. 562 (2010) (upholding search following arrest for carrying concealed weapon); *see also State v. Toledo*, 204 N.C. App. 170 (2010) (holding that officers had probable cause to search vehicle for marijuana; also suggesting that officers may have had grounds to search vehicle incident to arrest of defendant for possession of marijuana).

C. Other Limits on Searches Incident to Arrest

Arizona v. Gant, discussed in subsection B., above, significantly limits the circumstances in which officers may search a vehicle incident to the arrest of a vehicle's occupant. Additional limits on searches of people and vehicles incident to arrest are discussed below, based on additional case law and *Gant.*

Citations. Officers may not search a person or vehicle incident to issuance of a citation if they do not arrest the person. *See Knowles v. Iowa*, 525 U.S. 113 (1998); *State v. Fisher*, 141 N.C. App. 448 (2000) (defendant had been issued citation for driving while license revoked but had not been placed under arrest; search could not be justified as search

incident to arrest); *see also Sibron v. New York*, 392 U.S. 40, 63 (1968) ("It is axiomatic that an incident search may not precede an arrest and serve as part of its justification."); FARB at 223 (search may be made before actual arrest if arrest is made contemporaneously with search, but whatever is found during search before formal arrest cannot be used to support probable cause for the arrest).

Area and people. Cases before *Gant* permitted a search of the passenger compartment of a vehicle incident to arrest of an occupant of a vehicle, but not other areas, such as the vehicle's trunk, and not other occupants of the vehicle.

Gant does not appear to modify these limitations. *See* FARB at 226 (so stating); *see also Owens v. Kentucky*, ___ U.S. ___, 129 S. Ct. 2155 (2009) (court summarily vacates state court decision authorizing automatic pat down of passengers when officers arrest a vehicle occupant and are preparing to conduct search incident to arrest; case remanded for reconsideration in light of *Gant*); *State v. Schiro*, ___ N.C. App. ___, 723 S.E.2d 134 (2012) (search of trunk of vehicle not valid as search incident to arrest of vehicle occupant; however, search was valid based on defendant's consent).

Containers. Before *Gant*, the North Carolina Court of Appeals held that officers may not search locked containers incident to arrest of a person. *See State v. Thomas*, 81 N.C. App. 200 (1986) (officers could not search, incident to arrest, locked suitcase arrestee was carrying); *cf. State v. Brooks*, 337 N.C. 132 (1994) (officers may search locked compartments within vehicle as part of search incident to arrest).

Gant may limit searches of containers, whether locked or unlocked or whether following arrest of a person or arrest of an occupant of a vehicle. If officers cannot satisfy either ground identified in *Gant* for a search incident to arrest—that is, if the arrestee was secured and could not reach the container, and there was not a reasonable basis to believe that the container contained evidence related to the offense of arrest—officers may not be able to search containers incident to arrest. *See* Jeff Welty, *Is Arizona v. Gant Limited to Automobiles?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 2, 2010) (making this point and citing cases from other jurisdictions to that effect), http://nccriminallaw.sog.unc.edu/?p=1565; FARB at 224–25 n.338;

Cell phones. Cell phones are a form of container but, because of the wide range of data they may contain, may present tricky issues about the permissible scope of a search incident to arrest. The N.C. Supreme Court has upheld the search of a cell phone found on a person incident to arrest of the person, but did not specifically consider the impact of *Arizona v. Gant* or other potential issues. *State v. Wilkerson*, 363 N.C. 382, 432–34 (2009); *see also* Jeff Welty, *Warrantless Searches of Computers and Other Electronic Devices*, at 7–8 (UNC School of Government, Apr. 2011) (listing cases from around the country on this issue), *available at* http://nccriminallaw.sog.unc.edu//wp-content/uploads/2011/05/2011-05-PDF-of-Handout-re-Warrantless-Searches.pdf; Jeff Welty, *Georgia Case on Searching Cell Phones Incident to Arrest*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Dec. 20, 2010)

(discussing potential issues), http://nccriminallaw.sog.unc.edu/?p=1835; FARB at 189–90.

Non-contemporaneous search of vehicle. Before *Gant*, some courts precluded a non-contemporaneous search of a vehicle following arrest of an occupant. *See Preston v. United States*, 376 U.S. 364 (1964) (where vehicle had been towed to garage, search of vehicle was not contemporaneous with arrest and was disallowed); *United States v. Vasey*, 834 F.2d 782 (9th Cir. 1987) (search of vehicle was not contemporaneous with arrest where search took place 30 to 45 minutes after occupant had been arrested, handcuffed, and placed in back of patrol car).

This limitation is implicit in the first ground for a search permitted by *Gant* because in virtually all instances the arrestee will not be within reaching distance of the vehicle at the time of a non-contemporaneous search. The courts also may be unwilling to allow vehicle searches long after arrest based on the "reasonable to believe" standard described in *Gant* and may require full probable cause or other grounds for non-contemporaneous searches. *See infra* § 15.6E, Probable Cause to Search Vehicle; § 15.6F, Inventory Search.

Strip search during search incident to arrest. A roadside strip search incident to arrest of a person may be impermissible unless probable cause to search and exigent circumstances exist. *See State v. Battle*, 202 N.C. App. 376, 387–88 (2010) (opinion for court so states); *accord State v. Fowler*, ___ N.C. App. ___, 725 S.E.2d 624, 628 (2012) (adopting language from *Battle*). For a discussion of the validity of strip searches based on probable cause, see *infra* "Strip searches based on probable cause" in § 15.6D, Probable Cause to Search Person.

Recent occupancy. In *Thornton v. United States*, 541 U.S. 615 (2004), a majority of the Court held that the *Belton* doctrine allowed a search of the passenger compartment of a vehicle after arrest of an "occupant" or "recent occupant." In *Thornton*, the Court found that the defendant was a recent occupant when he parked his car and exited right before the officer could pull the car over. *Thornton* appears to remain good law after *Gant.* Thus, if a person is not a "recent occupant" of the vehicle in question when approached by officers, a search of the vehicle incident to arrest of the person remains impermissible. *See State v. Dean*, 76 P.3d 429 (Ariz. 2003) (officers could not search defendant's car incident to arrest; defendant was not "recent occupant" of car when he had not occupied car for some two-and-one-half hours and his arrest occurred not in close proximity to automobile, which was parked in his driveway, but inside his residence). If a person is a recent occupant, officers still must meet one of the two grounds identified in *Gant* for a search of a vehicle incident to arrest of the person.

Passenger belongings. A passenger has standing to contest a search of his or her belongings within a vehicle, such as a purse, incident to arrest of an occupant of the vehicle. *See State v. Mackey*, 209 N.C. App. 116 (2011) (recognizing principle but holding that passenger asserted no possessory interest in vehicle or contents and did not have standing to contest search of vehicle resulting in discovery of weapon under seat).

Pretext. Before *Whren* (discussed *supra* § 15.3I, Pretext), it could be argued that a search incident to arrest violates the Fourth Amendment if the officers arrest the person, rather than issue a citation, as a pretext to search the person incident to arrest. In *Arkansas v. Sullivan*, 532 U.S. 769 (2001), the Court extended the rule in *Whren* to arrests, holding that an officer's decision to arrest a person for a traffic violation, if supported by probable cause, is not invalid even though the arrest is a pretext for a narcotics search incident to arrest. (On remand, the Arkansas Supreme Court held that a pretextual arrest violates the state constitution. *See State v. Sullivan*, 74 S.W.3d 215 (Ark. 2002).)

D. Probable Cause to Search Person

Person. Officers may conduct a warrantless search of a person whom they have not arrested if both probable cause to search and exigent circumstances exist. *See, e.g.*, *State v. Williams*, 209 N.C. App. 255 (2011) (probable cause existed to believe defendant possessed illegal drugs and exigent circumstances existed based on belief that defendant was attempting to swallow them; permissible for officer to conduct warrantless search of the defendant's mouth by grabbing him around the throat, pushing him onto the hood of a vehicle, and demanding that he spit out whatever he was trying to swallow); *State v. Yates*, 162 N.C. App. 118 (2004) (officer had probable cause to search defendant based on strong odor of marijuana about defendant's person; exigent circumstances justified immediate warrantless search); *State v. Smith*, 118 N.C. App. 106, *rev'd on other grounds*, 342 N.C. 407 (1995); *State v. Watson*, 119 N.C. App. 395 (1995).

Containers. Officers may conduct a warrantless search of a container found on a person whom they have not arrested if both probable cause to search *and* exigent circumstances exist. If exigent circumstances do not exist, they must obtain a search warrant. *See State v. Simmons*, 201 N.C. App. 698 (2010) (officers did not have probable cause to search bag or vehicle based on defendant's statements that bag contained cigar guts); FARB at 216–17 (discussing rule and exceptions); *State v. Gilkey*, 18 P.3d 402 (Or. Ct. App. 2001) (officers could seize chapstick container found during frisk but could not open it without a warrant).

Strip searches based on probable cause. Because of their intrusiveness, roadside strip searches require a greater justification than other warrantless searches based on probable cause. Officers must have specific probable cause that the defendant is hiding the items (usually, drugs) on his or her person. Further, there must be "exigent circumstances that show some significant government or public interest would be endangered were the police to wait until they could conduct the search in a more discreet location." *State v. Fowler*, ___ N.C. App. ___, 725 S.E.2d 624, 628 (2012) (citation omitted). The strip search also must be conducted in a reasonable manner. *See also supra* "Strip search during search incident to arrest" in § 15.6C, Other Limits on Searches Incident to Arrest (applying similar standard).

Appellate judges have divided over whether strip searches meet these higher standards. *Compare State v. Battle*, 202 N.C. App. 376 (2010) (finding strip search unconstitutional), *with State v. Robinson*, ___ N.C. App. ___, 727 S.E.2d 712 (2012)

(stating that showing of exigent circumstances was not required where officer had specific basis for believing weapons or contraband were under defendant's clothing) *and Fowler*, ___ N.C. App. ___, 725 S.E.2d 624 (finding exigent circumstances and upholding strip search). *See also State v. Smith*, 118 N.C. App. 106 (1995) (court of appeals holds that although officers' warrantless search was supported by probable cause and exigent circumstances, search was unreasonable where officers required defendant to pull down his pants on public street, shined a flashlight on his scrotum, and reached underneath his scrotum to remove paper towel), *rev'd in pertinent part*, 342 N.C. 407 (1995) (court adopts dissenting opinion, which found that search was not unreasonable under circumstances).

E. Probable Cause to Search Vehicle

Generally. Officers may conduct a warrantless search of an automobile, including the trunk and closed containers, if they have probable cause to believe the objects of the search may be located there. The rationale for what is known as the automobile exception to the warrant requirement is that cars are capable of being moved quickly and people have a reduced expectation of privacy in cars. *See California v. Acevedo*, 500 U.S. 565 (1991) (stating general standard); *State v. Holmes*, 109 N.C. App. 615 (1993) (to same effect); *State v. Corpening*, 109 N.C. App. 586 (1993) (to same effect); *see also Florida v. White*, 526 U.S. 559 (1999) (police do not need warrant to seize vehicle from public place when they have probable cause to believe that vehicle itself is forfeitable contraband). If probable cause exists to search an automobile, officers may conduct an immediate search at the scene, or a later search at the police station, without a warrant. *See Acevedo*, 500 U.S. at 570.

The scope of a warrantless search of a vehicle based on probable cause is broad but not unlimited. "The scope of a warrantless search of an automobile . . . is defined by the object of the search and the places in which there is probable cause to believe that it may be found." *See United States v. Ross*, 456 U.S. 798, 824–25 (1982) (holding that "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search; also observing that "[p]robable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab").

Passenger belongings. In *Wyoming v. Houghton*, 526 U.S. 295 (1999), the Court held that officers with probable cause to search a car may search passengers' belongings found in the car that are capable of concealing the object of the search. *Compare State v. Boyd*, 64 P.3d 419 (Kan. 2003) (distinguishing *Houghton*, the court held that officers could not search a passenger's purse as part of their search of a car when they had ordered her to leave her purse in the car and they did not have probable cause to search the car or passenger at the time they gave the order).

Probable cause to search a car and its contents does not necessarily authorize officers to search passengers themselves. Nor does it necessarily authorize searches of passengers'

belongings in other contexts—for example, when the driver but not the passenger consents to a search. *See supra* § 15.5D, Consent.

Seizure of object. Before seizing an object found during a search of a vehicle, officers must have probable cause to believe that the object constitutes evidence of a crime. *See State v. Bartlett*, 130 N.C. App. 79 (1998) (no probable cause to seize plastic-like substance found in car, which upon later laboratory analysis turned out to be controlled substance, because officers admitted that they did not know what substance was at time of seizure).

Drug cases. In *Maryland v. Dyson*, 527 U.S. 465 (1999), the Court reaffirmed that a finding of probable cause that a vehicle contains contraband satisfies the automobile exception to the search warrant requirement. At issue in such cases are what circumstances amount to probable cause to search and where officers may search. *See generally State v. Poczontek*, 90 N.C. App. 455 (1988) (officer lacked probable cause to search car for drugs based on informant's tip and officer's observations after stop).

When an officer detects the odor of marijuana emanating from a vehicle, probable cause exists for a warrantless search of the vehicle for marijuana. *See State v. Smith*, 192 N.C. App. 690 (2008) (so holding). Officers may search in areas of the car where they reasonably believe marijuana may be found. *See State v. Toledo*, 204 N.C. App. 170 (2010) (officer noted odor of marijuana from spare tire in the luggage area after defendant had validly consented to a search of the vehicle; after conducting a "ping test" by pressing the tire valve of the spare tire and noting a very strong odor of marijuana, officer searched second spare tire located under the vehicle; court finds that after first ping test, officer had probable cause to search second tire); *compare Commonwealth v. Garden*, 883 N.E.2d 905 (Mass. 2008) (odor of burnt marijuana on clothes of vehicle's occupant gave officer probable cause to search passenger compartment of vehicle; officer did not have probable cause, however, to search vehicle's trunk because officer could not reasonably believe that source of smell of burnt marijuana would be found in trunk), *abrogated on other grounds, Commonwealth v. Lobo*, 978 N.E.2d 807 (Mass. App. Ct. 2012).

Probable cause to search a vehicle for drugs does not necessarily give officers probable cause to search recent occupants of the vehicle. *See State v. Smith*, ___ N.C. App. ___, 729 S.E.2d 120 (2012) (drug dog's positive alert to a vehicle does not give officers probable cause to search recent occupants of the vehicle); *see also Bailey v. United States*, 568 U.S. ___, 133 S. Ct. 1031 (2013) (search warrant does not justify the detention of occupants beyond the immediate vicinity of the premises covered by a search warrant; in this case, the defendant left the premises before the search began and officers waited to detain him until he had driven about one mile away, which was impermissible in absence of other grounds for detention). *But cf. State v. Mitchell*, ___ N.C. App. ___, 735 S.E.2d 438 (2012) (possession of marijuana blunt by passenger gave officer probable cause to search car in which passenger was riding).

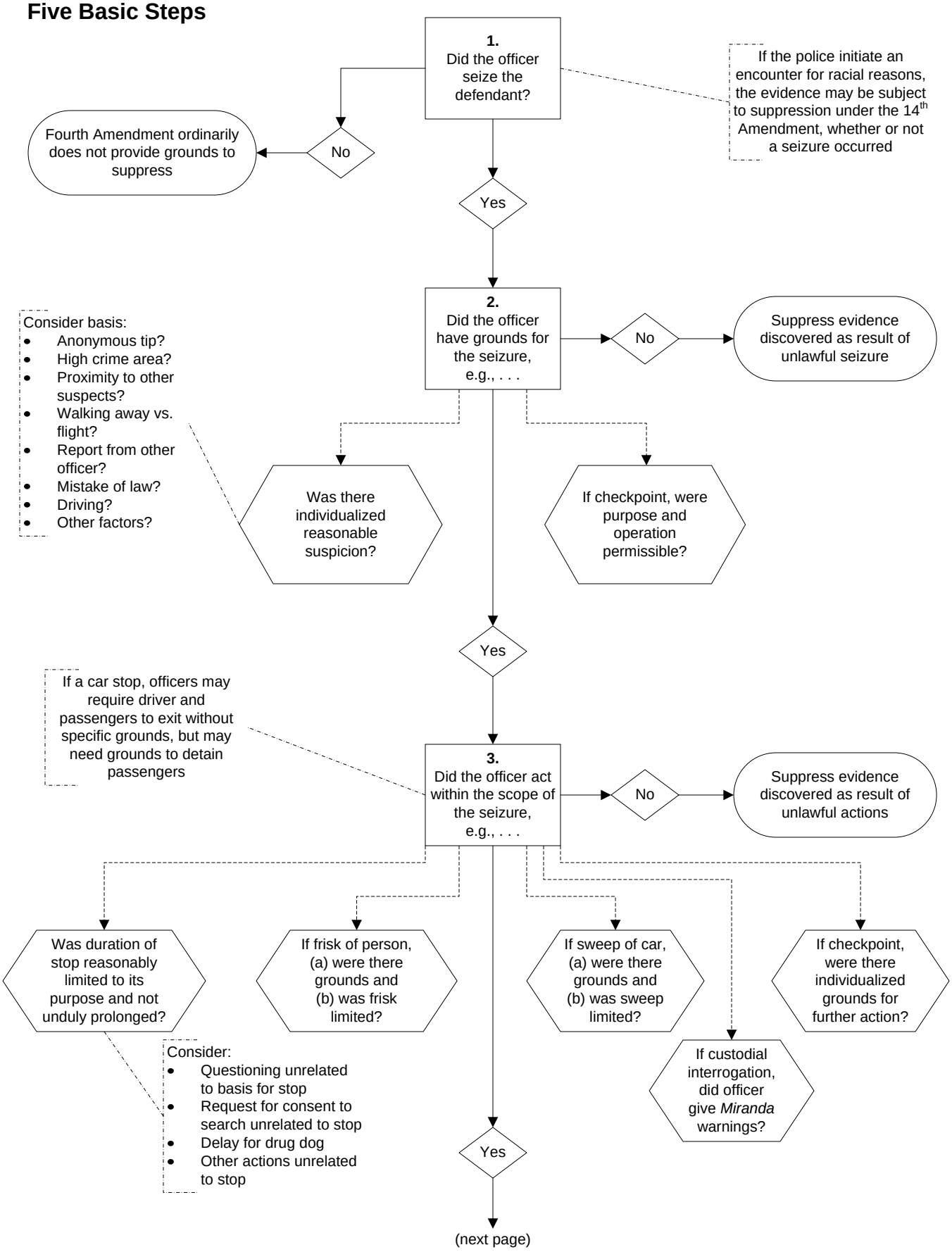
F. Inventory Search

Arrestees. Officers may search and inventory possessions of arrestee. *See* FARB at 229.

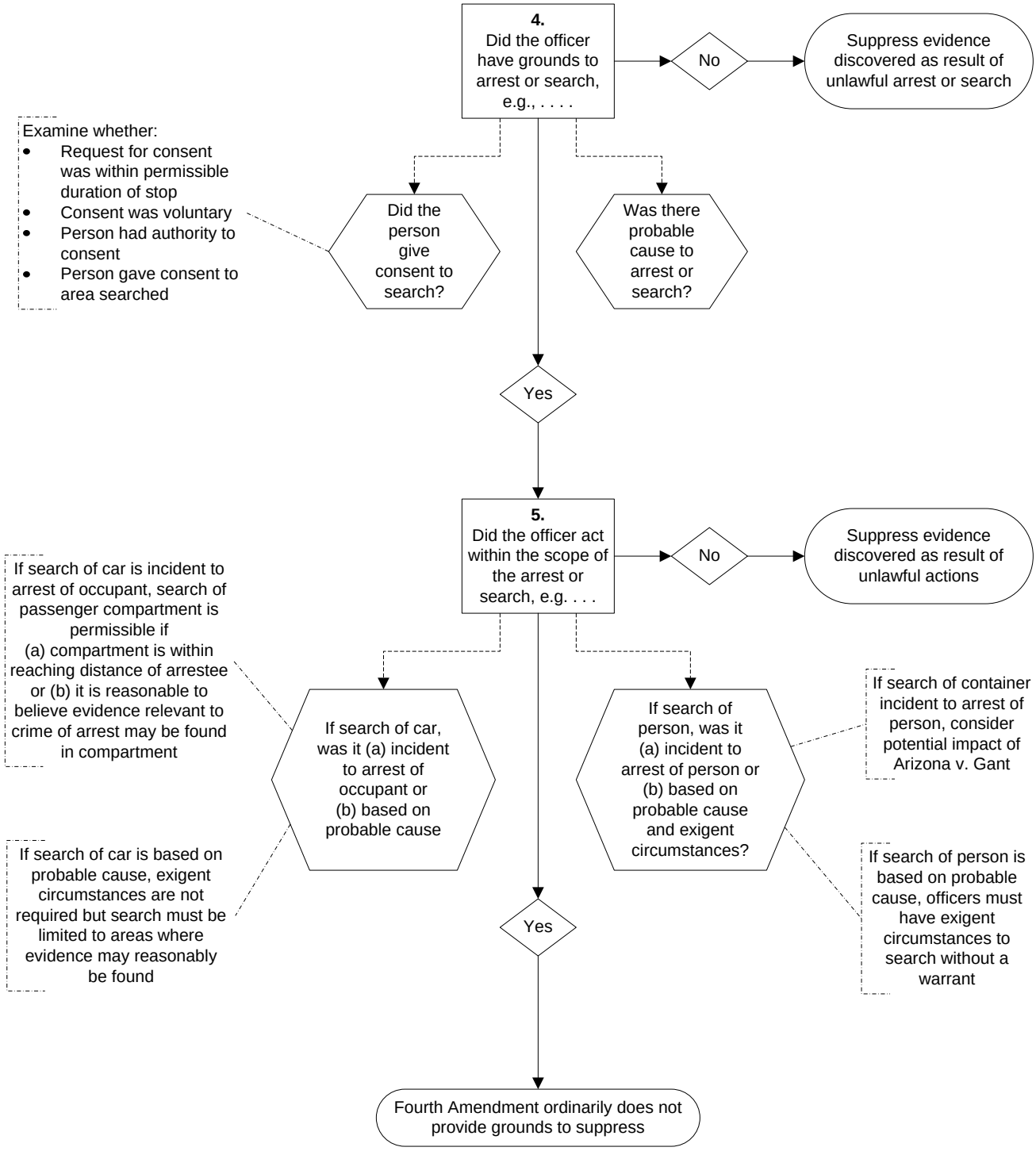
Vehicles. Officers may *impound* a vehicle if pursuant to departmental policy and grounds for impoundment exist, such as the need to safeguard the vehicle and its contents. Officers may *inventory* the vehicle and its contents if pursuant to departmental policy. *See State v. Phifer*, 297 N.C. 216 (1979) (failure to follow standardized procedure; inventory search suppressed); *State v. Peaten*, 110 N.C. App. 749 (1993) (inadequate grounds to impound vehicle; inventory search suppressed); FARB at 233–34 (discussing impoundment and inventory of vehicles).

