Issue Preservation and Development in Criminal Appeals

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Appellate Rule 10(a)(1)

- "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion,
- "stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.
- "It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion."

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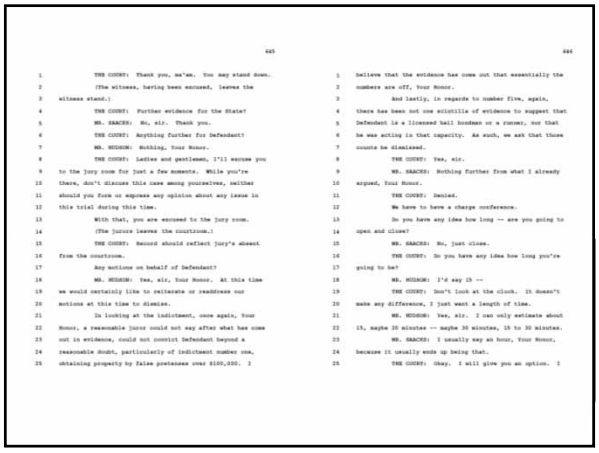

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THE COURT: Thank you, ma'am. You may stand down.
(The witness, having been excused, leaves the witness stand.)
THE COURT: Further evidence for the State?
MR. SAACKS: No, sir. Thank you.
THE COURT: Anything further for Defendant?
MR. HUDSON: Nothing, Your Honor.
THE COURT: Ladies and gentlemen, I'll excuse you to the jury room for just a few moments. While you're there, don't discuss this case among yourselves, neither should you form or express any opinion about any issue in this trial during this time.
With that, you are excused to the jury room.
(The jurors leaves the courtroom.)
THE COURT: Record should reflect jury's absent from the courtroom.
Any motions on behalf of Defendant?
MR. HUDSON: Yes, sir, Your Honor. At this time we would certainly like to reiterate or readdress our motions at this time to dismiss.
In looking at the indictment, once again, Your Honor, a reasonable juror could not say after what has come out in evidence, could not convict Defendant beyond a reasonable doubt, particularly of indictment number one, obtaining property by false pretenses over $100,000. I

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believe that the evidence has come out that essentially the numbers are off, Your Honor.
And lastly, in regards to number five, again, there has been not one scintilla of evidence to suggest that Defendant is a licensed bail bondman or a runner, nor that he was acting in that capacity. As such, we ask that those counts be dismissed.
THE COURT: Yes, sir.
MR. SAACKS: Nothing further from what I already argued, Your Honor.
THE COURT: Denied.
We have to have a charge conference.
Do you have any idea how long -- are you going to open and close?
MR. SAACKS: No, just close.
THE COURT: Do you have any idea how long you're going to be?
MR. HUDSON: I'd say 15 --
THE COURT: Don't look at the clock. It doesn't make any difference, I just want a length of time.
MR. HUDSON: Yes, sir. I can only estimate about 15, maybe 30 minutes -- maybe 30 minutes, 15 to 30 minutes.
MR. SAACKS: I usually say an hour, Your Honor, because it usually ends up being that.
THE COURT: Okay. I will give you an option. I

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State v. Golder, 839 S.E.2d 782 (N.C. 2020):

- "Rule 10(a)(3) of the North Carolina Rules of Appellate Procedure provides that, in a criminal case, to preserve an issue concerning the sufficiency of the State's evidence, the defendant must make 'a motion to dismiss the action … at trial.'" *Id*. at 245, 839 S.E.2d at 787.
- "Rule 10(a)(3) does not require that the defendant assert a specific ground for a motion to dismiss for insufficiency of the evidence." *Id*. at 245-46, 839 S.E.2d at 788.
- "By not requiring that a defendant state the specific grounds for his or her objection, Rule 10(a)(3) provides that a defendant preserves all insufficiency of the evidence issues for appellate review simply by making a motion to dismiss the action at the proper time." *Id*. at 246, 839 S.E.2d at 788.
- "We hold that, under Rule 10(a)(3), and our case law, defendant's simple act of moving to dismiss at the proper time preserved all issues related to the sufficiency of the evidence for appellate review." *Id*.

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- As this Court has recognized, "a variance-based challenge is, essentially, a contention that the evidence is insufficient to support a conviction." *State v. Gayton-Barbosa*, 197 N.C. App. 129, 134, 676 S.E.2d 586, 590 (2009). Our Supreme Court recently clarified that, under Rule 10(a)(3) of the Rules of Appellate Procedure, "a defendant's motion to dismiss preserves all issues related to sufficiency of the State's evidence for appellate review." *State v. Golder*, 374 N.C. 238, 246, 839 S.E.2d 782, 788 (2020). Following *Golder*, the Supreme Court has "assum[ed]" a motion to dismiss preserves a variance-based argument under *Golder*'s holding. *State v. Smith*, 846 S.E.2d 492, 496 (N.C. 2020). This Court should do the same.