Pretext. Inventory searches may be challenged as pretextual. *See supra* § 15.3I, Pretext.

Appendix 15-1
Stops and Warrantless Searches: Five Basic Steps



Five Basic Steps (cont'd)



Traffic Stops

Jeff Welty

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.

Chapter 8
Criminal Pleadings

8.1 Importance of Criminal Pleadings

A. Purposes of Pleadings

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

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

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

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

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

B. Chapter Summary

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

C. References

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

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

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

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

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

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

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

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

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

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

8.2 Misdemeanors Tried in District Court

A. Process as Pleading

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

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

B. Requirements for Misdemeanor Pleadings

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

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

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

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

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

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

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

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

C. Types of Misdemeanor Pleadings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Amendment of Misdemeanor Pleadings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. Common Pleading Defects in District Court

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Resist, obstruct, or delay. "A warrant or bill of indictment charging a violation of G.S. 14-223 must identify the officer by name and indicate the official duty he was discharging or attempting to discharge, and should point out, in a general way at least, the manner in which the defendant is charged with having resisted, delayed, or obstructed such officer." *State . Smith*, 262 N.C. 472, 474 (1964); *see also State v. Wells*, 59 N.C. App. 682 (1982) (citation that charged resisting arrest was fatally defective for omission of duty officer was performing); *State v. Powell*, 10 N.C. App. 443 (1971) (the words "resist arrest" in citation were insufficient to charge offense).

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

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

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

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

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

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

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

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

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

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

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

8.3 Misdemeanor Appeals

A. Scope of Jurisdiction on Appeal

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

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

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

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

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

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

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

B. Required Pleadings in Superior Court

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

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

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

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

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

C. Refiling of Misdemeanor Charges

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

D. Due Process Limits

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

8.4 Felonies and Misdemeanors Initiated in Superior Court

A. Scope of Original Jurisdiction

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

B. Types of Pleadings and Related Documents

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

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

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

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

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

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

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

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

C. Sufficiency of Pleadings

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

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

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

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

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

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

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

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

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

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

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

D. Amendment of Indictments

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

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

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

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

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

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

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

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

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

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

State v. Whitman, 179 N.C. App. 657 (2006) (State was entitled to amend the alleged dates for statutory rape and statutory sexual offense of a 13, 14, or 15-year-old from "January 1998 through June 1998" to "July 1998 through December 1998"; victim would have been fifteen under either version of indictment and defendant was on notice that if he wished to present an alibi defense, he was going to have to address all of 1998 because an incest indictment, which was not amended, alleged dates from "January 1998 through June 1999")

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Habitual Offender Pleading Requirements

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8.5 Common Pleading Defects in Superior Court

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

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

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

B. Pleading Does Not State Any Crime

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

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

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

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

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

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

C. Pleading Does Not State Required Elements of Crime

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

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

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

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

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

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

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

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

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

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

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

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

D. Failure to Identify Defendant

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

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

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

E. Lack of Identification, or Misidentification, of Victim

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

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

F. Two Crimes in One Count (Duplicity)

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

G. Disjunctive Pleadings

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

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

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

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

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

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

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

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

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

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

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

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

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

H. One Crime in Multiple Counts (Multiplicity)

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

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

I. Variance Between Pleading and Proof

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

J. Timing of Motions to Challenge Indictment Defects

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

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

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

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

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

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

8.6 Limits on Successive Prosecution

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

A. Double Jeopardy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Collateral Estoppel

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

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

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

C. Failure to Join

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

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

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

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

D. Due Process

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

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

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

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

E. Timing of Challenge

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

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

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

8.7 *Apprendi* and *Blakely* Issues

A. The Decisions

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

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

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

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

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

B. Notice and Pleading Requirements after *Blakely*

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

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

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

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

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

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

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

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

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

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

DISTRICT COURT PLEADINGS "TO GO"

APDs A. Maris & J. Donovan 2011

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

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

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

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

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

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

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

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

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

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

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

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

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

Are there additional limitations on **Amendments**?

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

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

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

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

STATUTORY REQ'TS (all pleadings)

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

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

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

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

SPECIFIC OFFENSE REQ'TS:

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

CRIMINAL PLEADINGS IN DISTRICT COURT

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

EXAMPLES:

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

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

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

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

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

PROBLEMS WITH PLEADING:

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

WHEN TO MOVE TO DISMISS:

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

SPECIFIC OFFENSES:

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

AMENDMENT:

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

PRACTICE TIPS:

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

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

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Contents

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I. Introduction

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

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

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

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

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

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

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

3. G.S. 15-153.

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

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

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

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

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

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

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

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

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

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

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

II. General Matters

A. Date or Time of Offense

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

1. Homicide

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

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

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

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

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

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

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

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

2. Burglary

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

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

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

3. Sexual Assault

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Failure to Register as a Sex Offender

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

5. Larceny

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

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

6. False Pretenses

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

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

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

7. Possession of a Firearm by a Felon

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

8. Impaired Driving

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

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

9. Conspiracy

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

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

10. Habitual and Violent Habitual Felon

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

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

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

11. Sexual Exploitation of a Minor

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

B. Victim's Name

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Defendant's Name

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

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

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

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

D. Address or County

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Use of the Word "Feloniously"

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

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

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

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

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

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

F. Statutory Citation

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

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

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

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

G. Case Number

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

H. Completion By Grand Jury Foreperson

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

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

I. Prior Convictions

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

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

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

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

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

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

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

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

J. "Sentencing Factors"

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

III. Offense Specific Issues

A. Homicide[58]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Arson

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

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

C. Kidnapping and Related Offenses

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Burglary, Breaking or Entering, and Related Crimes

1. Burglary and Breaking or Entering

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

96. *See id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Breaking into Coin- or Currency-Operated Machine

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

E. Robbery

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. Assaults

1. Generally

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

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

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

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

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

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

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

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

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

2. Injury Assaults

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

3. Deadly Weapon Assaults

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

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

The cases applying this rule are summarized below.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Assault on a Government Official

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

5. Habitual Misdemeanor Assault

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

6. Malicious Conduct by Prisoner

In *State v. Artis,*[115] the court of appeals held than an indictment charging malicious conduct by a prisoner under G.S. 14-258.4 was not defective even though it failed to allege that the defendant was in custody when the conduct occurred. The court held that the defendant had adequate notice of the charges because he was an inmate in the county detention center, was incarcerated when he received notice of the charges, and raised no objection that he was unaware of the facts giving rise to the charges.

G. Stalking

State v. Stephens, __ N.C. App. __, 655 S.E.2d 435 (2008) (the trial court did not err by allowing amendment of a stalking indictment; the amendment did not change the language of the indictment, but rather separated out the allegation regarding the prior conviction that elevated punishment to a felony, as required by G.S. 15A-928).

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113. *See* State v. Bethea, 71 N.C. App. 125, 128-29 (1984) (indictment charging that defendant assaulted a law enforcement officer who "was performing a duty of his office" was sufficiently specific to permit entry of judgment for felony assault with a firearm on a law enforcement officer; the indictment need not specify the particular duty the officer was performing; indictment only needs to allege that the law enforcement officer was performing a duty of his office at the time the assault occurred).

114. *See* State v. Thomas, 153 N.C. App. 326, 335-336 (2002) (indictment charging assault with deadly weapon on law enforcement officer did not need to allege that the defendant knew or had reasonable grounds to believe that the victim was a law enforcement officer; indictment alleged that defendant "willfully" committed an assault on a law enforcement officer, a term that indicates defendant knew that the victim was a law enforcement officer).

115. 174 N.C. App. 668, 671-73 (2005).

H. Resist, Delay, and Obstruct Officer

Indictments charging resisting, delaying, and obstructing an officer must identify the officer by name, indicate the duty being discharged (e.g., "searching the premises"), and indicate generally how the defendant resisted the officer (e.g., "using his body to block the officer's entry into the premises").[116]

I. Disorderly Conduct

In State v. Smith,[117] the court held that an indictment under G.S. 14-197 charging that the defendant "appeared in a public place in a rude and disorderly manner and did use profane and indecent language in the presence of two or more persons" was fatally defective. The indictment failed to allege that (1) the defendant used indecent or profane language on a public road or highway and (2) such language was made in a loud and boisterous manner.

J. Child Abuse

In *State v. Qualls,*[118] the court held that there was no fatal variance when an indictment alleged that the defendant inflicted a subdural hematoma and the evidence showed that the injury was an epidural hematoma. The court explained that to indict a defendant for felonious child abuse all that is required is an allegation that the defendant was the parent or guardian of the victim, a child under the age of sixteen, and that the defendant intentionally inflicted any serious injury upon the child. The court regarded the indictment's reference to the victim suffering a subdural hematoma as surplusage.

K. Sexual Assault

G.S. 15-144.1 prescribes a short form indictment for rape and G.S. 15-144.2 prescribes a short form indictment for sexual offense. The statutes provide that the short form indictments may

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116. *See* State v. Smith, 262 N.C. 472, 474 (1964) (pleading alleging that the defendant "did obstruct, and delay a police officer in the performance of his duties by resisting arrest" by striking, hitting and scratching him was fatally defective; a warrant or indictment charging a violation of G.S. 14-223 must identify the officer by name and indicate the official duty he was discharging or attempting to discharge, and should note the manner in which defendant resisted, delayed or obstructed); In Re J.F.M., 168 N.C. App. 144 (2005) (juvenile petition properly alleged resist, delay and obstruct by charging that "[T]he juvenile did unlawfully and willfully resist, delay and obstruct (name officer) S.L. Barr, by holding the office of (name office) Deputy (describe conduct) delay and obstructing a public [officer] in attempting to discharge a duty of his office. At the time, the officer was discharging and attempting to discharge a duty of his/her (name duty) investigate and detain [TB] whom was involved in an affray[.] This offense is in violation of G.S. 14-233."); State v. Swift, 105 N.C. App. 550, 552-54 (1992) (indictment charging resisting an officer was not fatally defective; such an indictment must identify the officer by name, indicate the official duty being discharged and indicate generally how defendant resisted the officer); *see also* State v. White, 266 N.C. 361 (1966) (resisting warrant charging that defendant "did unlawfully and willfully resist, delay and obstruct a public officer, to wit: Reece Coble, a Policeman for the Town of Pittsboro, while he, the said Reece Coble, was attempting to discharge and discharging a duty of his office, to wit: by striking the said Reece Coble with his fist" was insufficient) (citing *Smith*, 262 N.C. 472, discussed above).

117. 262 N.C. 472, 473-74 (1964).

118. 130 N.C. App. 1, 6-8 (1998), *aff'd*, 350 N.C. 56 (1999).

be used for a number of listed offenses.[119] For example, G.S. 15-144.1(a) provides the short form for forcible rape and states that any indictment "containing the averments and allegations herein named shall be good and sufficient in law as an indictment for rape in the first degree and will support a verdict of guilty of rape in the first degree, rape in the second degree, attempted rape or assault on a female." However, when a rape indictment specifically alleges all of the elements of first-degree rape under G.S. 14-27.2 and does not contain the specific allegations or averments of G.S. 15-144.1, the court may instruct the jury only on that offense and any lesser included offenses.[120]

The appellate courts repeatedly have upheld both the rape and sexual offense short form indictments.[121] This does not mean, however, that all indictments conforming to the statutory short form language are insulated from attack. In *State v. Miller*,[122] for example, the court of appeals found the statutory sex offense indictments invalid. In that case, although the indictments charged first-degree statutory sex offense in the language of G.S. 15-144.2(b), they also cited G.S. 14-27.7A (statutory rape or sexual offense of a person who is 13, 14, or 15 years old) instead of G.S. 14-27.4 (first-degree sexual offense). Moreover, the indictments included other allegations that pertained to G.S. 14-27.7A. Based on the "very narrow circumstances presented by [the] case," the court held that the short form authorized by G.S. 15-144.2 was not sufficient to cure the fatal defects.[123]

The effect of the short form is that although the State must prove each and every element of these offenses at trial, every element need not be alleged in a short form indictment.[124] A defendant may, of course, request a bill of particulars to obtain additional information about the charges.[125] The trial court's decision to grant or deny that request is reviewed for abuse of discretion.[126] An indictment that conforms to the statutory short form need not allege:

- That the victim was a female;[127]
- The defendant's age;[128]

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119. See *also* State v. Daniels, 164 N.C. App. 558 (2004) (holding that the short form in G.S. 15-144.2(a) may be used to charge statutory sex offense against a person who is 13, 14, or 15 years old).

120. *See* State v. Hedgepeth, 165 N.C. App. 321 (2004) (reasoning that the short form was not used and that assault on a female is not a lesser included offense of rape).

121. *See, e.g.,* State v. Wallace, 351 N.C. 481, 503-08 (2000) (upholding short form indictments for first-degree murder, rape, and sexual offense in the face of an argument that *Jones v. United States*, 526 U.S. 227 (1999), required a finding that they were unconstitutional); State v. Effer, 309 N.C. 742, 745-47 (1983) (short form for sexual offense); State v. Lowe, 295 N.C. 596, 599-604 (1978) (short form for rape is constitutional).

122. 159 N.C. App. 608 (2003), *aff'd,* 358 N.C. 133 (2004).

123. *See id*. at 614; *see supra* p. 14 & nn. 44-45 (discussing other sexual assault cases involving amendments to the statutory citation).

124. G.S. 15-144.1 ("In indictments for rape, it is not necessary to allege every matter required to be proved on the trial . . . ."); G.S. 15-144.2 (same for sexual offenses); *Lowe*, 295 N.C. at 600.

125. *See* State v. Randolph, 312 N.C. 198, 210 (1984).

126. *See id.*

127. *See* State v. Bell, 311 N.C. 131, 137-38 (1984) (indictments for attempted rape were sufficient even though they did not allege that the victims were females).

128. *See Lowe,* 295 N.C. at 600 (short form for rape "clearly authorizes an indictment … which omits [the] averment[] … [regarding] the defendant's age"); State v. Wiggins, 161 N.C. App. 583 (2003) (defendant's age not an essential element in statutory rape case); State v. Hunter, 299 N.C. 29, 37-38 (1980) (same). Note that under prior law both first-degree statutory and first-degree forcible rape required that the defendant be more than 16 years of age. *See* G.S. 14-21(1) (repealed). Under current law, although first-degree statutory

- The aggravating factor or factors that elevate a second-degree forcible offense to a first-degree forcible offense;[129] or
- The specific sex act alleged to have occurred.[130]

The statutes require that short form indictments for both forcible rape and forcible sexual offense include an averment that the assault occurred "with force and arms."[131] However, failure to include that averment is not a fatal defect.[132] The short forms for both forcible rape and forcible sexual offense also require an allegation that the offense occurred "by force and against her will."[133] However, in *State v. Haywood*,[134] the court of appeals concluded that the trial court did not err by allowing the State to amend a first-degree sex offense indictment by adding the words "by force." The court reasoned that because the indictment already included the terms "feloniously" and "against the victim's will," the charge was not substantially altered by the addition of the term "by force."

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rape requires that the defendant be at least 12 years old, first-degree forcible rape no longer has an element pertaining to the defendant's age. *See* G.S. 14-27.2.

129. *See* State v. Roberts, 310 N.C. 428, 432-34 (1984) (rejecting defendant's argument that a short form rape indictment was insufficient to charge first-degree rape because it did not allege that "defendant displayed a dangerous weapon or that he caused serious injury or that he was aided and abetted by another, essential elements of first degree rape"); *Lowe*, 295 N.C. at 600 (indictment is valid even if it does not indicate whether offense was perpetrated by means of a deadly weapon or by inflicting serious bodily injury).

130. *See* State v. Kennedy, 320 N.C. 20, 23-25 (1987) (indictments charging that defendant engaged in a sex offense with the victim without specifying the specific sexual act were valid); State v. Edwards, 305 N.C. 378, 380 (1982) (sexual offense indictment drafted pursuant to G.S. 15-144.2(b) need not specify the sexual act committed); State v. Burgess, 181 N.C. App. 27 (2007) (same); State v. Mueller, __ N.C. App. __, 647 S.E.2d 440 (2007) (indictments charging sexual crimes were sufficient even though they did not contain allegations regarding which specific sexual act was committed); State v. Youngs, 141 N.C. App. 220, 229-31 (2000) (no defect in indictments charging indecent liberties with a minor and statutory sex offense; an indictment charging statutory sex offense need not contain a specific allegation regarding which sexual act was committed; an indictment charging indecent liberties need not indicate exactly which of defendant's acts constitute the indecent liberty).

Although the State is not required to allege a specific sex act in the indictment, if it does so, it may be bound by that allegation, at least with respect to prosecutions under G.S. 14-27.7. *See* State v. Loudner, 77 N.C. App. 453, 453-54 (1985) (indictment pursuant to G.S. 14-27.7 (intercourse and sexual offenses with certain victims) charged that defendant engaged "in a sexual act, to wit: performing oral sex" and the evidence showed only that defendant engaged in digital penetration of the victim; "While the State was not required to allege the specific nature of the sex act in the indictment, having chosen to do so, it is bound by its allegations…") (citation omitted); State v. Bruce, 90 N.C. App. 547, 549-50 (1988) (fatal variance in indictment pursuant to G.S. 14-27.7 indicating that charge was based on defendant's having engaged in vaginal intercourse with the victim and evidence at trial that showed attempted rape, attempted anal intercourse and fellatio but not vaginal intercourse).

131. G.S. 15-144.1(a); G.S. 15-144.2(a).

132. *See* G.S. 15-155 (indictment not defective for omission of the words "with force and arms"); State v. Cheek, 307 N.C. 552, 555 (1983); State v. Corbett, 307 N.C. 169, 173-75 (1982).

133. *See* G.S. 15-144.1(a); G.S. 15-144.2(a).

134. 144 N.C. App. 223, 228 (2001).

For first-degree statutory rape and first-degree statutory sex offense, the short forms state that it is sufficient to allege the victim as "a child under 13."[135] Although that allegation need not follow the statute verbatim,[136] it must clearly allege that the victim is under the age of thirteen.[137]

For cases dealing with challenges to sexual assault indictments regarding the date of the offense, see *supra* pp. 5–7.

L. Indecent Liberties

An indictment charging taking indecent liberties with a child under G.S. 14-202.1 need not specify the act that constituted the indecent liberty.[138]

M. Larceny, Embezzlement, and Related Crimes Interfering with Property Rights

Larceny and embezzlement indictments must allege a person or entity that has a property interest in the property stolen. That property interest may be ownership, or it may be some special property interest such as that of a bailee or custodian.[139] Although the name of a person or entity with a property interest must be alleged in the indictment, the exact nature of the property interest, e.g., owner or bailee, need not be alleged.[140] G.S. 15-148 sets out the rule for alleging joint ownership of property. It provides that when the property belongs to or is in the possession of more than one person, "it is sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others as the case may be."

As the cases summarized below illustrate,[141] failure to allege the name of one with a property interest in the item will render the indictment defective. Similarly, a variance between the person or entity alleged to hold a property interest and the evidence at trial is often fatal. And finally, amendments as to this allegation generally are not permitted.

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135. G.S. 15-144.1(b); G.S. 15-144.2(b).

136. *See* State v. Ollis, 318 N.C. 370, 374 (1986) (allegation that the victim is "a female child eight (8) years old" sufficiently alleges that she is "a child under 12" and satisfies the requirement of G.S. 15-144.1(b) as it existed at the time; the additional allegation that the child was "thus of the age of under thirteen (13) years" is surplusage [Note: at the time of the alleged offense in this case, first-degree statutory rape applied to victims under the age of 12; the statute now applies to victims under the age of 13]).

137. *See id.*; State v. Howard, 317 N.C. 140, 140-41 (1986) (defendant was tried and convicted under G.S. 14-27.2 of rape of a "child under the age of 13 years" upon a bill of indictment which alleged that the offense occurred when the old version of G.S. 14-27.2, applying to victims under the age of 12, was in effect; although valid for offenses occurring after amendment of the statute, the indictment did not allege a criminal offense for a rape allegedly occurring before the amendment); State v. Trent, 320 N.C. 610, 612 (1987) (same).

138. *See* State v. Youngs, 141 N.C. App. 220, 229-31 (2000) (citing State v Blackmon, 130 N.C. App. 692, 699 (1998), and State v. Singleton, 85 N.C. App. 123, 126 (1987)).

139. *See, e.g.*, State v. Greene, 289 N.C. 578, 584 (1976).

140. *See Greene*, 289 N.C. at 586-86 (no fatal variance between indictment alleging that Welborn and Greene had a property interest in the stolen property and evidence showing that Greene was the owner and Welborn merely a bailee).

141. Many cases on point exist. The cases annotated here are meant to be illustrative.

Cases Finding a Fatal Defect or Variance/Error With Respect to an Amendment

State v. Downing, 313 N.C. 164, 166-68 (1985) (fatal variance between felony larceny indictment alleging that items were the personal property of a mother who owned the building and evidence showing that items were owned by the daughter's business, which was located in the building).

State v. Eppley, 282 N.C. 249, 259-60 (1972) (fatal variance between larceny indictment alleging that property belonged to James Ernest Carriker and evidence showing that although the property was taken from Carriker's home, it was owned by his father).

State v. Cathey, 162 N.C. App. 350 (2004) (error to allow amendment regarding owner of property).

State v. Craycraft, 152 N.C. App. 211, 213-14 (2002) (fatal variance between felony larceny indictment alleging that stolen property belonged to one Montague and evidence showing that items belonged to defendant's father; Montague, the landlord, did not have a special possessory interest in the items, although he was maintaining them for his former tenant).

State v. Salters, 137 N.C. App. 553, 555-57 (2000) (fatal variance between felony larceny indictment charging defendant with stealing property owned by Frances Justice and evidence showing that the property belonged to Kedrick (Justice's eight-year old grandson); noting that had Justice been acting *in loco parentis*, "there would be no doubt" that Justice would have been in lawful possession or had a special custodial interest in the item).

State v. Johnson, 77 N.C. App. 583, 585 (1985) (indictment charging defendant with breaking or entering a building occupied by Watauga Opportunities, Inc. and stealing certain articles of personal property was fatally defective because it was silent as to ownership, possession, or right to possess the stolen property; fatal variance existed between second indictment charging defendant with breaking or entering a building occupied by St. Elizabeth Catholic Church and stealing two letter openers, the personal property of St. Elizabeth Catholic Church, and evidence that did not show that the church either owned or had any special property interest in the letter openers but rather established that the articles belonged to Father Connolly).

Cases Finding No Fatal Defect or Variance/No Error With Respect to an Amendment

State v. Green, 305 N.C. 463, 474 (1982) (no fatal variance between larceny indictment alleging that the stolen item was "the personal property of Robert Allen in the custody and possession of Margaret Osborne" and the evidence; rejecting defendant's argument that the evidence conclusively showed that Terry Allen was the owner and concluding that even if there was no evidence that Robert Allen owned the item, there would be no fatal variance because the evidence showed it was in Osborn's possession; the allegation of ownership in the indictment therefore was mere surplusage).

State v. Liddell, 39 N.C. App. 373, 374-75 (1979) (no fatal variance between indictments charging defendant with stealing "the property of Lees-McRae College under the custody of Steve Cummings" and evidence showing that property belonged to Mackey Vending Company and ARA Food Services; Lees-McRae College was in lawful possession of the items as well as having custody of them as a bailee).

When a variance between the indictment's allegation regarding the owner or individual or entity with a possessory interest and the evidence can be characterized as minor or as falling within the rule of *idem sonans*,[142] it has been overlooked.[143]

Larceny and embezzlement indictments must allege ownership of the property in a natural person or a legal entity capable of owning property. When the property owner is a business, the words "corporation," "incorporated," "limited," and "company," as well as abbreviations for those terms such as "Inc." and "Ltd." sufficiently designate an entity capable of owning property.[144] The following cases illustrate this rule.

Cases Finding a Fatal Defect or Variance/Error With Respect to an Amendment

State v. Thornton, 251 N.C. 658, 660-62 (1960) (embezzlement indictment charging embezzlement from "The Chuck Wagon" was defective because it contained no allegation that the victim was a legal entity capable of owning property; although the victim's name was given, there was no allegation that it was a corporation and the name itself did not indicate that it was such an entity).

State v. Brown, __ N.C. App. __, 646 S.E.2d 590 (2007) (larceny indictment stating that stolen items were the personal property of "Smoker Friendly Store, Dunn, North Carolina" was defective because it did not state that the store was a legal entity capable of owning property; rejecting the State's argument that when count one and two were read together the indictment alleged a legal entity capable of owning property; although count two referenced a corporation as the owner, that language was not incorporated into count one and each count of an indictment must be complete in itself).

State v. Price, 170 N.C. App. 672, 673 (2005) (indictment for larceny was defective when it named the property owner as "City of Asheville Transit and Parking Services," which was not a natural person; the indictment did not allege that this entity was a legal entity capable of owning property).

State v. Phillips, 162 N.C. App. 719 (2004) (larceny indictments were fatally defective because they failed to give sufficient indication of the legal ownership of the stolen items; indictment alleged that items were the personal property of "Parker's Marine"; Parker's Marine was not an individual and the indictment failed to allege that it was a legal entity capable of ownership; defective count cannot be read together with

142. *See supra* pp. 10–11.

143. State v. Weaver, 123 N.C. App. 276, 291 (1996) (no fatal variance between attempted larceny indictment alleging that the stolen items were "the personal property of Finch-Wood Chevrolet-Geo Inc." and evidence; evidence showed that Finch-Wood Chevrolet had custody and control of the car but did not show that entity was incorporated or that it also was known as Finch-Wood Chevrolet-Geo); State v. Cameron, 73 N.C. App 89, 92 (1985) (no fatal variance between indictment alleging that stolen items belonged to "Mrs. Narest Phillips" and evidence showing that the owner was "Mrs. Ernest Phillips"; names are sufficiently similar to fall within the doctrine of idem sonans, and the variance was immaterial); State v. McCall, 12 N.C. App. 85, 87-88 (1971) (no fatal variance between indictment and proof; indictment charged the larceny of money from "Piggly Wiggly Store #7," and witnesses referred to the store as "Piggly Wiggly in Wilson," "Piggly Wiggly Store," "Piggly Wiggly," and "Piggly Wiggly Wilson, Inc."); *see also* State v. Smith, 43 N.C. App. 376, 378 (1979) (no fatal variance between warrant charging defendant with stealing the property of "K-Mart Stores, Inc., Lenoir, N.C." and testimony at trial that the name of the store was "K-Mart, Inc.," "K-Mart Corporation," or "K-Mart Corporation").

144. State v. Cave, 174 N.C. App. 580, 583 (2005).

non-defective count when defective count does not incorporate by reference required language).

State v. Norman, 149 N.C. App. 588, 593 (2002) (felony larceny indictment alleging that defendant took the property of "Quail Run Homes Ross Dotson, Agent" was fatally defective because it lacked any indication of the legal ownership status of the victim (such as identifying the victim as a natural person or a corporation); "Any crime that occurs when a defendant offends the ownership rights of another, such as conversion, larceny, or embezzlement, requires proof that someone other than a defendant owned the relevant property. Because the State is required to prove ownership, a proper indictment must identify as victim a legal entity capable of owning property.")

State v. Linney, 138 N.C. App. 169, 172-73 (2000) (fatal variance existed in embezzlement indictment alleging that rental proceeds belonged to an estate when in fact they belonged to the decedent's son; also, an estate is not a legal entity capable of holding property).

State v. Woody, 132 N.C. App. 788, 790 (1999) (indictment for conversion by bailee alleging that the converted property belonged to "P&R unlimited" was defective because it lacked any indication of the legal ownership status of the victim; while the abbreviation "ltd" or the word "limited" is a proper corporate identifier, "unlimited" is not).

State v. Hughes, 118 N.C. App. 573, 575-76 (1995) (embezzlement indictments alleged that gasoline belonged to "Mike Frost, President of Petroleum World, Incorporated, a North Carolina Corporation"; evidence showed that gasoline was actually owned by Petroleum World, Incorporated, a corporation; trial judge improperly allowed the State to amend the indictments to delete the words Mike Frost, President; because an indictment for embezzlement must allege ownership of the property in a person, corporation or other legal entity able to own property, the amendment was a substantial alteration).

State v. Strange, 58 N.C. App. 756, 757-58 (1982) (arresting judgment *ex mero moto* where the defendant was charged and found guilty of the larceny of a barbeque cooker "the personal property of Granville County Law Enforcement Association" because indictment failed to charge the defendant with the larceny of the cooker from a legal entity capable of owning property).

State v. Perkins, 57 N.C. App. 516, 518 (1982) (larceny indictment was defective because it failed to allege that "Metropolitan YMCA t/d/b/a Hayes-Taylor YMCA Branch" was a corporation or other legal entity capable of owning property and name did not indicate that it was a corporation or natural person).

Cases Finding No Fatal Defect or Variance/No Error With Respect to an Amendment

State v. Cave, 174 N.C. App. 580, 582 (2005) (larceny indictment was not defective; the indictment named the owner as "N.C. FYE, Inc."; the indictment was sufficient because the abbreviation "Inc." imports the entity's ability to own property).

State v. Day, 45 N.C. App. 316, 317-18 (1980) (no fatal variance between the indictment alleging that items were the property of "J. Riggings, Inc., a corporation" and evidence; witnesses testified that items were owned by "J. Riggings, a man's retailing establishment," "J. Riggins Store," and "J. Riggings" but no one testified that J. Riggings was a corporation).

One case that appears to be an exception to the general rule that the owner must be identified as one capable of legal ownership is *State v. Wooten*.[145] That case upheld a shoplifting indictment that named the victim simply as "Kings Dept. Store." Noting that indictments for larceny and embezzlement must allege ownership in either a natural person or legal entity capable of owning property, the *Wooten* court distinguished shoplifting because it only can be committed against a store. At least one case has declined to extend *Wooten* beyond the shoplifting context.[146]

A larceny indictment must describe the property taken. The cases annotated below explore the level of detail required in the description. When the larceny is of any money, United States treasury note, or bank note, G.S. 15-149 provides that it is sufficient to describe the item "simply as money, without specifying any particular coin [or note]." G.S. 15-150 provides a similar rule for embezzlement of money.

Cases Finding a Fatal Defect or Variance/Error With Respect to an Amendment

State v. Ingram, 271 N.C. 538, 541-44 (1967) (larceny indictment that described stolen property as "merchandise, chattels, money, valuable securities and other personal property" was insufficient).

State v. Nugent, 243 N.C. 100, 102-03 (1955) ("meat" was an insufficient description in larceny and receiving indictment of the goods stolen).

State v. Simmons, 57 N.C. App. 548, 551-52 (1982) (fatal variance between larceny indictment and the proof at trial as to what item or items were taken; property was alleged as "eight (8) Imperial, heavy duty freezers, Serial Numbers: 02105, 02119, 01075, 01951, 02024, 02113, 02138, 02079, the personal property of Southern Food Service, Inc., in the custody and possession of Patterson Storage Warehouse Company, Inc., a corporation"; however, the property seized was a 21 cubic foot freezer, serial number "W210TSSC-030-138").

Cases Finding No Fatal Defect or Variance/No Error With Respect to an Amendment

State v. Hartley, 39 N.C. App. 70, 71-72 (1978) (larceny indictments alleging property taken as "a quantity of used automobile tires, the personal property of Jerry Phillips and Tom Phillips, and d/b/a the Avery County Recapping Service, Newland, N.C." was sufficient; indictments named property (tires), described them as to type (automobile), condition (used), ownership, and location).

State v. Monk, 36 N.C. App. 337, 340-41 (1978) (indictment alleging "assorted items of clothing, having a value of $504.99 the property of Payne's, Inc." was sufficient).

State v. Boomer, 33 N.C. App. 324, 330 (1977) ("When describing an animal, it is sufficient to refer to it by the name commonly applied to animals of its kind without further description. A specific description of the animal, such as its color, age, weight, sex, markings or brand, is not necessary. The general term 'hogs' in the indictment sufficiently describes the animals taken so as to identify them with reasonable certainty.") (citation omitted).

State v. Coleman, 24 N.C. App. 530, 532 (1975) (no fatal variance between indictment describing property as "a 1970 Plymouth" with a specific serial number, owned by

145. 18 N.C. App. 652 (1973).

146. *See* State v. Woody, 132 N.C. App. 788, 791 (1999).

George Edison Biggs and evidence which showed a taking of a 1970 Plymouth owned by George Edison Biggs but was silent as to the serial number).

State v. Foster, 10 N.C. App. 141, 142-43 (1970) (larceny indictment alleging "automobile parts of the value of $300.00 . . . of one Furches Motor Company" was sufficient).

State v. Mobley, 9 N.C. App. 717, 718 (1970) (indictment alleging "an undetermined amount of beer, food and money of the value of $25.00 . . . of the said Evening Star Grill" was sufficient).

State v. Chandler[147] held that when the charge is attempted larceny, it is not necessary to specify the particular goods and chattels the defendant intended to steal. The court reasoned that the offense of attempted larceny is complete "when there is a general intent to steal and an act in furtherance thereof." Thus, it concluded, an allegation as to the specific articles intended to be taken is not essential to the crime.[148]

A larceny indictment need not describe the manner of the taking, even if the larceny was by trick.[149] Nor is it necessary for a larceny indictment to expressly allege that the defendant intended to convert the property to his or her own use, that the taking was without consent, or that the defendant had an intent to permanently deprive the owner of the property of its use.[150]

In order to properly charge felony larceny, the indictment must specifically allege one of the factors that elevate a misdemeanor larceny to a felony.[151] Thus, if the factor elevating the offense to a felony is that the value of the items taken exceeds $1,000, this fact must be alleged in the indictment. However, a variance as to this figure will not be fatal, provided that the evidence establishes that the value of the items is $1,000 or more.[152] An indictment alleging that the larceny was committed "pursuant to a violation of G.S. 14-51" is sufficient to charge felony larceny committed pursuant to a burglary.[153] Also, a defendant properly may be convicted of felony larceny pursuant

147. 342 N.C. 742, 753 (1996).

148. *See id.*

149. *See* State v. Barbour, 153 N.C. App. 500, 503 (2002) ("It is not necessary for the State to allege the manner in which the stolen property was taken and carried away, and the words 'by trick' need not be found in an indictment charging larceny."); State v. Harris, 35 N.C. App. 401, 402 (1978).

150. *See* State v. Osborne, 149 N.C. App. 235, 244-45 (indictment properly charged larceny even though it did not allege that item was taken without consent or that defendant intended to permanently deprive the owner; charge that defendant "unlawfully, willfully and feloniously did "[s]teal, take, and carry away" was sufficient), *aff'd*, 356 N.C. 424 (2002); State v. Miller, 42 N.C. App. 342, 346 (1979) (rejecting defendant's argument that the indictment was fatally defective because it failed to state a felonious intent to appropriate the goods taken to the defendant's own use; allegation that defendant "unlawfully and willfully did feloniously steal, take, and carry away" the item was sufficient); *see also* State v. Wesson, 16 N.C. App. 683, 685-88 (1972) (warrant's use of the term "steal" in charging larceny sufficiently charged the required felonious intent).

151. *See* G.S. 14-72 (delineating elements that support a felony charge); State v. Wilson, 315 N.C. 157, 164-65 (1985) (agreeing with defendant's contention that the indictment failed to allege felonious larceny because it did not specifically state that the larceny was pursuant to or incidental to a breaking or entering and the amount of money alleged to have been stolen was below the statutory amount necessary to constitute a felony).

152. *See* State v. McCall, 12 N.C. App. 85, 88 (1971) (indictment alleged larceny of $1948 and evidence showed larceny of $1748).

153. *See* State v. Mandina, 91 N.C. App. 686, 690-91 (1988).

to a breaking and entering when the indictment charged felony larceny pursuant to a burglary,[154] because breaking or entering is a lesser included offense of burglary.[155]

N. Receiving or Possession of Stolen Property

Unlike larceny, indictments charging receiving or possession of stolen property need not allege ownership of the property.[156] The explanation for this distinction is that the name of the person from whom the goods were stolen is not an essential element of these offenses.[157]

O. Injury to Personal Property

An indictment for injury to personal property must allege the owner or person in lawful possession of the injured property.[158] If the entity named in the indictment is not a natural person, the indictment must allege that the victim was a legal entity capable of owning property.[159] These rules follow those for larceny, discussed above.[160]

P. False Pretenses and Forgery

1. False Pretenses

One issue in false pretenses cases is how the false representation element should be alleged in the indictment. In *State v. Perkins*,[161] the court of appeals held that an allegation that the defendant used a credit and check card issued in the name of another person, wrongfully obtained and without authorization, sufficiently apprised the defendant that she was accused of falsely representing herself as an authorized user of the cards.[162] In *State v. Parker*,[163] the court of appeals upheld the

154. *See* State v. McCoy, 79 N.C. App. 273, 277 (1986); State v. Eldgridge, 83 N.C. App. 312, 316 (1986).

155. *See McCoy*, 79 N.C. App. at 277.

156. *See* State v. Jones, 151 N.C. App. 317, 327 (2002) (variance between ownership of property alleged in indictment and evidence of ownership introduced at trial is not fatal to charge of felonious possession of stolen goods); State v. Medlin, 86 N.C. App. 114, 123-24 (1987) ("In cases of receiving stolen goods, it has never been necessary to allege the names of persons from whom the goods were stolen, nor has a variance between an allegation of ownership in the receiving indictment and proof of ownership been held to be fatal. We now hold that the name of the person from whom the goods were stolen is not an essential element of an indictment alleging possession of stolen goods, nor is a variance between the indictments' allegations of ownership of property and the proof of ownership fatal.") (citations omitted).

157. *See Jones*, 151 N.C. App at 327.

158. *See* State v. Price, 170 N.C. App. 672, 673-74 (2005).

159. *See id.* at 674 (indictment for injury to personal property was defective when it named the property owner as "City of Asheville Transit and Parking Services," which was not a natural person; the indictment did not allege that it was a legal entity capable of owning property).

160. *See supra* pp. 34–36.

161. 181 N.C. App. 209, 215 (2007).

162. *Id.* (the indictment alleged that the defendant "unlawfully, willfully and feloniously did knowingly and designedly, with the intent to cheat and defraud, attempted to obtain BEER AND CIGARETTES from FOOD LION by means of a false pretense which was calculated to deceive. The false pretense consisted of the following: THIS PROPERTY WAS OBTAINED BY MEANS OF USING THE CREDIT CARD AND CKECK [sic] CARD OF MIRIELLE CLOUGH WHEN IN FACT THE DEFENDANT WRONGFULLY OBTAINED THE CARDS AND WAS NEVER GIVEN PERMISSION TO USE THEM").

163. 146 N.C. App. 715 (2001).

trial court's decision to allow the State to amend a false pretenses indictment by changing the items that the defendant represented as his own from "two (2) cameras and photography equipment" to a "Magnavox VCR."[164] The court held that the amendment was not a substantial alteration because the description of the item or items that the defendant falsely represented as his own was irrelevant to proving the essential elements of the crime charged. Those essential elements were simply that the defendant falsely represented a subsisting fact, which was calculated and intended to deceive, which did in fact deceive, and by which defendant obtained something of value from another.

In false pretenses cases, the thing obtained must be described with reasonable certainty.[165] This standard was satisfied in *State v. Walston*,[166] where the court held that there was no fatal variance between a false pretenses indictment alleging that the defendant obtained $10,000 in U.S. currency and the evidence that showed that the defendant deposited a $10,000 check into a bank account. The court reasoned that "whether defendant received $10,000.00 in cash or deposited $10,000.00 in a bank account, he obtained something of monetary value which is the crux of the offense."[167] Although early cases indicate that a false pretenses indictment should describe money obtained by giving the amount in dollars and cents,[168] more modern cases have been flexible on this rule. Thus, an indictment alleging that the defendant falsely represented to a store clerk that he had purchased a watch band in order to obtain "United States currency" was held to be sufficient, even though a dollar amount was not stated.[169] The court distinguished the earlier cases noting that in the case before it, the indictment alleged the item – the watch band – which the defendant used to obtain the money.[170]

G.S. 15-151 provides that in any case in which an intent to defraud is required for forgery or any other offense, it is sufficient to allege an intent to defraud, without naming the person or entity intended to be defrauded. That provision states that at trial, it is sufficient and not a variance if there is an intent to defraud a government, corporate body, public officer in his or her official capacity, or any particular person. Without citing this provision, at least one case has held that a false pretenses indictment need not specify the alleged victim.[171]

2. Identity Theft

Identity theft[172] is a relatively new crime and few cases have dealt with indictment issues regarding this offense. One case that has is *State v. Dammons,*[173] in which the indictment alleged that the defendant had fraudulently represented himself as William Artis Smith "for the purpose of making financial or credit transactions and for the purpose of avoiding legal consequences in the name of Michael Anthony Dammons." The State's evidence at trial indicated that the defendant assumed Smith's identity without consent in order to avoid legal consequences in the form of

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164. *See id*. at 719.

165. *See* State v. Walston, 140 N.C. App. 327, 334 (2000) (quotation omitted).

166. 140 N.C. App. 327 (2000).

167. *Id.* at 334-36

168. *See* State v. Smith, 219 N.C. 400, 401 (1941); State v. Reese, 83 N.C. 638 (1880).

169. State v. Ledwell, 171 N.C. App. 314, 317-18 (2005).

170. *See id.* at 318.

171. State v. McBride, __ N.C. App. __, 653 S.E.2d 218 (2007) (the court concluded that the statute proscribing the offense, G.S. 14-100, does not require that the State prove an intent to defraud any particular person).

172. G.S. 14-113.20.

173. 159 N.C. App. 284 (2003).

felony charges. The appellate court rejected the defendant's argument of fatal variance, concluding that the charging language about the financial transaction was unnecessary and was properly regarded as surplusage.[174]

3. Forgery

In North Carolina, there are common law and statutory offenses for forgery.[175] For offenses charged under G.S. 14-119 (forgery of notes, checks, and other securities; counterfeiting instruments), the indictment need not state the manner in which the instrument was forged.[176]

Q. Perjury and Related Offenses

G.S. 15-145 provides the form for a bill of perjury. G.S. 15-146 does the same for a bill of subornation of perjury. G.S. 14-217(b) specifies the contents of an indictment for bribery of officials.

R. Habitual and Violent Habitual Felon

In North Carolina, being a habitual felon or a violent habitual felon is not a crime but a status, the attaining of which subjects a defendant thereafter convicted of a crime to an increased punishment.[177] The status itself, standing alone, will not support a criminal conviction.[178] Put another way, an indictment for habitual or violent habitual felon must be "attached" to an indictment charging a substantive offense.[179] Focusing on the distinction between a status and a crime, the

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174. *Id.* at 293.

175. *See* Jessica Smith, North Carolina Crimes: A Guidebook on the Elements of Crime pp. 334-39 (6th ed. 2007).

176. State v. King, 178 N.C. App. 122 (2006) (indictment alleged that "on or about the 19th day of March, 2004, in Wayne County Louretha Mae King unlawfully, willfully, feloniously and with the intent to injure and defraud, did forge, falsely make, and counterfeit a Wachovia withdrawal form, which was apparently capable of effecting a fraud, and which is as appears on the copy attached hereto as Exhibit "A" and which is hereby incorporated by reference in this indictment as if the same were fully set forth"; rejecting the defendant's argument that the indictment was defective because it failed to allege how the defendant committed the forgery; concluding that the indictment clearly set forth all of the elements of the offense and that furthermore a copy of the withdrawal slip was attached to the indictment as an exhibit showing the date and time of day, amount of money withdrawn, account number, and particular bank branch from which the funds were withdrawn).

177. *See, e.g.,* State v. Allen, 292 N.C. 431, 433-35 (1977) ("Properly construed the [habitual felon] act clearly contemplates that when one who has already attained the status of an habitual felon is indicted for the commission of another felony, that person may then be also indicted in a separate bill as being an habitual felon. It is likewise clear that the proceeding by which the state seeks to establish that defendant is an habitual felon is necessarily ancillary to a pending prosecution for the 'principal,' or substantive felony. The act does not authorize a proceeding independent from the prosecution of some substantive felony for the sole purpose of establishing a defendant's status as an habitual felon.").

178. *See, e.g., id.* at 435.