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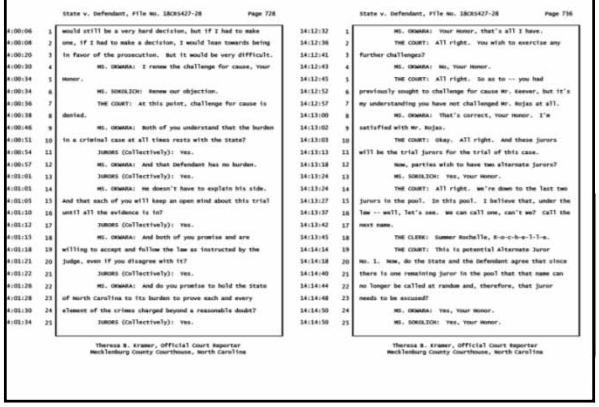

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would still be a very hard decision, but if I had to make one, if I had to make a decision, I would lean towards being in favor of the prosecution. But it would be very difficult.

MS. OHANNA: I renew the challenge for cause, Your Honor.

MS. SOKOLICH: Renew our objection.

THE COURT: At this point, challenge for cause is denied.

MS. OHANNA: Both of you understand that the burden in a criminal case at all times rests with the State?

JURORS (Collectively): Yes.

MS. OHANNA: And that Defendant has no burden.

JURORS (Collectively): Yes.

MS. OHANNA: He doesn't have to explain his side. And that each of you will keep an open mind about this trial until all the evidence is in?

JURORS (Collectively): Yes.

MS. OHANNA: And both of you promise and are willing to accept and follow the law as instructed by the judge, even if you disagree with it?

JURORS (Collectively): Yes.

MS. OHANNA: And do you promise to hold the State of North Carolina to its burden to prove each and every element of the crimes charged beyond a reasonable doubt?

JURORS (Collectively): Yes.

Theresa B. Kramer, Official Court Reporter
Mecklenburg County Courthouse, North Carolina

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MS. OHANNA: Your Honor, that's all I have.

THE COURT: All right. You wish to exercise any further challenges?

MS. OHANNA: No, Your Honor.

THE COURT: All right. So as to -- you had previously sought to challenge for cause Mr. Keever, but it's my understanding you have not challenged Mr. Rojas at all.

MS. OHANNA: That's correct, Your Honor. I'm satisfied with Mr. Rojas.

THE COURT: Okay. All right. And these jurors will be the trial jurors for the trial of this case.

Now, parties wish to have two alternate jurors?

MS. SOKOLICH: Yes, Your Honor.

THE COURT: All right. We're down to the last two jurors in the pool. In this pool. I believe that, under the law -- well, let's see. We can call one, can't we? Call the next name.

THE CLERK: Summer Rochelle, R-o-c-h-e-l-l-e.

THE COURT: This is potential Alternate Juror No. 1. Now, do the State and the Defendant agree that since there is one remaining juror in the pool that that name can no longer be called at random and, therefore, that juror needs to be excused?

MS. OHANNA: Yes, Your Honor.

MS. SOKOLICH: Yes, Your Honor.

Theresa B. Kramer, Official Court Reporter
Mecklenburg County Courthouse, North Carolina

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N.C.G.S. §15A-1214:

- (h) In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:
  - (1) Exhausted the peremptory challenges available to him;
  - (2) Renewed his challenge as provided in subsection (i) of this section; and
  - (3) Had his renewal motion denied as to the juror in question.
- (i) A party who has exhausted his peremptory challenges may move orally or in writing to renew a challenge for cause previously denied if the party either:
  - (1) Had peremptorily challenged the juror; or
  - (2) States in the motion that he would have challenged that juror peremptorily had his challenges not been exhausted.
- The judge may reconsider his denial of the challenge for cause, reconsidering facts and arguments previously adduced or taking cognizance of additional facts and arguments presented. If upon reconsideration the judge determines that the juror should have been excused for cause, he must allow the party an additional peremptory challenge.

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- Even assuming the defense attorney did not comply with N.C. Gen. Stat. § 15A-1214(h) and (i), those provisions are not controlling because they conflict with the North Carolina Constitution. Article IV, § 13(2) of the North Carolina Constitution expressly grants our Supreme Court the "exclusive authority to make rules of procedure and practice for the Appellate Division." In *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007); *State v. Bennett*, 308 N.C. 530, 535, 302 S.E.2d 786, 790 (1983); and *State v. Elam*, 302 N.C. 157, 160, 273 S.E.2d 661, 664 (1981), our Supreme Court struck down statutory provisions that purported to state that certain issues were preserved without objection because they conflicted with Article IV, § 13(2) of the North Carolina Constitution.
- Here, N.C. Gen. Stat. § 15A-1214 purports to create a procedure for preserving challenges for cause during jury selection. As in *Bennett*, *Elam*, and *Oglesby*, N.C. Gen. Stat. § 15A-1214(h) and (i) are unconstitutional because they conflict with the Supreme Court's constitutional authority to create rules of preservation. In the absence of N.C. Gen. Stat. § 15A-1214(h) and (i), Appellate Rule 10(a)(1) states that in order to preserve an argument for appeal, a party must present a "timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." In this case, the defense attorney made timely challenges to Mr. Keever. In addition, the basis of her challenges was apparent from the context of jury selection. The focus of the defense attorney's questioning of Mr. Keever was that he was biased in favor of the State. Therefore, under Appellate Rule 10(a)(1), the defense attorney's challenge to Mr. Keever is preserved for review.