179. *Compare id.* at 436 (holding that habitual felon indictment was invalid because there was no pending felony prosecution to which the habitual felon proceeding could attach) *and* State v. Davis, 123 N.C. App. 240, 243-44 (1996) (trial court erred by sentencing defendant as an habitual felon after arresting judgment in all the underlying felonies for which defendant was convicted) *with* State v. Oakes, 113 N.C. App. 332, 339 (1994) (until judgment was entered upon defendant's conviction of the substantive felony, there remained a pending, uncompleted felony prosecution to which a new habitual felon indictment could

North Carolina Court of Appeals has stated that because being a habitual felon is not a substantive offense, the requirement in G.S. 15A-924(a)(5) that each element of the crime be pleaded does not apply.[180] It went on to indicate that as a status, "the only pleading requirement is that defendant be given notice that he is being prosecuted for some substantive felony as a recidivist."[181]

The relevant statutes provide that the indictment charging habitual felon or violent habitual felon status shall be separate from the indictment charging the substantive felony.[182] Although it has not ruled on the issue, in *State v. Patton*, the North Carolina Supreme Court has indicated that this language requires separate indictments.[183] In *State v. Young*,[184] the North Carolina Court of Appeals upheld an indictment that charged the underlying felony and habitual felon in separate counts of the same indictment. *Young* held that G.S. 14-7.3 does not require that a habitual felon indictment be contained in a separate bill of indictment; rather it held that the statute requires merely that the indictment charging habitual felon status "be distinct, or set apart, from the charge of the underlying felony." However, *Young* was decided before *Patton* and it is not clear that its rationale survives that later case.

The indictment for the substantive felony need not charge or refer to the habitual felon status.[185] Nor must the habitual felon indictment allege the substantive felony.[186] If the substantive felony is alleged in the habitual felon indictment and an error is made with regard to that allegation, the allegation will be treated as surplusage and ignored.[187] Finally a separate habitual felon indictment is not required for each substantive felony indictment.[188]

A number of issues have arisen regarding the timing of habitual and violent habitual felon indictments. The basic rule is that an indictment for habitual felon or violent habitual felon must be obtained before the defendant enters a plea at trial to the substantive offense.[189] The reason for this rule is "so that defendant has notice that he [or she] will be charged as a recidivist before pleading to the substantive felony, thereby eliminating the possibility that he [or she] will enter a

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attach) *and* State v. Mewborn, 131 N.C. App. 495, 501 (1998) (after the original violent habitual felon indictment was quashed, prayer for judgment continued was entered on the substantive felony, a new indictment was issued, and defendant stood trial under that indictment as a violent habitual felon; because defendant had not yet been sentenced for the substantive felony and because the original indictment placed him on notice that he was being tried as a violent habitual felon, the subsequent indictment attached to the ongoing felony proceeding and defendant was properly tried as a violent habitual felon).

180. *See* State v. Roberts, 135 N.C. App. 690, 698 (1999).

181. *Id.* at 698 (quotation omitted and emphasis deleted).

182. *See* G.S. 14-7.3 (habitual felon); 14-7.9 (violent habitual felon).

183. *See* State v. Patton, 342 N.C. 633, 635 (1996); State v. Allen, 292 N.C. 431, 433 (1977).

184. 120 N.C. App. 456, 459-61 (1995).

185. *See* State v. Todd, 313 N.C. 110, 120 (1985); State v. Peoples, 167 N.C. App. 63, 71 (2004); State v. Mason, 126 N.C. App. 318, 322 (1997); State v. Hodge, 112 N.C. App, 462, 466-67 (1993); State v. Sanders, 95 N.C. App. 494, 504 (1989); State v. Keyes, 56 N.C. App. 75, 78 (1982).

186. *See* State v. Cheek, 339 N.C. 725, 727 (1995); State v. Smith, 160 N.C. App. 107, 124 (2003); State v. Bowens, 140 N.C. App. 217, 224 (2000); State v. Roberts, 135 N.C. App. 690, 698 (1999); *Mason,* 126 N.C. App. at 322.

187. *See, e.g., Bowens*, 140 N.C. App. at 224-25.

188. *See* State v. Patton, 342 N.C. 633, 635 (1996) (rejecting the notion that a one-to-one correspondence was required); State v. Taylor, 156 N.C. App. 172, 174 (2003).

189. *See* State v. Allen, 292 N.C. 431, 436 (1977); State v. Little, 126 N.C. App. 262, 269 (1997).

The court of appeals has rejected the argument that the "cut off" is when a defendant enters a plea at an arraignment. State v. Cogdell, 165 N.C. App. 368 (2004). The court concluded that "the critical event . . . is the plea entered before the actual trial." Id. at 373.

guilty plea without a full understanding of the possible consequences of conviction."[190] A habitual or violent habitual indictment may be obtained before an indictment on the substantive charge is obtained, provided there is compliance with the statutes' notice and procedural requirements.[191] Once a guilty plea has been adjudicated on a habitual felon indictment or information, that particular pleading has been "used up" and cannot support sentencing the defendant as a habitual felon on another felony; this rule applies even if the sentencing on the original pleading has been continued.[192]

The most common challenges to habitual felon and violent habitual felon indictments are to the prior felonies alleged. G.S. 14-7.3 (charge of habitual felon), provides that indictments "must set forth the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place." G.S. 14-7.9 (charge of violent habitual felon) contains similar although not identical language. The prior convictions are treated as elements; thus, it is error to allow the State to amend an indictment to replace an alleged prior conviction.[193] Similarly, an indictment will be deemed defective if one of the alleged priors is a misdemeanor, not a felony, even if defense counsel stipulates that the prior convictions were felonies.[194] By contrast, the courts are lenient with regard to the statutory requirement that the indictment identify the state or other sovereign against whom the prior felonies were committed.[195]

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190. State v. Oakes, 113 N.C. App. 332, 338 (1994). The court of appeals has deviated from the basic timing rule in two cases. However, in both cases, (1) the habitual felon indictment was obtained before the defendant entered a plea at trial and was later replaced with either a new or superseding indictment; thus there was some notice as to the charge; and (2) both cases described the defects in the initial indictment as "technical"; thus, both probably could have been corrected by amendment. *See Oakes,* 113 N.C. App. 332; *Mewborn*, 131 N.C. App. 495.

191. *See* State v. Blakney, 156 N.C. App. 671, 675 (2003); *see also* State v. Murray, 154 N.C. App. 631, 638 (2002).

192. State v. Bradley, 175 N.C. App. 234 (2005) (when the defendant pleaded guilty to two crimes and having attained habitual felon status as to each but sentencing was continued, the original habitual felon informations could not be used to support habitual felon sentencing for a subsequent felony charge).

193. *State v. Little*, 126 N.C. App. 262, 269-70 (1997) (the State should not have been allowed to obtain a superseding indictment which changed one of the three felony convictions listed as priors; the court concluded that a change in the prior convictions was substantive and altered an allegation pertaining to an element of the offense).

194. State v. Moncree, __ N.C. App. __, 655 S.E.2d 464 (2008) (habitual felon indictment was defective where one of the prior crimes was classified as a misdemeanor in the state where it was committed; defense counsel's stipulations that all of the priors were felonies did not foreclose relief on appeal).

195. State v. Montford, 137 N.C. App. 495, 500-01 (2000) (trial court did not err in allowing the State to amend the habitual felon indictment; original indictment listed three previous felonies, but did not state that they had been committed against the State of North Carolina, instead listing that they had occurred in Carteret County; State amended the indictment by inserting "in North Carolina" after each listed felony; "we need not even address the amendment issue, as we conclude that the original indictment itself was not flawed"; although the statute requires the indictment to allege the name of the state or sovereign, we have not required rigid adherence to this rule; "the name of the state need not be expressly stated if the indictment sufficiently indicates the state against whom the felonies were committed"; the original indictment sufficiently indicated the state against whom the prior felonies were committed because "State of North Carolina" explicitly appears at the top of the indictment, followed by "Carteret County," thus, Carteret County is clearly linked with the state name); State v. Mason, 126 N.C. App. 318, 323 (1997) (indictment stated the prior assault with a deadly weapon inflicting serious injury occurred in "Wake County, North Carolina" and

Cases dealing with date issues regarding prior convictions in these indictments are summarized above, see *supra* pp. 8–9. The summaries below explore other challenges that have been asserted against the prior felony allegations in habitual felon and violent habitual felon indictments.

> *State v. McIlwaine,* 169 N.C. App. 397, 399-499 (2005) (habitual felon indictment alleged that the defendant had been previously convicted of three felonies, including "the felony of possession with intent to manufacture, sell or deliver [S]chedule I controlled substance, in violation of N.C.G.S. 90-95"; the indictment was sufficient to charge habitual felon even though it did not allege the specific name of the controlled substance).
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> *State v. Briggs*, 137 N.C. App. 125, 130-31 (2000) (habitual felon indictment listing conviction for "felony of breaking and entering buildings in violation of N.C.G.S. 14-54" and containing the date the felony was committed, the court in which defendant was convicted, the number assigned to the case, and the date of conviction was sufficient).
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> *State v. Hicks*, 125 N.C. App. 158, 160 (1997) (no error by allowing State to amend habitual felon indictment; original indictment alleged that all of the previous felony convictions were committed after the defendant reached the age of eighteen; the State amended to allege that all but one of the previous felony convictions were committed after the defendant reached the age of eighteen; the three underlying felonies remained the same).

S. Drug Offenses

1. Sale or Delivery

Indictments charging sale or delivery of a controlled substance in violation of G.S. 90-95(a)(1) must allege a controlled substance that is included in the schedules of controlled substances.[196] Such indictments also must allege the name of the person to whom the sale or delivery was made, when that person's name is known, or allege that the person's name was unknown.[197] One exception

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that judgment was entered in Wake County Superior Court and listed voluntary manslaughter as occurring in "Wake County" and that judgment was entered in Wake County Superior Court, but did not list a state; indictment was sufficient "because the description of the assault conviction indicates Wake County is within North Carolina, and the indictment states both judgments were entered in Wake County Superior Court, we believe this, along with the dates of the offenses and convictions, is sufficient to give defendant the required notice"); State v. Young, 120 N.C. App. 456, 462 (1995) (rejecting defendant's argument that habitual felon indictment inadequately alleged the name of the state or other sovereign against whom the prior felonies were committed); State v. Hodge, 112 N.C. App. 462, 467 (1993) (upholding indictment that alleged that the felony of common law robbery was committed in "Wake County, North Carolina," and that the other priors were committed in "Wake County," descriptions which were in the same sentence; the use of "Wake County" to describe the sovereignty against which the felonies were committed was clearly a reference to Wake County, North Carolina); State v. Williams, 99 N.C. App. 333, 334-35 (1990) (habitual felon indictment setting forth each of the prior felonies of which defendant was charged and convicted as being in violation of an enumerated "North Carolina General Statutes" contained a sufficient statement of the state or sovereign against whom the felonies were committed).

196. State v. Ahmadi-Turshizi, 175 N.C. App. 783, 785-86 (2006); *see infra* pp. 47-48 (discussing allegations regarding drug name).

197. *See* State v. Bennett, 280 N.C. 167, 168-69 (1971) (an indictment for sale of a controlled substance must state the name of the person to whom the sale was made or that his or her name was unknown) (decided under prior law); State v. Calvino, 179 N.C. App. 219, 221-222 (2006) (the indictment alleged that defendant sold cocaine to "a confidential source of information" and it was undisputed that the State knew the name

to this rule has been recognized by the court of appeals in cases involving middlemen. *State v. Cotton*[198] is illustrative. In *Cotton,* the sale and delivery indictment charged that the defendant sold the controlled substance to Todd, an undercover officer. The evidence at trial showed a direct sale to Morrow, who was acting as a middleman for Todd. Defendant unsuccessfully moved to dismiss on grounds of fatal variance. The court of appeals noted that the State could overcome the motion by producing substantial evidence that the defendant knew the cocaine was being sold to a third party, and that the third party was named in the indictment. Turning to the facts before it, the court noted that the evidence showed that Todd accompanied Morrow to the defendant's house and was allowed to stay in the house while Morrow and defendant had a discussion. Todd was brought upstairs with them and waited in the bedroom when they went into the bathroom. Morrow then came out and told Todd to give him the money because the defendant was paranoid, went back into the bathroom, and came out with the cocaine. The court concluded that there was substantial evidence that the defendant knew that Morrow was acting as a middleman, and that the cocaine was actually being sold to Todd, the person named in the indictment, and thus that there was no fatal variance.[199] When there is insufficient evidence showing that the defendant knew that the intermediary was buying or taking delivery for the purchaser named in the indictment, a fatal variance results.[200]

If the charge is conspiracy to sell or deliver, the person with whom the defendant conspired to sell and deliver need not be named.[201]

2. Possession and Possession With Intent to Manufacture, Sell or Deliver

An indictment for possession of a controlled substance must identify the controlled substance allegedly possessed.[202] However, time and place are not essential elements of the offense of

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of the individual to whom defendant allegedly sold the cocaine in question; the indictment was fatally defective); State v. Smith, 155 N.C. App. 500, 512-13 (2002) (fatal variance in indictment alleging that defendant sold marijuana to Berger; facts were that Berger and Chadwell went to defendant's bar to purchase marijuana; Berger waited in the car while Chadwell went into the building and purchased marijuana on their behalf; there was no substantial evidence that defendant knew he was selling marijuana to Berger); State v. Wall, 96 N.C. App. 45, 49-50 (1989); (fatal variance between indictment charging sale and delivery of cocaine to McPhatter, an undercover officer, and evidence showing that McPhatter gave Riley money to purchase cocaine, which she did; there was no substantial evidence that defendant knew Riley was acting on McPhatter's behalf); State v. Pulliman, 78 N.C. App. 129, 131-33 (1985) (no fatal variance between indictment charging sale and delivery to Walker, an undercover officer, and evidence; evidence showed that although the sale was made to Cobb, defendant knew Cobb was buying the drugs for Walker); State v. Sealey, 41 N.C. App. 175, 176 (1979) (fatal variance between indictment charging defendant with selling dilaudid to Mills and evidence showing that defendant made the sale to Atkins); State v. Ingram, 20 N.C. App. 464, 465-66 (1974) (fatal variance between indictment charging that defendant sold to Gooche and evidence showing that the purchaser was Hairston); State v. Martindate, 15 N.C. App. 216, 217-18 (1972) (indictment that did not name the person to whom a sale was allegedly made and did not allege that the purchaser's name was unknown was fatally defective); State v. Long, 14 N.C. App. 508, 510 (1972) (same).

198. 102 N.C. App. 93 (1991).

199. *See also Pulliman*, 78 N.C. App. at 131-33.

200. *See Wall,* 96 N.C. App. at 49-50; *Smith,* 155 N.C. App. at 512-13.

201. *See, e.g.,* State v. Lorenzo, 147 N.C. App. 728, 734-35 (2001) (indictment charging conspiracy to traffic in marijuana by delivery was not defective for failing to name the person to whom defendant allegedly conspired to sell or deliver the marijuana).

202. *See* State v. Ledwell, 171 N.C. App. 328, 331 (2005).

unlawful possession.[203] Indictments charging possession with intent to sell or deliver need not allege the person to whom the defendant intended to distribute the controlled substance.[204]

For case law pertaining to drug quantity, see *infra* pp. 46–47. For case law pertaining to the name of the controlled substance, see *infra* pp. 47–48.

3. Trafficking

An indictment charging conspiracy to traffic in controlled substances by sale or delivery is sufficient even if it does not identify the person with whom the defendant conspired to sell or deliver the controlled substance.[205]

For case law pertaining to drug quantity in trafficking cases, see *infra* pp. 46–47.

4. Maintaining a Dwelling

The specific address of the dwelling need not be alleged in an indictment charging the defendant with maintaining a dwelling.[206]

5. Drug Paraphernalia

In *State v. Moore*,[207] an indictment charging possession of drug paraphernalia alleged that the defendant possessed "drug paraphernalia, to wit: a can designed as a smoking device." However, none of the evidence at trial related to a can; rather, it described crack cocaine in a folded brown paper bag with a rubber band around it. After denying the defendant's motion to dismiss, the trial court granted the State's motion to amend the indictment striking "a can designed as a smoking device" and replacing it with "drug paraphernalia, to wit: a brown paper container." The court of appeals held that because this change constituted a substantial alteration of the indictment, it was impermissible and the motion to dismiss should have been granted. It reasoned: "As common household items and substances may be classified as drug paraphernalia when considered in the light of other evidence, in order to mount a defense to the charge of possession of drug paraphernalia, a defendant must be apprised of the item or substance the State categorizes as drug paraphernalia." Without citing *Moore,* a later case held that no plain error occurred when the indictment charged the defendant with possessing "drug paraphernalia, SCALES FOR PACKAGING A CONTROLLED SUBSTANCE," but the trial court instructed the jury that it could find the defendant guilty if it concluded that he knowingly possessed drug paraphernalia, without mentioning scales or packaging.[208]

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203. *See Bennett*, 280 N.C. at 169.

204. *See* State v. Campbell, 18 N.C. App. 586, 589 (1973) (decided under prior law).

205. *See Lorenzo*, 147 N.C. App. at 734.

206. *See* State v. Grady, 136 N.C. App. 394, 396-98 (2000) (no error in allowing amendment of dwelling's address in indictment for maintaining dwelling for use of controlled substance; address changed from "919 Dollard Town Road" to "929 Dollard Town Road"; because the specific designation of the dwelling's address need not be alleged in an indictment for this offense, the amendment did not "substantially alter the charge set forth in the indictment"; also, defendant could not have been misled or surprised because another count in the same indictment contained the correct address).

207. 162 N.C. App. 268 (2004).

208. State v. Shearin, 170 N.C. App. 222, 232-33 (2005).

6. Obtaining Controlled Substance by Fraud or Forgery

Cases involving challenges to indictments charging obtaining a controlled substance by forgery are annotated below.

State v. Brady, 147 N.C. App. 755, 758 (2001) (no error in allowing amendment to change the controlled substance named from "Xanax" to "Percocet" in an indictment for obtaining a controlled substance by forgery; the name of the controlled substance is not necessary in an indictment charging this offense).

State v. Baynard, 79 N.C. App. 559, 561-62 (1986) (indictments charging crime of obtaining controlled substance by fraud and forgery under G.S. 90-108(a)(10) were adequate to support conviction, even though they did not specifically state that defendant presented forged prescriptions knowing they were forged; indictments alleged that the offense was done "intentionally" and contained the words "misrepresentation, fraud, deception and subterfuge," all of which implied specific intent to misrepresent).

State v. Fleming, 52 N.C. App. 563, 565-66 (1981) (indictment properly charged offense under G.S. 90-108(a)(10); the illegal means employed was alleged with sufficient particularity).

State v. Booze, 29 N.C. App. 397, 398-400 (1976) (indictment alleging the time and place and the persons from whom defendant attempted to acquire the controlled substance, identifying the controlled substance, and stating the illegal means with particularity, "by using a forged prescription and presenting it to" the named pharmacists, was sufficient; "it was not necessary to make further factual allegations as to the nature of the forged prescriptions or to incorporate the forged prescriptions in the bills").

7. Amount of Controlled Substance

When the amount of the controlled substance is an essential element of the offense, it must be properly alleged in the indictment. Amount is an essential element with felonious possession

of marijuana,[209] felonious possession of hashish,[210] and trafficking in controlled substances.[211] Quantity is not an element of an offense under 90-95(a)(1).[212]

8. Drug Name

When the identity of the controlled substance is an element of the offense,[213] the indictment must allege a substance that is included in the schedules of controlled substances.[214] Thus, when an indictment alleged that the defendant possessed "Methylenedioxyamphetamine (MDA), a controlled substance included in Schedule I," and no such controlled substance by that name is listed in Schedule I, the indictment was defective.[215] Similarly, an indictment that identified the controlled substance allegedly possessed, sold, and delivered as "methylenedioxymethamphetamine a controlled substance which is included in Schedule I of the North Carolina Controlled Substances Act" was defective because although 3, 4-Methylenedioxymethamphetamine was listed in

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209. *See* State v. Partridge, 157 N.C. App. 568, 570-71 (2003) (indictment charging felonious possession of marijuana was defective because it did not state drug quantity; the weight of the marijuana is an essential element of this offense); State v. Perry, 84 N.C. App. 309, 311 (1987) (the elements of felony possession were set out with sufficient clarity in indictment that specifically mentioned drug quantity).

210. *See* State v. Peoples, 65 N.C. App. 168, 168 (1983) (indictment that failed to allege the amount of hashish possessed could not support a felony conviction).

211. *See* State v. Outlaw, 159 N.C. App. 423 (trafficking indictment that failed to allege weight of cocaine was invalid) (citing State v. Epps, 95 N.C. App. 173 (1989)); State v. Trejo, 163 N.C. App. 512 (2004) (rejecting defendant's argument that the indictments charging him with trafficking in marijuana by possession and trafficking in marijuana by transportation were fatally defective because each failed to correctly specify the quantity of marijuana necessary for conviction; indictment charging trafficking in marijuana by possession alleged that defendant "possess[ed] 10 pounds or more but less than 50 pounds" of marijuana; the indictment charging defendant with trafficking in marijuana by transportation alleged that defendant "transport[ed] 10 pounds or more but less than 50 pounds" of marijuana; indictments, although overbroad, did allege the required amount of marijuana; fact that challenged indictments were drafted to include the possibility that defendant possessed and transported exactly ten pounds of marijuana (which does not constitute trafficking in marijuana) does not invalidate the indictments); *Epps*, 95 N.C. App. at 175-76 (quashing conspiracy to traffic in cocaine indictment for failure to refer to amount of cocaine); State v. Keyes, 87 N.C. App. 349, 358-59 (1987) (although statute makes it a trafficking felony to possess "four grams or more, but less than 14 grams" of heroin, the indictment charged possession of "more than four but less than fourteen grams of heroin"; distinguishing *Goforth*, discussed below, and holding that variance was not fatal; the indictment excludes from criminal prosecution the possession of exactly four grams, whereas the statute includes the possession of exactly four grams; the indictment, while limiting the scope of defendant's liability, is clearly within the confines of the statute); State v. Goforth, 65 N.C. App. 302, 305 (1983) (applying prior law that criminalized trafficking in marijuana at weights of in excess of 50 pounds and holding that indictment charging conspiracy to traffic "in at least 50 pounds" of marijuana was defective). *But see Epps*, 95 N.C. App. at 176-77 (affirming trafficking by sale conviction even though relevant count in indictment did not allege a drug quantity; defendant was charged in a two-count indictment, count one charged trafficking by possession of a specified amount of cocaine and count two charged trafficking by sale but did not state an amount; the two counts, when read together, informed defendant that he was being charged with trafficking by sale).

212. *See* State v. Hyatt, 98 N.C. App. 214, 216 (1990) ("while the quantity of drugs seized is evidence of the intent to sell, 'it is not an element of the offense'"); *Peoples*, 65 N.C. App. at 169 (same).

213. *See, e.g., supra* pp. 43, 44.

214. State v. Ahmadi-Turshizi, 175 N.C. App. 783, 784-85 (2006); State v. Ledwell, 171 N.C. App. 328 (2005).

215. *Ledwell*, 171 N.C. App. at 331-33.

Schedule I, methylenedioxymethamphetamine was not.[216] Notwithstanding this, cases have held that controlled substance indictments will not be found defective for minor errors in identifying the relevant controlled substance, such as "cocoa" instead of cocaine,[217] cocaine instead of a mixture containing cocaine,[218] and the use of a trade name instead of a chemical name.[219]

T. Weapons Offenses and Firearm Enhancement

Several cases addressing indictment issues with regard to weapons offenses and the firearm enhancement in G.S. 15A-1340.16A are annotated below.

1. Shooting into Occupied Property

State v. Pickens, 346 N.C. 628, 645-46 (1997) (no fatal variance between indictment alleging that defendant fired into an occupied dwelling with a shotgun and evidence establishing that the shot came from a handgun; the essential element of the offense is "to discharge ... [a] firearm"; indictment alleging that defendant discharged "a shotgun, a firearm" alleged that element and the averment to the shotgun was not necessary, making it mere surplusage in the indictment).

State v. Cockerham, 155 N.C. App. 729, 735-36 (2003) (indictment charging shooting into occupied property was not defective for failing to allege that defendant fired into a "building, structure or enclosure"; indictment alleged defendant shot into an "apartment" and as such was sufficient; an indictment which avers facts constituting every element of the offense need not be couched in the language of the statute).

State v. Bland, 34 N.C. App. 384, 385 (1977) (no fatal variance between indictment alleging that defendant shot into an occupied building and evidence showing that he shot into an occupied trailer; indictment specifically noted that the occupied building was located at 5313 Park Avenue, the address of the trailer).

State v. Walker, 34 N.C. App. 271, 272-74 (1977) (indictment not defective for failing to allege that the defendant knew or should have known that the trailer was occupied by one or more persons).

2. Possession of Firearm by Felon

G.S. 14-415.1 makes it a crime for a felon to possess a firearm or weapon of mass destruction. G.S. 14-415.1(c) provides that an indictment charging a defendant with this crime "shall be separate from any indictment charging him with other offenses related to or giving rise to a charge under this section." It further provides that the indictment

> must set forth the date that the prior offense was committed, the type of offense and the penalty therefore, and the date that the defendant was convicted or plead guilty to such

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216. *Ahmadi-Turshizi*, 175 N.C. App. at 785-86.

217. *See* State v. Thrift, 78 N.C. App. 199, 201-02 (1985).

218. State v. Tyndall, 55 N.C. App. 57, 61-62 (1981) (although the indictment alleged that defendant sold cocaine rather than a mixture containing cocaine, this was not a fatal variance).

219. State v. Newton, 21 N.C. App. 384, 385-86 (1974) (no fatal variance between indictment charging that defendant possessed Desoxyn and evidence that showed defendant possessed methamphetamine; Desoxyn is a trade name for methamphetamine hydrochloride).

offense, the identity of the court in which the conviction or plea of guilty took place and the verdict and judgment rendered therein.

The court of appeals has held that the statutory requirement that the indictment state the conviction date for the prior offense is directory and not mandatory.[220] Thus, it concluded that failure to allege the date of the prior conviction did not render an indictment defective.[221] Also, *State v. Boston,*[222] rejected a defendant's claim that an indictment for this offense was fatally defective because it failed to state the statutory penalty for the prior felony conviction. The court held that "the provision . . . that requires the indictment to state the penalty for the prior offense is not material and does not affect a substantial right," that the defendant was apprised of the relevant conduct, and "[t]o hold otherwise would permit form to prevail over substance." Other relevant cases are summarized below.

Cases Finding a Fatal Defect or Variance/Error With Respect to an Amendment

State v. Langley, 173 N.C. App. 194, 196-99 (2005) (in conviction under a prior version of G.S. 14-415.1, the court held that there was a fatal variance where the indictment charged that the defendant was in possession of a handgun and the State's evidence at trial tended to show that defendant possessed a firearm with barrel length less than 18 inches and overall length less than 26 inches, a sawed-off shotgun).[223]

Finding No Fatal Defect or Variance/No Error With Respect to an Amendment

State v. Coltrane, __ N.C. App. __, 656 S.E.2d 322 (2008) (the trial court did not err by allowing the State to amend the allegation that the defendant's underlying felony conviction occurred in Montgomery County Superior Court to state that it occurred in Guilford County Superior Court; the indictment correctly identified all of the other allegations required by G.S. 14-415.1(c).

State v. Bishop, 119 N.C. App. 695, 698-99 (1995) (indictment was not invalid for failing to allege (1) that possession of the firearm was away from defendant's home or business; (2) that defendant's prior Florida felony was "substantially similar" to a particular North Carolina crime; and (3) to which North Carolina statute the Florida conviction was similar; omission of the situs of the offense was not an error because situs is an exception to the offense, not an essential element; omission of a statement that the Florida felony was "substantially similar" to a particular North Carolina crime was not an error because the indictment gave sufficient notice of the offense charged; the indictment clearly described the felony committed in Florida, satisfying the requirements of G.S. 14-415.1(b)(3) and properly charging defendant with possession of firearms by a felon).

State v. Riggs, 79 N.C. App. 398, 402 (1986) (indictment charging that defendant possessed "a Charter Arms .38 caliber pistol, which is a handgun" was not invalid for failing to allege the length of the pistol).

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220. State v. Inman, 174 N.C. App. 567 (2005).

221. *Id.* at 571.

222. 165 N.C. App. 214 (2004).

223. At the time, the prior version of the statute made it a crime for a felon to possess "any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches, or any weapon of mass destruction as defined by G.S. 14-288.8(c)." G.S. 14-415.1(a) (2003).

3. Possession of Weapon of Mass Destruction

State v. Blackwell, 163 N.C. App. 12 (2004) (no fatal variance between indictment charging possession of weapon of mass destruction that alleged possession of "a Stevens 12 gauge single-shot shotgun" and evidence at trial that shotgun was manufactured by Jay Stevens Arms; even if there was no evidence that the shotgun was a "Stevens" shotgun, there would be no fatal variance because "any person of common understanding would have understood that he was charged with possessing the sawed-off shotgun that he used to shoot the victim).

4. Firearm Enhancement

G.S. 15A-1340.16A provides for an enhanced sentence if the defendant is convicted of a felony falling within one of the specified classes and the defendant used, displayed, or threatened to use or display a firearm during commission of the felony. The statute provides that an indictment is sufficient if it alleges that "the defendant committed the felony by using, displaying, or threatening the use or display of a firearm and the defendant actually possessed the firearm about the defendant's person."[224]

U. Motor Vehicle Offenses

1. Impaired Driving

G.S. 20-138.1(c) and 20-138.2(c) allow short-form pleadings for impaired driving and impaired driving in a commercial vehicle respectively. For a discussion of the implications of *Blakely v. Washington,*[225] on these offenses, see *supra* p. 16. A case dealing with an allegation regarding the location of an impaired driving offense is summarized below.

State v. Snyder, 343 N.C. 61, 65-68 (1996) (indictment alleged that offense occurred on a street or highway; trial judge properly permitted the State to amend the indictment to read "on a highway or public vehicular area"; although the *situs* of the impaired driving offense is an essential element, the indictment simply needs to contain an allegation of *a situs* covered by the statute and no greater specificity is required; change in this case merely a refinement in the description of the type of *situs* on which the defendant was driving rather than a change in an essential element of the offense).

2. Habitual Impaired Driving

Under the current version of the habitual impaired driving statute,[226] this offense is committed when a person drives while impaired and has three or more convictions involving impaired driving within the last ten years. Under an earlier version of the statute, the "look-back period" for prior convictions was only seven years. At least one case has held, in connection with a prosecution under the prior version of the statute, that it was error to allow the State to amend a habitual impaired driving indictment to correct the date of a prior conviction and thereby bring it within the seven-year look-back period.[227] Indictments charging habitual impaired driving must conform to G.S. 15A-928. Cases on point are summarized below.

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224. G.S. 15A-1340.16A(d).
225. 542 U.S. 296 (2004).
226. G.S. 20-138.5.
227. State v. Winslow, 360 N.C. 161 (2005).

State v. Mark, 154 N.C. App. 341, 344-45 (2002) (rejecting defendant's argument that indictment violated G.S. 15A-928 because count three was entitled "Habitual Impaired Driving"), *aff'd,* 357 N.C. 242 (2003).

State v. Lobohe, 143 N.C. App. 555, 557-59 (2001) (indictment which alleged in one count the elements of impaired driving and in a second count the previous convictions elevating the offense to habitual impaired driving properly alleged habitual impaired driving) (citing G.S. 15A-928(b)).

State v. Baldwin, 117 N.C. App. 713, 715-16 (1995) (indictment alleged the essential elements of habitual impaired driving; contrary to defendant's claim, it alleged that defendant had been previously convicted of three impaired driving offenses).

3. Speeding to Elude Arrest

G.S. 20-141.5 makes it a misdemeanor to operate a motor vehicle while fleeing or attempted to elude a law enforcement officer who is in lawful performance of his or her duties. The crime is elevated to a felony if two or more specified aggravating factors are present, or if the violation is the proximate cause of death.

An indictment for this crime need not allege the lawful duties the officer was performing.[228] When the charge is felony speeding to elude arrest based on the presence of aggravating factors, the indictment is sufficient if it charges those aggravating factors by tracking the statutory language.[229] Thus, when the aggravating factor is "reckless driving proscribed by G.S. 20-140,"[230] the indictment need not allege all of the elements of reckless driving.[231] However, when the aggravating factor felony version of this offense is charged, the aggravating factors are essential elements of the crime and it is error to allow the State to amend the indictment to add an aggravating factor.[232]

4. Driving While License Revoked

In *State v. Scott,*[233] the court rejected the defendant's argument that an indictment for driving while license revoked was defective because it failed to list the element of notice of suspension. Acknowledging that proof of actual or constructive notice is required for a conviction, the court held that "it is not necessary to charge on knowledge of revocation when unchallenged evidence shows that the State has complied with the provisions for giving notice of revocation.[234]

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228. State v. Teel, 180 N.C. App. 446, 448-49 (2006).

229. State v. Stokes, 174 N.C. App. 447, 451-52 (2005) (indictment properly charged this crime when it alleged that the defendant unlawfully, willfully and feloniously did operate a motor vehicle on a highway, Interstate 40, while attempting to elude a law enforcement officer, T.D. Dell of the Greensboro Police Department, in the lawful performance of the officer's duties, stopping the defendant's vehicle for various motor vehicle offenses, and that at the time of the violation: (1) the defendant was speeding in excess of 15 miles per hour over the legal speed limit; (2) the defendant was driving recklessly in violation of G.S. 20-140; and (3) there was gross impairment of the defendant's faculties while driving due to consumption of an impairing substance); *see also* State v. Scott, 167 N.C. App. 783, 787-88 (2005) (indictment charging driving while license revoked as an aggravating factor without spelling out all elements of that offense was not defective).

230. G.S. 20-141.5(b)(3).

231. *Stokes,* 174 N.C. App. at 451-52.

232. State v. Moses, 154 N.C. App. 332, 337-38 (2002) (error to allow the State to amend misdemeanor speeding to allude arrest indictment by adding an aggravating factor that would make the offense a felony).

233. 167 N.C. App. 783 (2005).

234. *Id.* at 787.

V. General Crimes

1. Attempt

An indictment charging a completed offense is sufficient to support a conviction for an attempt to commit the offense.[235] This is true even though the completed crime and the attempt are not in the same statute.[236] G.S. 15-144, the statute authorizing use of short-form indictment for homicide, authorizes the use of the short-form indictment to charge attempted first-degree murder.[237]

2. Solicitation

In solicitation indictments, "it is not necessary to allege with technical precision the nature of the solicitation."[238]

3. Conspiracy

For the law regarding conspiracy to sell or deliver controlled substances indictments, see *supra* p. 44. For cases pertaining to allegations regarding the date of a conspiracy offense, see *supra* p. 8.

Conspiracy indictments "need not describe the subject crime with legal and technical accuracy because the charge is the crime of conspiracy and not a charge of committing the subject crime."[239] Thus, the court of appeals has upheld a conspiracy indictment that alleged an agreement between two or more persons to do an unlawful act and contained allegations regarding their purpose, in that case to "feloniously forge, falsely make and counterfeit a check."[240] The court rejected the defendant's argument that the indictment should have been quashed for failure to specifically allege the forgery of an identified instrument.[241]

4. Accessory After the Fact to Felony

Accessory after the fact to a felony is not a lesser included offense of the principal felony.[242] This suggests that an indictment charging only the principal felony will be insufficient to convict for accessory after the fact.[243]

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235. *See* G.S. 15-170; State v. Gray, 58 N.C. App. 102, 106 (1982); State v. Slade, 81 N.C. App. 303, 306 (1986)

236. *See Slade*, 81 N.C. App. at 306 (1987) (discussing State v. Arnold, 285 N.C. 751, 755 (1974), and describing it as a case in which the defendant was indicted for the common law felony of arson but was convicted of the statutory felony of arson).

237. State v. Jones, 359 N.C. 832, 834-38 (2005) (noting that it is sufficient for the State to insert the words "attempt to" into the short form language); State v. Reid, 175 N.C. App. 613, 617-18 (2006) (following *Jones*).

238. State v. Furr, 292 N.C. 711, 722 (1977) (holding "indictment alleging defendant solicited another to murder is sufficient to take the case to the jury upon proof of solicitation to find someone else to commit murder, at least where there is nothing to indicate defendant insisted that someone other than the solicitee commit the substantive crime which is his object").

239. State v. Nicholson, 78 N.C. App. 398, 401 (1985) (rejecting defendant's argument that conspiracy to commit forgery indictment was fatally defective because it "failed to allege specifically the forgery of an identified instrument").

240. *Id.*

241. *See id.*

242. *See* State v. Jones, 254 N.C. 450, 452 (1961).

243. *Compare infra* n. 246 & accompanying text (discussing accessory before the fact). For a case allowing amendment of an accessory after the fact indictment, see *State v. Carrington*, 35 N.C. App. 53, 56-58 (1978) (indictments charged defendant with being an accessory after the fact to Arthur Parrish and an

W. Participants in Crime

An indictment charging a substantive offense need not allege the theory of acting in concert,[244] aiding or abetting,[245] or accessory before the fact.[246] Thus, the short-form murder indictment is sufficient to convict under a theory of aiding and abetting.[247] Because allegations regarding these theories are treated as "irrelevant and surplusage,"[248] the fact that an indictment alleges one such theory does not preclude the trial judge from instructing the jury that it may convict on another such theory not alleged,[249] or as a principal.[250]

unknown black male in the murder and armed robbery of a named victim; trial court did not err by allowing amendment of the indictments to remove mention of Parrish, who had earlier been acquitted).

244. *See* State v. Westbrook, 345 N.C. 43, 57-58 (1996).

245. *See* State v. Ainsworth, 109 N.C. App. 136, 143 (1993) (rejecting defendant's argument that first degree rape indictment was insufficient because it failed to charge her explicitly with aiding and abetting); State v. Ferree, 54 N.C. App. 183, 184 (1981) ("[A] person who aids or abets another in the commission of armed robbery is guilty … and it is not necessary that the indictment charge the defendant with aiding and abetting."); State v. Lancaster, 37 N.C. App. 528, 532-33 (1978).

246. *See* G.S. 14-5.2 ("All distinctions between accessories before the fact and principals … are abolished."); *Westbrook*, 345 N.C. at 58 (1996) (indictment charging murder need not allege accessory before the fact); State v. Gallagher, 313 N.C. 132, 141 (1985) (indictment charging the principal felony will support trial and conviction as an accessory before the fact).

247. State v. Glynn, 178 N.C. App. 689, 694-95 (2006).

248. State v. Estes, __ N.C. App. __, 651 S.E.2d 598 (2007).

249. *Estes*, __ N.C. App. __, 651 S.E.2d 598 (trial judge could charge the jury on the theory of aiding and abetting even though indictment charged acting in concert).

250. State v. Fuller, 179 N.C. App. 61, 66-67 (2006) (where superseding indictment charged the defendant only with aiding and abetting indecent liberties, the trial judge did not err in charging the jury that it could convict if the defendant was an aider or abettor or a principal).

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IDS' Mission, Resources & Policies

2017 New Misdemeanor Defender Program

Presented By:
Thomas K. Maher
Executive Director IDS

Overview

- IDS' Mission
- Relationship Between IDS and AOC
- Resources
- Policies & Procedures
- Current challenges and initiatives
- What do PD Offices, PAC, and Contract Attorneys Need from IDS?

Effective July 2001, IDS was created to:

- Improve quality of representation and ensure independence of counsel
- Generate reliable statistical information to evaluate services provided and funds expended
- Deliver services in most efficient and cost-effective manner without sacrificing quality representation

In "Short" …..

- IDS' statutory mission is to enhance quality, uniformity, efficiency, accountability, and cost-effectiveness of indigent defense services in North Carolina
- IDS' policies are all aimed at fulfilling one or more aspect of that statutory mission

In "Short" ….

- In order to fulfill its mission, IDS needs:
  - Defense counsel who have experience, skill, passion and resources:
    - Time to work with clients
    - Access to investigators and other experts
    - Willingness to help IDS collect data

Relationship Between IDS and AOC

(See G.S. 7A-498.2)

IDS Independence

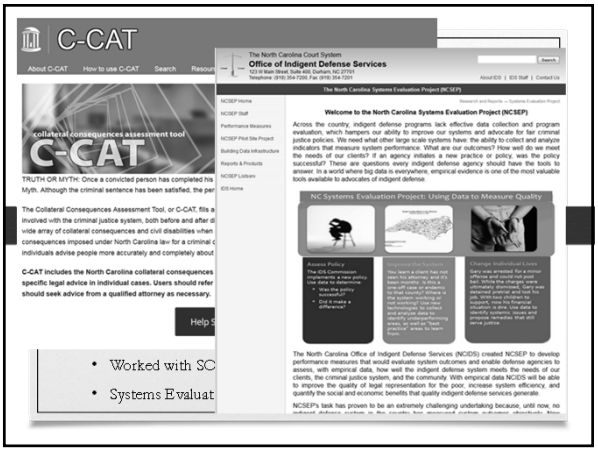
- Although IDS is largely independent of AOC, we work with AOC in fulfilling our mission:
  - IDS' budget is separate from AOC's budget, but AOC has the authority to modify IDS' budget
  - IDS exercises its powers independently of AOC
  - AOC budget policies—such as limitations on hiring and travel, mileage reimbursement rate, etc.—do not apply to IDS unless IDS Director chooses to apply them

Continuing AOC Support

- AOC has the statutory obligation to provide general administrative support to IDS, including purchasing, payroll, human resources, and similar services
- AOC Human Resources is there to serve PD offices along with the rest of the Judicial Branch
  - AOC's workplace harassment policies apply to your offices
  - If you have any concerns about workplace harassment, please notify AOC HR and IDS immediately

Legislative Advocacy for Public Defense

- IDS regularly advocates for public defense at the General Assembly
  - Needed increases in the budget for PAC and PD
  - Substantive changes, such as allowing APD's to engage in pro bono legal work
- IDS works closely with NC Advocates for Justice and other groups on various initiatives impacting defense function



- Worked with SC
- Systems Evaluat

Public Defense Resources

Improved Defender Training

- IDS has a standing contract with the School of Government ("SOG") to provide defender education programs for PDs and for private assigned counsel ("PAC") and contract attorneys who do a significant amount of indigent work
- Thanks to the hard work of SOG faculty and staff, IDS has developed a number of new and innovative training programs

Some Examples of Programs

- 5-day trial advocacy school for public defenders and PAC
- Specialized programs for attorneys who handle appellate cases, involuntary commitment cases, juvenile delinquency cases, and abuse/neglect/dependency and TPR cases
- Specialized training in forensics, capital defense and other topics
- Regional training for contractors
- Training for public defender staff investigators

On-Line Training

- In response to continuing budget limitations, SOG has also concentrated on new on-line training programs, such as:
  - "Webinars on demand"
  - "Virtual CLEs:" Self-paced on-line presentations that may be accessed from any computer with an Internet connection

NCAJ Membership

- IDS has a contract with the NC Advocates for Justice, which entitles APDs to some benefits of NCAJ membership, including
  - Subscription to NCAJ criminal defense listserv
  - 80 pre-paid CLEs, with IDS paying for additional CLEs at public service rate
  - Each APD receives CD-ROM of NCAJ's DWI Trial Notebook
- We hope this benefit is helpful to your practices

Non-IDS Programs

- IDS sometimes approves requests for APDs to attend specialized training programs that are sponsored by groups other than IDS and SOG, especially if they address topics that are not covered by the IDS-SOG calendar and the attendee is willing to serve as a future trainer on the topic

Available on

IDS Listservs

- IDS has created a number of listservs to facilitate communication with and between attorneys across the state who handle various types of cases
- Listservs have proven to be a great way to enhance communication and resource-sharing

IDS Listservs

- Chief public defenders and assistant public defenders
- Investigators in public defender offices and private investigators
- Public defender support staff
- Capital trial attorneys
- Capital post-conviction attorneys
- Appellate attorneys
- Attorneys who represent parent-respondents in A/N/D and TPR cases
- Attorneys who handle juvenile delinquency cases
- Attorneys who handle involuntary commitment cases
- Attorneys who handle child-support contempt cases
- IDS contract attorneys

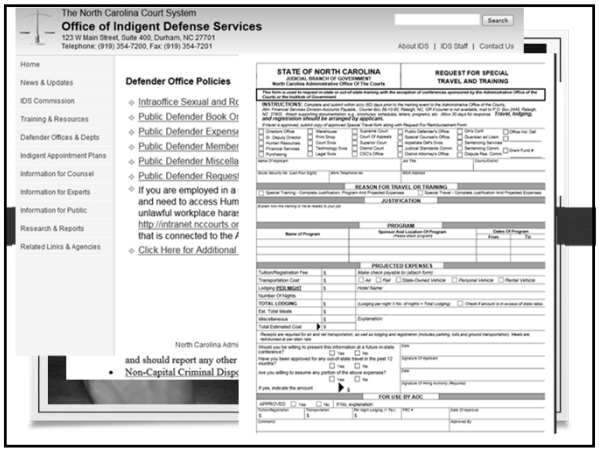
Performance Guidelines

- IDS has developed performance guidelines for:
  - non-capital criminal cases at trial level
  - juvenile delinquency proceedings
  - abuse/neglect/dependency and termination of parental rights cases
- All guidelines are posted on IDS website

What Guidelines Are and Are Not

- Guidelines *are*:
  - Checklist of best practices and things counsel should consider at each stage of a proceeding
  - Training tool
  - Resource for new and experienced attorneys
  - Tool for legislative advocacy and systemic reform
- Guidelines are *not* absolute standards or mandates

Public Defense Policies



What IDS Needs From PD Offices

IDS Needs PD Offices to:

1. Provide Quality Legal Services for Clients
2. Report Data Accurately & Reliably
3. Submit Fee Applications to Judges in Cases that End in Conviction

Quality Legal Services for Clients

- Most importantly, IDS wants PD offices . . . and PAC . . . and contract attorneys to provide quality legal representation for indigent clients
- We hope the resources we provide help you do your jobs better
- If we can provide other resources that would assist you, please let us know

Accurate & Reliable PD Data Reporting

It all hinges on your fee applications …

- After a PD office completes a case, a fee application is prepared
- Each fee application is then compiled into an on-line disposition reporting system that documents the number of cases disposed by highest charge and attorney
  - Rules for counting closed cases are posted on IDS website

We Collect this Data Because it is Required by Law

G.S. 7A-498.9:

The IDS Office must report to the General Assembly by March 1 of each year about the following matters:

(1) **The volume and cost of cases handled in each district by assigned counsel or public defenders;**

(2) Actions taken by the Office to improve the cost-effectiveness and quality of indigent defense, including the capital case program;

(3) Plans for changes in rules, standards, or regulations in the upcoming year; and

(4) Any recommended changes in law or funding procedures that would assist the Office in improving the management of funds expended for indigent defense services.

It's Also in Our Interests

- To justify our budget requests, IDS needs data that shows why we need more money
- Overall court data alone would suggest that IDS' budget should not be increased, because the total number of court dispositions over the past several years has remained relatively flat
- But percentage of cases funded out of IDS' budget has steadily increased over same time period

Your Chief PD Needs this Data:

- To assess APD caseloads
- To assess demands on support staff
- To demonstrate with hard data the needs of your office
- To support a request for a new attorney or support staff position when authorized by the Legislature

Recoupment: Fee Applications in Cases that End in Conviction

- G.S. 7A-455 provides that, in all cases that end in a conviction, the court shall direct entry of a civil judgment against the indigent person for the money value of services rendered by a public defender
- Thus, in all such cases, public defenders are required by statute to complete a fee application and submit it to the Court

Recoupment Helps Fund the Indigent Defense System

- All funds collected through recoupment go back to the indigent defense fund to pay for services to future clients, and IDS' projected receipts from recoupment are added into our budget each year
- In FY14, IDS collected a total of $12.9 million in recoupment revenues
- Due to changes in tax withholding, recoupment has declined and was approximately $10 million in FY16.
- AOC audited PD submission of fee applications and found offices were effective in submitting fee applications
- Advocate for your client on financial obligations, but do not underreport hours and continue to file fee applications.

Current Challenges and Initiatives

Challenges

Initiatives

- Fee Schedule Pilot
  - PAC paid according to a fee schedule for all cases resolved in district court in six pilot counties
- Public Defender Workload Study
  - IDS, with input from AOC, is working with the National Center for State Courts to develop a workload formula that will be used for recommendations on staffing levels
- Indigency Determination
  - AOC, with input from IDS, is studying development of a more formal system of indigency determination

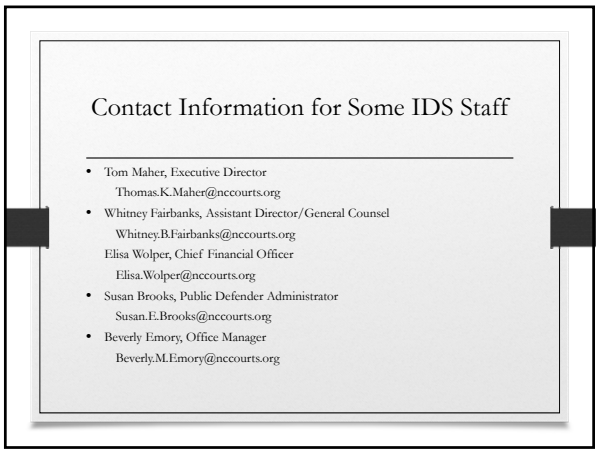
What do PD Offices, PAC, and Contract Attorneys Need from IDS?

We're Interested in Your Thoughts

- Even if there is not a legislative directive for IDS to investigate and propose reforms in a specific area, we are always interested in systemic reforms that would enhance quality and efficiency
- If you have ideas based on your work on the front lines, please let us know!

How Can IDS Help You?

- We want to know how IDS can help you, and welcome all feedback and suggestions
- Contact information for some IDS staff members is listed on the next screen
- Do you have any questions or comments to share at this time?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If You Build It, They Will Come: Creating and Utilizing a Meaningful Theory of Defense

by Stephen P. Lindsay

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So the file hits your desk. Before you open to the first page you hear the shrill noise of not just a single dog, but a pack of dogs. Wild dogs. Nipping at your pride. You think to yourself, "Why me? Why do I always get the dog cases? It must be fate." You calmly place the file on top of the stack of ever-growing canine files. Your reach for your cup of coffee and seriously consider upping your membership in the S.P.C.A. to "Angel" status. Just as you think a change in profession might be in order, your coworker steps in the door, new file in hand, lets out a piercing howl and says, "This one is the dog of all dogs. The mother of all dogs!" Alas. You are not alone.

Dog files bark because there does not appear to be any reasonable way to mount a successful defense. Put another way, winning the case is about as likely as a crowd of people coming to watch a baseball game at a ballpark in a cornfield in the middle of Iowa. According to the movie, *Field of Dreams,* "If you build it, they will come . . ." And they came. And they watched. And they enjoyed. Truth be known, they would come again, if invited —even if they were not invited.

Every dog case is like a field of dreams: nothing to lose and everything to gain. Believe it or not, out of each dog case can rise a meaningful, believable, and solid defense—a defense that can win. But as Kevin Costner's wife said in the movie, "[I]f all of these people are going to come, we have a lot of work to do." The key to building the ballpark is in designing a theory of defense supported by one or more meaningful themes.

What Is a Theory and Why Do I Need One?

Having listened over the last 20 years to some of the finest criminal defense attorneys lecture on theories and themes, it has become clear to me that there exists great confusion as to what constitutes a theory and how it differs from supporting themes. The words "theory" and "theme" are often used interchangeably. However, they are very different concepts. So what is a theory? Here are a few definitions:

- *That combination of facts (beyond change) and law which in a common sense and emotional way leads a jury to conclude a fellow citizen is wrongfully accused.*—Tony Natale
- *One central theory that organizes all facts, reasons, arguments and furnishes the basic position from which one determines every action in the trial.* —Mario Conte
- *A paragraph of one to three sentences which summarizes the facts, emotions and legal basis for the citizen accused's acquittal or conviction on a lesser charge while telling the defense's story of innocense or reduces culpability.* —Vince Aprile

Common Thread Theory Components

Although helpful, these definitions, without closer inspection, tend to leave the reader thinking "Huh?" Rather than try to decipher these various definitions, it is more helpful to compare them to find commonality. The common thread within these definitions is that each requires a theory of defense to have the same three essential elements:

1. a factual component (fact-crunching/ brainstorming);
2. a legal component (genre); and
3. an emotional component (themes/ archetypes).

In order to fully understand and appreciate how to develop each of these elements in the quest for a solid theory of defense, it

is helpful to have a set of facts with which to work. These facts can then be used to create possible theories of defense. The Kentucky Department of Public Advocacy developed the following fact problem:

State v. Barry Rock, 05 CRS 10621 (Buncombe County)

Betty Gooden is a "pretty, very intelligent young lady" as described by the social worker investigating her case. Last spring, Betty went to visit her school guidance counselor, introducing herself and commenting that she knew Ann Haines (a girl that the counselor had been working with due to a history of abuse by her uncle, and who had recently moved to a foster home in another school district).

Betty said that things were not going well at home. She said that her stepdad, Barry Rock, was very strict and would make her go to bed without dinner. Her mother would allow her and her brother (age 7) to play outside, but when Barry got home, he would send them to bed. She also stated that she got into trouble for bringing a boy home. Barry yelled at her for having sex with boys in their trailer. This morning, she said, Barry came to school and told her teacher that he caught her cheating—copying someone's homework. She denied having sex with the boy or cheating. She was very upset that she wasn't allowed to be a normal teenager like all her friends.

The counselor asked her whether Barry ever touched her in an uncomfortable way. She became very uncomfortable and began to cry. The counselor let her return to class, then met her again later in the day with a police officer present. At that time, Betty stated that since she was 10, Barry had told her if she did certain things, he would let her open presents. She explained how this led to Barry coming into her room in the middle of the night to do things with her. She stated that she would try to be loud enough to wake up her mother in the room next door in the small trailer, but her mother would never come in. Her mother is mentally retarded, and before marrying Barry, had quite a bit of contact with Social Services due to her weak parenting skills. She stated that this had been going on more and more frequently in the last month and estimated it had happened 10 times.

Betty is an A/B student who showed no sign of academic problems. After reporting the abuse, she has been placed in a foster home with her friend Ann. She has also attended extensive counseling sessions to help her cope. Medical exams show that she has been sexually active.

Kim Gooden is Betty's 35-year-old mentally retarded mother. She is a "very meek and introverted person" who is "very soft spoken and will not make eye contact." She told the investigator she had no idea Barry was doing this to Betty. She said Barry made frequent trips to the bathroom and had a number of stomach problems that caused diarrhea. She said that Betty always wanted to go places with Barry and would rather stay home with Barry than go to the store with her. She said that she thought Betty was having sex with a neighbor boy, and she was grounded for it. She said that Betty always complains that she doesn't have normal parents and can't do the things her friends do. She is very confused about why Betty was taken away and why Barry has to live in jail now. An investigation of the trailer revealed panties with semen that matches Barry. Betty says those are her panties. Kim says that Betty and her are the same size and share all of their clothes.

Barry Rock is a 39-year-old mentally retarded man who has been married to Kim for five years. They live together in a small trailer making do with the Social Security checks that they both get due to mental retardation.

Barry now adamantly denies that he ever had sex and says that Betty is just making this up because he figured out she was having sex with the neighbor boy. After Betty's report to the counselor, Barry was interviewed for six hours by a detective and local police officer. In this videotaped statement, Barry is very distant, not making eye contact, and answering with one or two words to each question. Throughout the tape, the officer reminds him just to say what they talked about before they turned the tape on. Barry does answer "yes" when asked if he had sex with Betty and "yes" to other leading questions based on Betty's story. At the end of the interview, Barry begins rambling that it was Betty that wanted sex with him, and he knew that it was wrong, but he did it anyway.

Barry has been tested with IQs of 55, 57, and 59 over the last three years. Following a competency hearing, the trial court found Barry to be competent to go to trial.

The Factual Component

The factual component of the theory of defense comes from brainstorming the facts. More recently referred to as "fact-busting," brainstorming is the essential process of setting forth facts that appear in discovery and arise through investigation.

It is critical to understand that facts are nothing more—and nothing less—than just facts during brainstorming. Each fact should be written down individually and without any spin. Non-judgmental recitation of the facts is the key. Do not draw conclusions as to what a fact or facts might mean. And do not make the common mistake of attributing the meaning to the facts that is given to them by the prosecution or its investigators. It is too early in the process to give value or meaning to any particular fact. At this point, the facts are simply the facts. As we work through the other steps of creating a theory of defense, we will begin to attribute meaning to the various facts.

Judgmental Facts (WRONG)	Non-Judgmental Facts (RIGHT)
Barry was retarded	Barry had an IQ of 70
Betty hated Barry	Barry went to Betty's school, went to her classroom, confronted her about lying, accused her of sexual misconduct, talked with her about cheating, dealt with her in front of her friends
Confession was coerced	Several officers questioned Barry, Barry was not free to leave the station, Barry had no family to call, questioning lasted six hours

The Legal Component

Now that the facts have been developed in a neutral, non-judgmental way, it is time to move to the second component of the theory of defense: the legal component. Experience, as well as basic notions of persuasion, reveal that stark statements such as "self-defense," "alibi," "reasonable doubt," and similar catch-phrases, although somewhat meaningful to lawyers, fail to accurately and completely convey to jurors the essence of the defense. "Alibi" is usually interpreted by jurors as "He did it, but he has some friends that will lie about where he was." "Reasonable doubt" is often interpreted as, "He did it, but they can't prove it."

Thus, the legal component must be more substantive and understandable in order to accomplish the goal of having a meaningful theory of defense. Look at Hollywood and the cinema; thousands of movies have been made that have as their focus some type of alleged crime or criminal behavior. According to Cathy Kelly, training director for the Missouri Pubic Defender's Office, when these types of movies are compared, the plots, in relation to the accused, tend to fall into one of the following genres:

1. It never happened (mistake, set-up);
2. It happened, but I didn't do it (mistaken identification, alibi, set-up, etc.);
3. It happened, I did it, but it wasn't a crime (self-defense, accident, claim or right, etc.);
4. It happened, I did it, it was a crime, but it wasn't this crime (lesser included offense);
5. It happened, I did it, it was the crime charged, but I'm not responsible (insanity, diminished capacity);
6. It happened, I did it, it was the crime charged, I am responsible, so what? (jury nullification).

The six genres are presented in this particular order for a reason. As you move down the list, the difficulty of persuading the jurors that the defendant should prevail increases. It is easier to defend a case based upon the legal genre "it never happened" (mistake, set-up) than it is on "the defendant is not responsible" (insanity).

Using the facts of the Barry Rock example as developed through non-judgmental brainstorming, try to determine which genre fits best. Occasionally, facts will fit into two or three genres. It is important to settle on one genre, and it should usually be the one closest to the top of the list; this decreases the level of defense difficulty. The Rock case fits nicely into the first genre (it never happened), but could also fit into the second category (it happened, but I didn't do it). The first genre should be the one selected.

But be warned. Selecting the genre is not the end of the process. The genre is only a bare bones skeleton. The genre is a legal theory, not your theory of defense. It is just the second element of the theory of defense, and there is more to come. Where most attorneys fail when developing a theory of defense is in stopping once the legal component (genre) is selected. As will be seen, until the emotional component is developed and incorporated, the theory of defense is incomplete.

It is now time to take your work product for a test drive. Assume that you are the editor for your local newspaper. You have the power and authority to write a headline about this case. Your goal is to write it from the perspective of the defense, being true to the facts as developed through brainstorming, and incorporating the legal genre that has been selected. An example might be:

Rock Wrongfully Tossed from Home by Troubled Stepdaughter

Word choice can modify, or entirely change, the thrust of the headline. Consider the headline with the following possible changes:

Rock →	***Barry, Innocent Man, Mentally Challenged Man***
Wrongfully Tossed →	***Removed, Ejected, Sent Packing, Calmly Asked To Leave***
Troubled →	***Vindictive, Wicked, Confused***
Stepdaughter →	***Brat, Tease, Teen, Houseguest, Manipulator***

Notice that the focus of this headline is on Barry Rock, the defendant. It is important to decide whether the headline could be more powerful if the focus were on someone or something other than the defendant. Headlines do not have to focus on the defendant in order for the eventual theory of defense to be successful. The focus does not even have to be on an animate object. Consider the following possible headline examples:

Troubled Teen Fabricates Story for Freedom

Overworked Guidance Counselor Unknowingly Fuels False Accusations

Marriage Destroyed When Mother Forced to Choose Between Husband and Troubled Daughter

Underappreciated Detective Tosses Rock at Superiors

Each of these headline examples can become a solid theory of defense and lead to a successful outcome for the accused.

The Emotional Component

The last element of a theory of defense is the emotional component. The factual element or the legal element, standing alone, are seldom capable of persuading jurors to side with the defense. It is the emotional component of the theory that brings life, viability, and believability to the facts and the law. The emotional component is generated from two sources: archetypes and themes.

Archetypes, as used herein, are basic, fundamental, corollaries of life that transcend age, ethnicity, gender and sex. They are truths that virtually all people in virtually all walks of life can agree upon. For example, few would disagree that when one's child is in danger, one protects the child at all costs. Thus, the archetype demonstrated would be a parent's love and dedication to his or her child. Other archetypes include love, hate, betrayal, despair, poverty, hunger, dishonesty and anger. Most cases lend themselves to one or more archetypes that can provide a source for emotion to drive the theory of defense. Archetypes in the Barry Rock case include:

- The difficulties of dealing with a stepchild
- Children will lie to gain a perceived advantage
- Maternity/paternity is more powerful than marriage
- Teenagers can be difficult to parent

Not only do these archetypes fit nicely into the facts of the Barry Rock case, each serves as a primary category of inquiry during jury selection.

In addition to providing emotion through archetypes, attorneys should use primary and secondary themes. A primary theme is a word, phrase, or simple sentence that captures the controlling or dominant emotion of the theory of defense. The theme must be brief and easily remembered by the jurors.

For instance, a primary theme developed in the theory of defense and advanced during the trial of the O.J. Simpson case was, "If it doesn't fit, you must acquit." Other examples of primary themes include:

- One for all and all for one
- Looking for love in all the wrong places
- Am I my brother's keeper?
- Stand by your man (or woman)
- Wrong place, wrong time, wrong person
- When you play with fire, you're going to get burned

Although originality can be successful, it is not necessary to redesign the wheel. Music, especially country/western music, is a wonderful resource for finding themes. Consider the following lines taken directly from the songbooks of Nashville (and assembled by Dale Cobb, an incredible criminal defense attorney from Charleston, South Carolina):

Top 10 Country/Western Lines (Themes?)

10. Get your tongue outta my mouth 'cause I'm kissin' you goodbye.
9. Her teeth was stained, but her heart was pure.
8. I bought a car from the guy who stole my girl, but it don't run so we're even.
7. I still miss you, baby, but my aim's gettin' better.
6. I wouldn't take her to a dog fight 'cause I'm afraid she'd win.
5. If I can't be number one in your life, then number two on you.
4. If I had shot you when I wanted to, I'd be out by now.
3. My wife ran off with my best friend, and I sure do miss him.
2. She got the ring and I got the finger.
1. She's actin' single and I'm drinkin' doubles.

Incorporating secondary themes can often strengthen primary themes. A secondary theme is a word or phrase used to identify, describe, or label an aspect of the case. Here are some examples: a person—"never his fault"; an action—"acting as a robot"; an attitude—"stung with lust"; an approach—"no stone unturned"; an omission—"not a rocket scientist"; a condition—"too drunk to fish."

There are many possible themes that could be used in the Barry Rock case. For example, "blood is thicker than water"; "Bitter Betty comes a calling"; "to the detectives, interrogating Barry should have been like shooting fish in a barrel"; "sex abuse is a serious problem in this country—in this case, it was just an answer"; "the extent to which a person will lie in order to feel accepted knows no bounds."

Creating the Theory of Defense Paragraph

Using the headline, the archetype(s) identified, and the theme(s) developed, it is time to write the "Theory of Defense Paragraph." Although there is no magical formula for structuring the paragraph, the following template can be useful:

Theory of Defense Paragraph
- Open with a theme
- Introduce protagonist/antagonist
- Introduce antagonist/protagonist
- Describe conflict
- Set forth desired resolution
- End with theme

Note that the protagonist/antagonist does not have to be an animate object.

The following examples of theory of defense paragraphs in the Barry Rock case are by no means first drafts. Rather, they have been modified and adjusted many times to get them to this level. They are not perfect, and they can be improved upon. However, they serve as good examples of what is meant by a solid, valid, and useful theory of defense.

Theory of Defense Paragraph One

The extent to which even good people will tell a lie in order to be accepted by others knows no limits. "Barry, if you just tell us you did it, this will be over and you can go home. It will be easier on everyone." Barry Rock is a very simple man. Not because of free choice, but because he was born mentally challenged. The word of choice at that time was "retarded." Despite these limitations, Barry met Kim Gooden, who was also mentally challenged, and the two got married. Betty, Kim's daughter, was young at that time. With the limited funds from Social Security Disability checks, Barry and Kim fed and clothed Betty, made sure she had a safe home in which to live, and provided for her many needs. Within a few years, Betty became a teenager, and with that came the difficulties all parents experience with teenagers: not wanting to do homework, cheating to get better grades, wanting to stay out too late, experimenting with sex. Mentally challenged, and only a stepparent, Barry tried to set some rules—rules Betty didn't want to obey. The lie that Betty told stunned him. Kim's trust in her daughter's word, despite Barry's denials, hurt him even more. Blood must be thicker

than water. All Barry wanted was for his family to be happy like it had been in years gone by. "Everything will be okay, Barry. Just say you did it and you can get out of here. It will be easier for everyone if you just admit it."

Theory of Defense Paragraph Two

The extent to which even good people will tell a lie in order to be accepted by others knows no limits. Full of despair and all alone, confused and troubled, Betty Gooden walked into the guidance counselor's office at her school. Betty was at what she believed to be the end of her rope. Her mother and stepfather were mentally retarded. She was ashamed to bring her friends to her house. Her parents couldn't even help her with homework. She couldn't go out as late as she wanted. Her stepfather punished her for trying to get ahead by cheating. He even came to her school and made a fool of himself. No—of her!!! She couldn't even have her boyfriend over and mess around with him without getting punished. Life would be so much simpler if her stepfather were gone. As she waited in the guidance counselor's office, *Bitter Betty* decided there was no other option—just tell a simple, not-so-little lie. *Sex abuse is a serious problem in this country.* In this case, it was not a problem at all—because it never happened. *Sex abuse was Betty's answer.*

The italicized portions in the above examples denote primary themes and secondary themes—the parts of the emotional component of the theory of defense. Attorneys can strengthen the emotional component by describing the case in ways that embrace an archetype or archetypes—desperation in the first example, and shame towards parents in the second. It is also important to note that even though each of these theories are strong and valid, the focus of each is from a different perspective. The first theory focuses on Barry, and the second on Betty.

The primary purpose of a theory of defense is to guide the lawyer in every action taken during trial. The theory will make trial preparation much easier. It will dictate how to select the jury, what to include in the opening, how to handle each witness on cross, how to decide which witnesses are necessary to call in the defense case, and what to include in and how to deliver the closing argument. The theory of defense might never be shared with the jurors word for word; but the essence of the theory will be delivered through each witness, so long as the attorney remains dedicated and devoted to the theory.

In the end, whether you choose to call them dog cases, or to view them, as I suggest you should, as fields of dreams, such cases are opportunities to build baseball fields in the middle of cornfields in the middle of Iowa. If you build them with a meaningful theory of defense, and if you believe in what you have created, the people will come. They will watch. They will listen. They will believe. "If you build it, they will come . . ." ▪

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."

DIRECT EXAMINATION:

"ALLOWING OTHERS TO HELP TELL THE STORY"

July 2006

Prepared by and reprinted with the permission of Phyllis Subin and Dan Shemer

I. A Few Key Concepts

A. Persuasive Storytelling: The Goal of direct examination is to persuasively have others tell your story or to discredit the prosecutor's case.

B. The SIX Ps: **"P**roper **P**reparation **P**revents **P**iss **P**oor **P**erformance**!"** (John Delgado, Esq.)

C. **Advances the Theory of Defense**

D. You must have an **"AURA"** about yourself:

A = **ATTENTION** Get and Keep Your Jurors' **ATTENTION**.
U = **UNDERSTAND** Make Sure The Jurors **UNDERSTAND** Your Witness' Testimony.
R = **REMEMBER** Make Sure The Jurors **REMEMBER** Your Witness' Testimony.
A = **ACCEPT** Make Sure The Jurors **ACCEPT** Your Witness' Testimony.

E. Keep the **Jury in Mind**

1. What you do must be considered from the perspective of the jury (or your trier of fact).

2. Try viewing your ideas through the eyes and minds of your potential jurors.

3. While delivering your direct, always consider the juror's ability to see, hear, understand, etc.

F. YOUR Witness: The witness is in your possession and it is your responsibility to do all you can to ensure that your witness' testimony is successful.

G. Persuasion

1. Communication is 65% non-verbal.

2. Use non-verbal communication (body language, key words, tone, pitch, pace, movement, gestures, etc.) to <u>reinforce</u> your message.

3. If you communicate one message with your words and a different one non-verbally, the trier of fact will believe the non-verbal message or not know which one to believe.

H. Your witness is the Attraction: On cross examination, the focus is on you. On direct, the focus must be on your witness

II. Do I Put <u>This</u> Witness On?

A. Does your theory of defense require you to put on this witness?

1. Test your theory of defense with this witness and without. Which is better? Why?

2. Benefits of calling this witness

    a. Directly supports your theory of defense
    b. Damage the prosecutor's version.
    c. Corroboration by witness supports theory.

3. Benefits of NOT calling this witness

    a. Good defense witnesses can help. Bad defense witnesses can destroy. Weigh the benefits against possible damage. Do you need it? Is it valuable enough?
    b. Keeps spotlight on the prosecution's case. Limits prosecutor's case and arguments.
    c. Even truthful witnesses may not be believed.
    d. Defense witnesses can fill or fix holes in the prosecutor's case.

B. Choose quality over quantity.

1. Put up the best evidence and witnesses to back up your theory of defense.

2. Having the body to say the words, does not make a defense. They must say it well!

III. INVESTIGATING For Direct Examination

A. Investigation concepts.

1. Investigation Fact finding

    a. What are the facts? What does the witness have to say?
    b. Does the witness seem credible? Will s/he be a good witness?
    c. Help decide theory of defense?

2. Investigation Fact development

    a. Find facts that support or enhance your theory of defense.
    b. Seek details that make the witness' testimony real and believable.
    c. Collect corroborating documentation and locate other supporting witnesses.

B. What do you need to know about your witness? **EVERYTHING.**

1. **History (background**) - educational, employment, military, family, criminal history, religious affiliations, health, vision problems, hearing problems, etc.

2. **Relations -** to client, other parties, witnesses, relatives of witnesses or parties

3. **Knowledge** - facts of the case, other witnesses or other parties, source of knowledge and reason for recollection

4. **Quality** - demeanor and attitudes, intelligence, willingness to cooperate, communication skills, ability to survive cross examination, etc.

5. **Actions** - With whom has this witness spoken about the case? police? prosecutor? written statements? contact with other witness? nature of that contact?

C. Is this witness essential to the theory of defense or case?

1. Is there a less dangerous means of presenting the evidence than through a witness who may be subject to cross examination? A document? A less "attackable" witness?

2. Is the witness' testimony cumulative, trivial or peripheral?

IV. PREPARING The Direct Examination: 13 STEPS

Once you have decided that your theory of defense allows and requires to call *this* witness, you must have an organized method of preparing. There are many methods of preparation. What follows is one method. It is one method of many, but it is one that may work for you. Whether you use this one or another is immaterial, so long as you develop one that works for you.

A. STEP 1: Review Everything

1. Read everything document in the file. Then re-read everything that you have about this witness.

2. **"Stream of consciousness note taking"** - anything that pops into your mind about this witness or this witness' testimony should be jotted down. By writing down these thoughts and ideas, you preserve your initial reactions, as well as those flashes of brilliance (that arrive invariably while you are in the shower!) about trial tactics and direct examination techniques that will be perfect for this case and/or this witness.

3. Brainstorm with others – including others who are not lawyers.

B. STEP 2: Juror Questions and Emotions Lists

1. **Anticipate the jurors thoughts about and reaction to your witness and your witness' testimony. (Assess your witness).** This includes the factual thoughts and the "gut" or emotional reactions.

2. **Juror Questions List**

   a. What questions will “normal” people i.e. non-lawyers ask about this witness? about the witness' testimony? What are the motives of the witness?
   b. **Write them down.**
   c. Which questions work for you? against you?

3. **Juror Emotions List**

   a. What will the jurors "feel" about your witness and his/her testimony?
   b. **Write them down.**
   c. Which emotions work for you? against you?

C. **STEP 3: Determine your Objectives**

1. How will this witness advance your theory of defense?

2. What are your **legal, factual, emotional and "believability enhancement" themes and objectives with this witness?**

3. **Factual Themes**

   a. What do you want the jurors to believe after hearing from this witness?
   b. Every objective must advance your theory.
   c. Develop objectives that appeal to people, not lawyer.

4. **Emotional Themes**

   a. How do you want the jurors to **feel** when the witness is finished testifying?
   b. What words would you like them to use to describe the witness?
   c. Emotional objectives must advance your theory.

5. **"Believability Enhancement" Objectives**

   a. Make the witness be and appear to be believable in the eyes of your jurors.
   b. What facts can you bring out? What things can you have the witness do? What can you do to make this witness more believable?
   c. Develop in the jury one of the following reactions: **Identification,** "The Witness is like me;" or **Understanding,** "The Witness is nothing like me, but I understand how s/he came out that way."
   d. Create a connection between the witness and juror i.e. “That’s what I would have done.”

6. **Legal objectives**

   a. Is this witness necessary to establish a legal point?
      - the absence of an element?
      - an affirmative defense?
      - to generate an issue?
      - to lay an evidentiary foundation?
   b. List the legal point(s) that must be established.
   c. List the legal point(s) that <u>this witness</u> must establish.
   d. List the facts that this witness must testify to, to satisfy the legal objective(s).

7. Re-evaluate and Reduce

   a. We all have limited attention spans. Re-evaluate your objectives, reducing them to the essentials. Discard any that you believe are not important.
   b. Select, from among all of the objectives lists, only those objectives that are critical for this witness.

D. **STEP 4: Marshal the facts**

1. Ask yourself, “what am I trying to achieve, and why?”

2. For EVERY THEME, list EVERY SUPPORTING FACT.

3. Consider every fact in the case in light of the particular theme. Repeat this process for each objective, going through the facts over and over, considering the next objective each time.

4. Don't settle for just the obvious facts. Develop reasonable and logical extrapolations.

5. Ask yourself: Which facts lead you to believe that the stated objective is true. Write those facts down. Then look for more!

6. Marshaling the facts develops depth and believability in your theory. It provides new facts that support your objectives that had not been identified before.

E. **STEP 5: Develop story(s), images and key words**

1. Identify and develop the **witness' story(s)** and develop **key words.**

2. Whatever information you want the witness to convey, put it in story form.

3. **Why Stories?**

   a. Stories create and maintain interest.
   b. Stories provide a context into which the jurors may understand and place the facts. It allows the jurors to discern which facts are important and which are insignificant.
   c. Stories enhance recall.
   d. Stories encourage empathy and increase believability.

4. **Identify the witness' story(s).**

   a. A single witness may have one or several relevant stories. Whatever the witness has to offer, be it short or long, consider how to present it in story form.
   b. Gives your jurors a better sense of the witness and makes the witness more "real".
   c. You work with the witness as they are the storyteller. The lawyer's role is that of facilitator.

5. **Develop key words**

   a. "Words Are Magic". Maximize the effectiveness of a witness' testimony e.g. "scared" or "in fear" is less compelling than "terrified," or "I knew I was about to die."
   b. Consider the best words and the worst words that the witness can use. The witness must use the best language to make their point and avoid the bad phrases.
   c. Develop word that **maximize or minimize** the desired impression.
   d. Develop descriptive, poetic language.

F. **STEP 6: Organize persuasively**

1. Organize your themes and your witness' story(s) persuasively and effectively. Organization is a key tool of persuasion.

2. Where To Begin Your Direct

   a. Traditional Organization**:** Ease-In
      - Allows the witness to get comfortable on the stand.
      - Allow the witness to ease into the testimony.
      - Allows the witness to get over the nervousness of being on the stand.
      - Allows better communication of the important points better.

   b. Modern Organization: Primacy and Recency
      - We remember best what we hear first and last.
      - Jurors will perceive the first and last points as most important.
      - Identify your best one or two points. This points should be the first and last points you have the witness make.
      - Consider starting with questions that establish the theme of the witness' testimony superficially, turning to background information and returning to the theme.

3. Other Organizational Issues

   a. Background / Scene / Action organization - This approach is logical and easy to follow.
      (1) Witness background
      (2) Event background
      (3) Scene of the action described
      (4) Action described
   b. Logical progression of your questions; from general to specific
   c. Complete a topic before moving to another.

4. Do you disclose weaknesses?

   a. The **"majority opinion**" recommends that you disclose weaknesses to maintain credibility and take the "sting" out of disclosure by the adversary. The disclose must be made in a way that reduces the impact of the weakness.
   b. The **"minority opinion**," sometimes referred to as the "sponsorship" theory, recommends that you do not disclose weaknesses because doing so increases, rather than reduces, the impact of the weaknesses. "If they are admitting that much, imagine how bad it really is" is representative of this view.
   c. **If you do plan to disclose weaknesses**, consider the following:
      - Place it in the middle where it is least likely to have a major impact and least likely to be remembered.
      - Only disclose weakness that you are sure will come out.
      - Present the **good stuff before the bad stuff.**
      - Present the weakness in the best possible light.
      - Attempt to reasonably minimize the weakness by using minimizing words and questioning about it briefly.

G. **STEP 7: Anticipate cross examination**

1. Anticipate the weaknesses in witness' attitude, testimony and history for cross examination.

2. What are the weaknesses of this witness?

    a. Easily riled?
    b. Have an "attitude?"
    c. Will s/he hold up on cross?
    d. Does s/he answer well, volunteer too much or shade the answers?

3. What are the weaknesses of this witness' testimony?

    a. Holes in the story
    b. Unbelievable story
    c. Absence of expected corroboration

4. What attitude/demeanor do you anticipate from the prosecutor during cross.

H. **STEP 8: Prepare re-direct examination**

1. Be very careful with re-direct. Use it to rehabilitate or introduce something that is necessary and failed to introduce during direct (if you can).

2. Re-direct can be dangerous. Because it is difficult to plan the result, often questions that are unartfully crafted, open doors, and permits re-cross providing the prosecutor with another chance to hurt your client and the witness.

3. If re-direct is necessary be brief. It is not necessary to refute or respond to every point made by the prosecutor on cross examination. Stick to the important ones.

I. **STEP 9: Prepare Your Trial Props**

1. Doing things and using things during the trial heighten interest, clarify facts, increase recall and promote acceptance.

2. Using slides, videos, pictures, etc., or moving around during the presentation usually is more interesting than just standing still and talking. Appeal to the jurors' senses.

3. Use actions and creations during trial

    a. Use re-enactments, demonstrations by the witness
    b. Create and use maps, diagrams, pictures, things written on flip charts
    c. Rebuild the interrogation room where your client confessed in the courtroom.
    d. Use clothing, toy guns, knives or weapons similar to the ones involved in the case. Use Sweet N' Low packets to show a gram of cocaine, or an ounce of oregano to show an ounce of marijuana. Such things help illustrate the witness' testimony.

J. **STEP 10: Prepare the other parts of the trial to aid your direct examination**

1. The trial is an "integrated whole." Each part of the trial should be used to support and advance the other parts of the trial and the theory of defense.

2. Think about how each part of the trial can be used to aid the testimony of this witness. The other part of the trial may be used to undercut anticipated cross, to minimize weaknesses, to corroborate strengths, etc.

    a. What **pre-trial motions** can/must be filed to aid the direct examination of this witness?
        - During a suppression motion, "lock down" a witness' testimony that will corroborate the direct of a defense witness.
        - File a Motion In Limine to determine whether a particular defense witness' prior conviction or an item of evidence will be admissible.
    b. What **voir dire questions** can be asked to aid the direct examination of this witness?
    c. What **types of jurors** are most desirable considering this witness and his/her testimony?
    d. What can/must be said in **opening statement** to aid the direct examination of this witness?
    e. What **cross examination** of state's witnesses can/must be conducted to aid the direct examination of this witness?
    f. What **jury instructions** can/must be requested/given to aid the direct examination of this witness?
    g. What must be said in **closing argument** to aid the direct examination of this witness?

K. **STEP 11: Prepare your <u>questions</u>**

1. Review your themes & objectives lists and marshal the facts sheet.

2. Should you write out your questions for each theme? It depends on your organizational style.

    a. Writing out your questions can be beneficial however it is time consuming and may prevent you from actually listening to the answers.
    b. It requires you to think about the best way to ask the question. It also encourages better use of good key words.
    c. If you don't write out your questions, write out the themes and facts that must be covered.
        - Use a separate page for each theme / objective (Posner and Dodd)
        - Easy to re-organize or discard.

3. Choreograph the direct

    a. Build movement into your direct. The absence of movement during the direct will add to the boredom potential substantially. Movement adds interest to the exam.
    b. Plan when, where and how YOU and YOUR WITNESS will move.
    c. Plan how to use your voice; loud, soft, when to use the appropriate tone of voice, etc.

L. **STEP 12: Practice**

1. Practice your questions and practice with props and demonstrations.

2. If you don't practice out loud, alone or in front of someone else, at least, go through the questions and movements in your head. Ideally, ask a friend, spouse, etc. for feedback. If not, a mirror will do.

3. Sometimes ideas that seem wonderful in your mind or on paper, don't work when given sound. Try it, and find out before you are standing before a jury.

4. Practice demonstrations and practice with demonstrative aids or items of tangible evidence. A great demonstration about the ease of misfiring a gun may fall flat if you can't get the gun open when standing before the jury.

M. **STEP 13: Tune-up**

Review and refine your direct examination. This is the time to tighten-up your examination, to add anything necessary, to discard anything unnecessary, etc.

V. PREPARING <u>Your Witness</u>:

N. General thoughts

1. **The witness stand is an alien environment.** It has strange rules, a foreign language and an odd Q & A style of communication. Keep this in mind when preparing the witness for testimony.

2. **Don't forget to ask your witness.** S/he may have good suggestions and insights about what will work.

3. **Explain why**. Your witness must understand why everything that s/he is to do or say is necessary. If your witness understands "why", s/he will respond better on direct and cross.

O. **STEP 1: The Basics**

1. **Logistics**

   a. The physical layout of the courtroom
   b. Courtroom location, number, directions, etc.
   c. Court reporters, sheriffs, bailiffs, jail guards, etc.
   d. Time to arrive, where to wait, what to do upon arrival, who will meet the witness
   e. How the witness will be called into the courtroom, the oath, etc.

2. Basics of law, procedure and evidence

P. **STEP 2: Explain Witness' Role**

1. Explain your **theory of defense**, the **witness' role** in that theory and it's **importance.**

   a. If the witness understands the **big picture,** this will help the witness to know what is important to tell you and tell the jury.
   b. **Beware** giving too much detail or explaining too much to a potentially hostile witness, as they may use this information against you or tell your adversary what they learned.
   c. Your explanation should clarify what information is required of the witness, how it fits in with the overall theory and why it is important.

Q. **STEP 3: Discuss Appearance and Communication Skills**

1. Refine the witness' appearance and communication skills.

2. Discuss how to dress for court

   a. Proper dress is about **respect** for the court, the trial process and the jury.
   b. Be **specific.** Don't merely say, "Dress nicely," or "Wear what you would wear to worship services."

3. **Discuss non-verbal communication and refine these skills**

   a. May require **Q & A sessions**
   b. **Explain** what non-verbal communication is and its **impact**
      - what the jurors believes
      - the jurors' impression of the witness
      - believability
   c. **Body language**
   d. **Voice and manner**
      - volume - loud enough for the farthest juror to hear
      - tone - should be conversational but congruent with the content of the testimony
      - polite, always polite
      - pause before answering to ensure that the question is completed; to ensure that witness understands the question and, on cross, to permit you to object
      - Nervousness is OK - Acknowledge witness' reality
   e. **Words Choice**
      - Encourage **Simple words** - "bar" talk, per Terry MacCarthy e.g. "Told me" rather than "indicated"
      - Encourage **Fact words** - not opinions, characterizations or conclusions; "6'2" and 240 lbs." rather than "big"; "Light blue button down shirt, khaki pants and docksiders" rather that "preppie attire"
      - Encourage **Power words** - Words that communicate certainty.
      - Avoid **Hedge words** (I think, probably, I submit, we contend, etc.)
      - Avoid **Unnecessary intensifiers** (really, very, extremely, etc.)
      - **Hesitations or filler words** (ah, ladies and gentlemen, well, etc.)
      - **Question intonation** (when your voice goes up at the end of a sentence)

R. **STEP 4: Review Prior Statements**

1. Review all of the witness' prior statements with your witness.

2. Let your witness read all of his/her prior statements, especially those given to the State.

S. **STEP 5: Practice Questions and Answers**

1. Practice and refine your questions and answers with the witness.

2. Encourage **NARRATIVE ANSWERS** by the witness

3. **Conduct a mock direct examination** session with your witness.

    a. **Ask the exact questions** and explain why you are asking those questions; don't merely talk about the topics you plan to ask about.
    b. **Get the exact answers the witness will give** - as they will answer in the courtroom.
        - Improve the quality of the answer - The answer may not be clear, may not bring out all of the facts, use poor language, include irrelevant information, etc. You must help the witness answer clearly and effectively.
        - You are not putting words into the witness' mouth. You are ensuring that the words that do come out are clear, complete and effectively communicate the information.

4. Tell the witness to look at the jury, where appropriate or at the questioning lawyer.

T. **STEP 6: Practice Cross and Re-direct**

1. Prepare your witness for **cross examination and re-direct** examination.

2. **Explain "typical" cross examination objectives and tactics**.

    a. Leading questions
    b. Attempts to limit the witness to "yes" or "no" answers
    c. Efforts to show that the witness is unsure, mistaken, biased or lying
    d. Efforts to show that the witness is not reliable or a believable person
    e. Efforts to get the witness upset or angry, in the hope that the witness will appear violent, rash, less believable, or will say something foolish or wrong.

3. **Explain "typical" cross examination techniques** that you expect will be used.
    a. Asking about the witness' recollection about other days around the time of the crime.
    b. Asking why didn't the witness tell this information to the police.
    c. Asking how does the witness recall this particular date.
    d. Exploiting the witness' relationship with the client to suggest that the witness is lying.
    e. Making big issues out of minor variations or inconsistencies with the testimony of others witnesses or with the witness' prior statements.
    f. Asking the "lying then or lying now" question.
    g. The old, "You say A. Witness X says B. Is Witness B lying or mistaken?" technique.
    h. You discussed this information with the defense attorney and others and were told what to say.

4. **Explain <u>this</u> prosecutor's anticipated cross examination objectives and why.**

5. **Practice cross Q & A session.**

    a. Have someone else play the prosecutor's role. Don't take it easy on the witness.
    b. Consider several different styles - an aggressive, fast paced, in-your-face style or a friendly disarming pleasant style cross.

6. **Explain the rules of re-direct and your objectives.**

    a. Explain your **objectives,** why and how they fit in with the theory

b. Conduct a **Q & A** session for the re-direct questions.

VI. DELIVERING Your Direct Examination.

U. Remember your **"AURA"** and being **jury centered**!

V. **Your Organization - Start Well**

1. **Traditional or modern "primacy" approach**

2. **Primacy** - You may start with the **ultimate question.**

3. **Traditional** - You may wish to **ease in** to the exam

W. **Your Movement, Body and Voice**

1. **Your movement**

a. Movement **adds interest.** Exciting movies aren't called "action" pictures for nothing!
b. Your movement should **not detract** or distract attention from the witness
c. Your movement should be intentional. **Limit** your movement.

2. **Your witness' movement**

a. **Build in** as much movement of this witness as is possible e.g. witness draw diagrams, show photos, demonstrate actions, handle exhibits, etc.
b. Good witness? Get him or her off the stand and as close to the jury as much as possible.

3. **Your Voice**

a. A lack of variety in the examination makes any direct **boring.**
b. Inflection in your voice will create interest. If your tone of voice is monotone, your witness will begin to answer in the same monotone. If you sound interested, your witness will sound interested and be more interesting to your jurors.
c. **Variety in your voice:** Pace, tone, volume, pitch
d. **Belief -** Your belief in your witness must come across. If you do not believe your witness, do not put the witness on the stand.

4. **Congruity**

a. You and your questions must be congruent. Your tone, volume, pace, word choice, etc. must be congruent with the content of the question and the content of the witness' testimony.
b. **Mirror the emotion**
c. Your pace, tone, etc. must be congruent with the message

X. **Basic Questioning Thoughts and Techniques**

1. **Main objective: Get THE WITNESS to speak**. The witness must be the focus of attention, not the attorney.

2. **LISTEN** to your witness and her answers.

3. **Avoid Prosecutorial techniques**

   a. The "What, if anything,..." questions.
   b. The "And then what happened?" or the "What happened next?" questions.
   c. These are examples of being unprepared

4. **Simple and short questions**

   a. **Single issue** or single point per question
      - Avoid compound, long questions
      - Simple questions are understood easily by your witness and your jurors.

5. **Open-ended questions**

   a. Ask questions that seek and solicit a **NARRATIVE** response.
   b. **Journalism questions** - Ask questions that begin with **who, what, when, where, why, how, tell us, describe, explain**, etc. These are the questions that will let the witness speak, the objective of direct examination.

6. **Leading questions? RARELY.**

   a. Leading questions reduce your and your witness' credibility and the impact of the witness' testimony because it appears that you are putting words into your witness' mouth.
   b. Leading <u>sometimes</u> is okay
      - Preliminary or inconsequential matters
      - Hostile witness

7. Avoid or clarify **"quibble"** words

   a. "Quibble" words are unhelpful qualifiers and words that are subject to interpretation. Unhelpful qualifiers are words like very, really, extremely, so, etc.
   b. Words that are subject to interpretation usually are adjectives, such as upset, big, fast.
   c. These words do not clearly define the testimony for the trier of fact. How upset is upset? Is really upset any clearer?
   d. Prepare your witness not to use these words. Prepare them to offer the facts instead. If they do use them, ask a clarifying question.

8. **Transitions**

   a. Transitions are used to let everyone know that you are changing the subject or to highlight an important question or answer.

b. **Pauses**

- Those golden moments of silence in the courtroom, the ones that terrify lawyers. Those moments of silence are powerful weapons and should be used.
- A moment of silence between topics signals a change in the subject matter of the questions to the witness and the trier of fact.
- Silence lets the good stuff sink in and lets the jurors think about and **feel the emotional impact** of the testimony

c. **Headlines**

- Use to **change topic or objectives**
- **Orient the jurors** and make the testimony easier to follow
- **Orient the witness** and make the questions easier to answer e.g. "I'd like to ask you about the lighting in the alley"; "Lets talk about the moment when you first saw Mr. Violent."; "Can I stop you right there. What was going through your mind at that moment.";"I have some questions about your relationship with Mr. Smith."

9. **Avoid "recollection stage" of questions and answers.**

a. The recollection stage, ("Do you recall seeing....") can lead to confusing and inefficient responses.
b. For example, if you ask "Do you recall if the person had a moustache?" and the witness says "No," does the witness mean that she didn't see a moustache or that she doesn't recall seeing a moustache or doesn't recall whether the person had a moustache or not. To avoid the problem, leave the "do you recall" part of the question out.
c. Further, including this stage in the question suggests uncertainty. If the question suggests uncertainty, the witness may become or appear uncertain.

Y. Advanced Questioning Thoughts and Techniques

1. **Present tense questions**
   a. Ask questions in the present tense, rather than the past tense.
   b. This techniques adds interest and immediacy to your witness' testimony. If you ask the questions in the present tense, the witness will begin to answer in the present tense.
   c. Q: Where were you on May 2, 1993 at 1 a.m.? A: I was in Red Alley.
      Q: Now Mr. Client, it <u>is</u> May 2, 1993 at 2 a.m. in Red Alley. What <u>are</u> you doing?
      A: I am standing there and this big guy is walking toward me.

2. **Sense questions**

a. Ask questions that seek answers that focus on the **senses**. These questions seek evocative answers to which the trier of fact will relate.
   - **Hear**
   - **See**
   - **Smell**
   - **Taste**
   - **Touch**
   - **Feel physically**
   - **Feel emotionally.**

b. Focusing on colors and familiar objects at the scene will make the scene come to life f or the jurors.

3. **Looping technique**

   a. Use the words of a question or answer in a succeeding question or questions.
   b. These can be planned and/or spontaneous.
      Q: How big was the man? A: He was 6'2" and weighed about 225.
      Q: What was the 6'2", 225 lb. man doing when you saw him? A: Hitting Mr. Client.
      Q: When the 6'2", 225 lb man was hitting Mr. Client, what was Mr. Client doing?

4. **Juror's Voice Technique**

   a. Ask the questions that are in the jurors' minds. (See your "juror questions list")
   b. Ask the questions using the same words and the same tone of voice that the juror would use if asking the question. Hear it in your head.
   c. You become the juror's representative. The jurors will come to rely on you to ask the things they want to know. This also takes the sting out of the prosecutor's points
   d. For example:
      Q: How could you have seen it wasn't Mr. Client when you were driving the car at the same time as you say you were watching the fight?
      Q: How could you possibly recall such details about a single day 14 months ago?
   e. A well prepared witness will knock these questions out of the ballpark!

5. **Jury instruction questions.** Use the language of the anticipated jury instructions in framing questions and refining answers.

6. **"What were you thinking / feeling" questions**

   a. Ask questions that disclose the witness' thoughts, feelings and motivations, particularly at the critical time for the witness.
   b. These question humanize the witness and help juror identification.
      Q: "As you saw the person being robbed, what were you thinking?"
      Q: "When you heard that your son was charged with shooting someone on Saturday, May 3, what went through your mind?"
      Q: "You told us that he came at you with a knife. What were you feeling at that moment?"

7. **Emphasis**

   a. Highlights, clarifies and adds interest
   b. Placing **emphasis** on a particular word in a sentence can change the meaning or focus of the question.
      Q: **WHERE** was Fred when you first saw him?
      Where **WAS** Fred when you first saw him?
      Where was **FRED** when you first saw him?
      Where was Fred **WHEN** you first saw him?
      Where was Fred when **YOU** first saw him?
      Where was Fred when you **FIRST** saw him? etc.

c. **Pausing** after a particular word in a sentence can change the meaning or focus of the question.
   Q: Where..... was Fred when you first saw him?
   Where was..... Fred when you first saw him?
   Where was Fred..... when you first saw him?

8. **Flagging** a question will give it emphasis.

Q: "Now, Mr. Witness, this question is very important, so please listen carefully before answering...."
Q: "What is the one thing that stands out most in your mind?"

9. **Stretch out / shrink down technique**

a. The **"stretch out"** technique seeks to maximize the impact of information by "stretching out" answers. It can be used to make something big seem bigger, something far seem farther, something slow seem slower, etc. For example:
   To show that the client stood <u>far</u> from the shooting and, therefore, was not involved;
   Q: You told us that Mr. Client was across the street from where the shooting took place. I'd like to ask you about how far away he was. First, is there a sidewalk?
   Q: How wide is it?
   Q: Is there a lane where cars park on the south side of the street?
   Q: How many lanes of traffic going south?
   Q: How many lanes of traffic going north?
   Q: Is there a lane where cars park on the north side of the street? etc.

b. The **"shrink down"** technique seeks to minimize the impact of information by "shrinking it down." It can be used to make something fast seem faster, something minor seem even more minor, something close seem closer, etc. For example:
   To show client stood <u>close</u> to the shooting and therefore, was not involved:
   Q: You told us that Mr. Client was across the street from where the shooting took place. How close was he to Mr. Decedent at the time the shots were fired?
   A: Pretty close. He was just across the street. He's lucky he didn't get hit himself.

10. **Influencing words**

a. The words included in the question can influence the answer.
b. Decide what answer you want and use the language of the desired answer to ask the question.
   - If you want something to seem far, ask "How far?"
   - If you want something to seem close, ask "How close?"
   - Short/tall; big/small; fast/slow. etc.
c. Your question may presuppose a desired fact. "Did you see <u>THE</u> gun?" versus "Did you see <u>A</u> gun?" This presumes the existence of the gun. The jurors and the witness are more likely to believe that a gun was involved and seen by the witness.

11. **Stop action or Freeze frame technique**

    a. Have the witness focus on a specific moment or part of an event and have her describe it in detail. For example:
       Q: "Let me stop you there. Please describe Mr. Aggressor at that moment."
       Q: "Where was the knife?"
       Q: "Where was his other hand?"
       Q: "What was he saying?"
    b. This technique brings a critical moment to life by presenting substantial detail.

Z. **Techniques for Problem Witnesses**

1. Non-responsive answers or who won't stay on the subject

    a. Take the blame - "I'm sorry, my question wasn't clear. Let me try again."
    b. Explain what you want - "Mr. Witness, I'm trying to find out about whether you got a look at the face of the attacker. Do you understand that? Now, did you see his face? Can you please tell us about it?"

2. Who has a bad attitude (occasionally, your client)

    a. Confront it.
    b. Your jurors are taking it in. "Mr. X, you seem upset. Would you like to tell the ladies and gentlemen of the jury why you are upset?"

3. Who repeatedly refer to **inadmissible evidence:** Explain the rules, but be nice!
   Q: "Mr. Witness, the law doesn't allow you to offer your opinion about Mr. Victim. When I ask you a question about him, please just tell us the facts that answer the question. OK?"
   Q: "Ms. Witness, the law doesn't permit you to tell us what you heard in the neighborhood. That is called hearsay. You can tell us only what <u>you</u> saw, <u>you</u> heard. Not what someone else told you. Do you understand what I mean by that?"

4. Who gives an **unexpected bad / fatal answer**

    a. Prevention, through preparation, is the best technique.
    b. There are no good ways to handle this. Seek the lesser of evils.
       - Ignore it and hope the jurors didn't hear it. At least you aren't making a big deal out of it for the jurors.
       - Claim surprise and cross examine the witness.
       - "You just said.... Is that what you meant to say?"
       - Refresh recollection with previous interview notes. Q: "You and I just spoke about this yesterday, didn't we?" Q: "Didn't you say X, not Y?" Q: "Can you explain that?"
       - **Fail-safe response** - Approach the bench and hope for a good plea!

5. Who is **forgetful**

    a. Refresh recollection
    b. Use a document as "past recollection recorded"
    c. Ask for a recess

d. Lead the witness - option of last resort

AA. **Storytelling and picture painting techniques**

1. **Scene Before Action.**

a. Before describing the action of a story, tell the jurors about the place where the events are happening. This gives context for the story; gives the jurors a place to put the people and events to follow.

b. Sometimes a **physical description** of the location is required.
Q: I'd like you to tell the ladies and gentlemen of the jury about Red Alley. Can you please describe it?
Q: If I were walking in it, what things would I see?
Q: What does it smell like?

c. Sometimes the **emotional landscape** must be described.
Q: What kind of place is Joe's Bar? A: It's a filthy biker's bar.
Q: Can you describe the people who have been there when you've been there in the past?
A: They're all biker's, big guys with tattoos who get drunk and like to mess with people.
Q: What activities have gone on there when you've been there? A: There are always fights, every night I was ever there.

d. Having set the scene, you can describe the action using any of the techniques described below.

2. **Flashback** or **flash forward** - Start the story at the point that is most critical for your theory. Then, flash back to something earlier or forward to something later. For example:
Q: Mr. Client, why did you hit Mr. Jones?
A: He threw a beer in my face and was reaching for a pool stick. I hit him before he got the stick and smacked me with it.
Q: Let's back up a moment, and please, tell us how this all started?
A: I was in the bar with a few friends and this guy was drunk and ....

3. **Parallel action development** - Present the story of different parties separately, a little at a time, until you bring them together at the critical moment. For example:
Q: Ms. Witness, what was Mr. Client doing at this time?
A: He was sitting there minding his own business, drinking a beer at the bar.
Q: While Mr. Client was minding his own business, what was Mr. Accuser doing?
A: He was shooting pool.
Q: How was he acting?
A: He was screaming at some guy, accusing him of taking his quarter. He was pretty drunk and pretty loud.
Q: How did Mr. Client come to fight with Mr. Accuser?
A: Mr. Accuser swung the pool stick at the guy he was playing pool with and missed. He hit Mr. Client. As Mr. Accuser was winding up again, that's when Mr. Client hit him.

4. **Freeze frame** - Select the critical moment in light of the specifics of your theory and paint it in minute detail so that your jurors see it exactly as it was. For example:

Q: Mr. Witness, you told us that you saw the whole thing. Can you tell us what you saw?
A: Yes, I saw Mr. Deceased running at Mr. Client with a table leg and Mr. Client shot him.
Q: I'd like you to tell us about Mr. Deceased and what he was doing. First, How big is he?
A: He is a big man, 6'2", maybe 225 lbs.
Q: How was he built?
A: He was real strong. Built kinda like a weightlifter. Big arms and all.
Q: Tell us about his clothes?
A: He had on a black tank top with something like "...Meanest SOB in the valley" on it.
Q: What else was he wearing?
A: Jean shorts, cutoffs, black combat boots....

5. The **Interview** or the **Investigation** - Tell the story by following the police investigation or the interview of an important witness.
   Q: Officer Jones you told us that you were the investigating officer? Was Mr. Witness on the scene when you got there? A: Yes
   Q: Did you talk to him? A: Yes.
   Q: Did he tell you he saw the guy who did it? A: Yes
   Q: Did you ask him whether he could describe the guy?
   A: Yes. He said he could.
   Q: Tell us about the questions that you asked him?

6. **Panorama to zoom** - Put the story into context. Question the witness about the big picture and move to questions about the specific important things. For example:
   Q: Can you tell us about the area?
   A: It's a nice neighborhood. There are row houses on both sides of the street. Cars park on both sides too. There's a little Ma & Pa grocery on the corner. It's nice.
   Q: What kind of day was it?
   A: It is a beautiful day. Real sunny, the sky was blue and it was real warm. In the street, some of the kids were playing stickball.
   Q: Did you see Mr. Violent in the area?
   A: Yeah, on the corner with a group of guys, wearing a blue coat and had a black steel revolver in his right hand.
   Q: Tell us about the gun?

7. **The walk through.** Directional comments are confusing and meaningless too often. Think about the homicide police report; "The body was lying in a northerly direction with the head facing in a westerly direction and the feet facing the southeast...." Not very helpful. Instead, select a place to start and question the witness about the things they see to their right, their left, in front, etc. as they walk through the scene. For example:
   Q: Officer Jones when you walked into the alley, what did you see?
   A: I saw a body.
   Q: Please describe the way the body was lying as you were looking at it?
   A: It was face down. The person's face was to the left...
   Q: Whose left?
   A: My left and his left. His face was facing kind of away from me.

8. **Chronological** - Easy to follow, but it's less interesting and harder to highlight the important stuff.

BB. **Objections**

1. **Your objections to the prosecutor's cross examination.**

   a. Can you object? Is the prosecutor doing something improper? Can you win? at what cost?
   b. Should you object?
      - Your objections must be consistent with your theory.
      - Does the question hurt the witness? damage your theory? If the answer is no, why object?
      - Jurors dislike objections. They feel excluded and believe that you are hiding something from them. So, even if the objection is proper, is it worth the price?
   c. Protect your witness. If your witness needs help, step in with a proper objection.
      - Harassment, too fast paced
      - Prosecutor won't let witness answer
      - Interrupting the witness
      - Remember, a good witness may be able to handle it.

2. **Objections by the prosecutor to your direct examination**

   a. Prevention; don't ask objectionable questions.
   b. Make 'em pay
      - Tell the jury that you won; "Thank you, your Honor. Mr. Witness the Judge has ruled that the question is proper. You may answer the question."
      - Repeat the question; "Let me state the question again. Why do you say that Mr. State's Witness is known to be a lying scumbag in the neighborhood?"
      - Summarize what the witness said; "Before the objection, you told us that Mr. Victim was drunk, had a large knife and was looking for my client. Had you finished the answer or is there more you'd like to add?"
   c. Don't apologize or withdraw the question. Rephrase the question so that the judge will allow it.
   d. Use proffers and other strategies to get the court to allow an important question.

CC. **FINISH STRONG:** You should save something with high impact and substance for your last point.

VII. Your Client in the Courtroom and on the Stand

A. **To Testify or Remain Silent**

1. There should be no set rule. Like any other witness, the decision to have a client testify depends on the quality of the client as a witness and the value and necessity of his/her testimony. Remember, this is the client's decision, but should be reached with the advice of counsel.

2. Recent research suggests that juror's expect the client to testify and held it against him or her when s/he didn't. However, the same study found that when the client did testify, the testimony did more harm than good far more often than not.

B. **Should the client show emotion?**

1. Traditional wisdom suggests that clients shouldn't show emotion in front of the trier of fact. However, a lack of emotion under the circumstances seems unnatural. Your call.

2. If the client will be emotional, be sure that the emotion is consistent with the theory of defense.

3. Anger and violence are not suggested, but frustration and righteous indignation may be fine.

C. **Over preparation? No such thing with your client**

1. Everything done to prepare a witness for direct, should be done to prepare your client.

2. Discuss how your client should behave in the courtroom. Remind her that someone on the jury will always be watching.

3. Practice denials: Just saying "no" may not have enough force. Tell your client to give the denial some verbal "ummph" and add something like "No, I didn't do it," "No, that is not true" or the like.

D. **References to your client**

1. **Physical reference.**

   a. Do not have witnesses point at your client. You shouldn't do it either.
   b. You and/or the witness become just another accusing finger. Clients have suggested that this makes them uncomfortable.
   c. If you must, gesture to your client using an open hand, palm up. Preferably, walk over to the client or ask the client to stand.

2. **Verbal reference**

   a. Have witnesses call your client by name, preferably a less formal name. John is better than Mr. Client. If a judge won't permit this, call him John Client. CAVEAT: If you are considerably younger than your client or circumstances suggest that it will appear disrespectful to use the client's first name alone, don't do it.
   b. Never use the dehumanizing phrase "the defendant." The only way to ensure that you do not use this phrase during the trial is not to use it at all. Calling your client by name will help you to see him or her as a person. Where a generic name is needed, such as in motions, substitute the word "accused" for defendant.

E. Beware of, and counsel against, **overly broad responses**

1. **Opens the door** to otherwise irrelevant and inadmissible testimony.

2. Avoid generalizations like:
   a. "I never have done...."
   b. "I wouldn't even know what that stuff looks like."

3. This is a good suggestion to discuss with all witnesses.

F. **Organization for the client's direct**

1. The beginning (The important stuff)

   a. Consider beginning with an absolute denial and brief explanation why. Client wants to say it and jurors want to hear it. The explanation orients the jurors. A simple "No" isn't enough. A little added punch is necessary.
   b. Q: "Mr. Client, did you do it?"
      A: "No, I didn't."
      Q: "If you didn't do it, where were you at the time of the shooting?"
      A: "I was home with my mother and girlfriend the whole night." .....(Pause)
      Q: "Can you tell us about yourself?"

2. The middle (The bad or less important stuff)
   a. Confront prior record, prior inconsistent statements and other bad stuff in the middle where they are more likely to be minimized or forgotten.

3. The end (More important stuff or the same important stuff from the beginning)
   a. Select a second strong point and question about it here. Alternatively, repeat the same point with which you began.
   b. Consider ending with a denial again, if asked in a slightly different way to avoid an objection.
   c. Consider closing with a trilogy.
      You may close with a trilogy
      Q: On June 1st did you point a gun at Mr. Jones? A: No, I didn't.
      Q: On June 1st did you shoot a gun at Mr. Jones? A: No, absolutely not.
      Q: On June 1st did you have a gun? A: No, I didn't have a gun at all.

      PAUSE
      Thank you. I don't have any other questions.

G. **Humanize the client.**

1. Lots of background information, whenever you can

2. All the good stuff and Even the bad stuff, playing up the rough upbringing angle to develop understanding or sympathy.

H. **Corroboration.** Seek as much corroboration of the client's testimony as is possible, but don't get bogged down in details.

VIII. Conclusion

Direct examination is too important to surrender to prosecutors. If you prepare yourself, your case and your witness well, direct examination and the techniques set forth here will help you win cases. Remember the "Six Ps" and always remember your "AURA."

Daniel Shemer

“I was an Assistant Public Defender in Maryland from 1980 until 1999. The material included in this handout was shamelessly stolen from numerous parties and publications. I have listed many of the subjects of my theft below. My thanks to the ingenious authors, actors and lawyers, particularly, the many other Maryland Public Defenders, for creating and sharing this wealth of ideas. May your creative juices continue to bubble up and ‘may justice flow down like the waters and mercy like an everflowing stream.’”

1. "Direct Examination: Strategic Planning, Preparation and Execution." by Phyllis H. Subin, Esq., Director Of Training and Recruitment, Defender Association Of Philadelphia.
2. The ABA Journal, Litigation Section, by James McElhaney, Esq.
3. "The Art Of Formulating Questions: Preparation Of Witnesses." by Neal R. Sonnett, Esq., 2 Biscayne Blvd., 1 Biscayne Tower, Ste.2600, Miami, Fla. 33131
4. "The Drama and Psychology of Persuasion in the Defendant's Opening Statement," by Jodie English, Esq. (I know this outline is about direct examination, but this is an exceptional article that explains the psychological bases for many of the techniques recommended in this outline.)
5. Joe Guastaferro, Actor, Director and Trial Consultant. 4170 N. Marine Drive, #19L, Chicago, Ill. 60613. Just about anything Joe has ever said or done!
6. "Jury Psychology" by Paul Lisnek, J.D., Ph.D., Trial Consultant. 612 N. Michigan Ave., Suite 217, Chicago, Ill. 60611.

Any thoughts, comments or suggestions to improve this outline? Share them, please. Write me at Office of the Public Defender, Training and Continuing Education Division, 6 St. Paul Street, Baltimore, Maryland 21202, call me at (410) 767-8466 or FAX to me at (410) 333-8496. Thank you.

THE THREE P'S OF DIRECT EXAMINATION

1. PLAYERS

   Select witnesses who advance your theory of the case

2. PREPARATION

   a. Think about your questions

      i. Open-ended

      - Who
      - What
      - When
      - Where
      - How
      - Why
      - Tell us about/Describe

      ii. Specific

   b. Prepare and practice with the witness

3. PRODUCTION

   a. Remember primacy & recency

   b. Use "chapters" and "signposts"

   c. Elicit factual details

   d. Tap into your frustrated inner actor

   b. Have a conversation with the witness

   f. LISTEN

State v. Big Bad Wolf

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."

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."

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."

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."

You can lead on cross

- Rule 611 (c): "Ordinarily leading questions should be allowed on cross examination."

Impeachment

- A prior statement that is inconsistent with the witnesses testimony may be used to impeach that witness.

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)

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."

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

Polygraphs

- The results of polygraph examinations are strictly forbidden to be placed into evidence.

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:

- (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.

Opinion on truth telling

- Improper opinion evidence under Rule 701 and improper expert evidence under Rule 702.

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."

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."

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."

Corroboration

- In North Carolina, prior consistent statements of the witness may be introduced to corroborate that witness's testimony.

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)

Out of court statements not hearsay if not being offered for truth of the matter asserted.

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."