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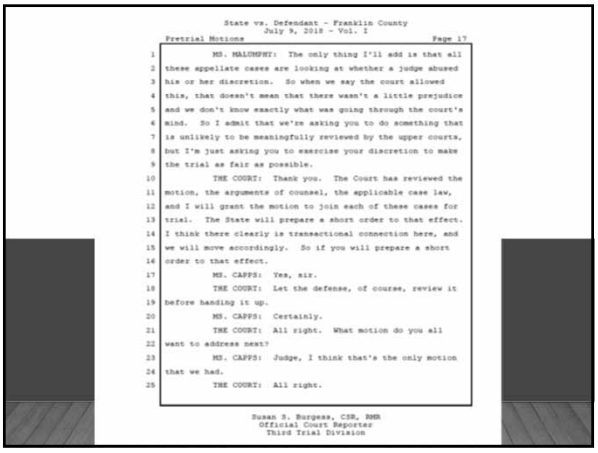

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MS. MALONEY: The only thing I'll add is that all these appellate cases are looking at whether a judge abused his or her discretion. So when we say the court allowed this, that doesn't mean that there wasn't a little prejudice and we don't know exactly what was going through the court's mind. So I admit that we're asking you to do something that is unlikely to be meaningfully reviewed by the upper courts, but I'm just asking you to exercise your discretion to make the trial as fair as possible.

THE COURT: Thank you. The Court has reviewed the motion, the arguments of counsel, the applicable case law, and I will grant the motion to join each of these cases for trial. The State will prepare a short order to that effect. I think there clearly is transactional connection here, and we will move accordingly. So if you will prepare a short order to that effect.

MS. CAPPS: Yes, sir.

THE COURT: Let the defense, of course, review it before handing it up.

MS. CAPPS: Certainly.

THE COURT: All right. What motion do you all want to address next?

MS. CAPPS: Judge, I think that's the only motion that we had.

THE COURT: All right.

Susan S. Burgess, CSR, RMR
Official Court Reporter
Third Trial Division

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State v. Yarborough, 843 S.E.2d 454 (N.C. Ct. App. 2020):

- Section 15A-927 of our General Statutes requires a criminal defendant to file a motion to sever charges prior to trial or, if the grounds for severance are not known before trial, file a motion to sever no later than the close of the State's evidence. N.C. Gen. Stat. §§ 15A-927(a)(1)-(2) (2017). A defendant waives his right to severance "if the motion is not made at the appropriate time." *Id.* § 15A-927(a)(1). . . Here, Defendant made no motion to sever, either before or during trial, but merely objected to the State's motion for joinder. Defendant now asks this Court to exercise its discretion under Rule 2 of our Rules of Appellate Procedure to review this issue. N.C. R. App. P. 2 (2020). We decline to do so.

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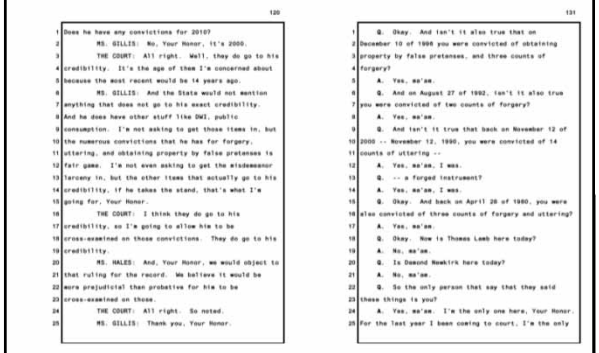
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Does he have any convictions for 2010?
MS. GILLIS: No, Your Honor, it's 2000.
THE COURT: All right. Well, they do go to his credibility. It's the age of them I'm concerned about because the most recent would be 14 years ago.
MS. GILLIS: And the State would not mention anything that does not go to his exact credibility. And he does have other stuff like DWI, public consumption. I'm not asking to get those items in, but the numerous convictions that he has for forgery, uttering, and obtaining property by false pretenses is fair game. I'm not even asking to get the misdemeanor larceny in, but the other items that actually go to his credibility, if he takes the stand, that's what I'm going for, Your Honor.
THE COURT: I think they do go to his credibility, so I'm going to allow him to be cross-examined on those convictions. They do go to his credibility.
MS. HALES: And, Your Honor, we would object to that ruling for the record. We believe it would be more prejudicial than probative for him to be cross-examined on those.
THE COURT: All right. So noted.
MS. GILLIS: Thank you, Your Honor.

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Q. Okay. And isn't it also true that on December 10 of 1998 you were convicted of obtaining property by false pretenses, and three counts of forgery?
A. Yes, ma'am.
Q. And on August 27 of 1992, isn't it also true you were convicted of two counts of forgery?
A. Yes, ma'am.
Q. And isn't it true that back on November 12 of 2000 -- November 12, 1990, you were convicted of 14 counts of uttering --
A. Yes, ma'am, I was.
Q. -- a forged instrument?
A. Yes, ma'am, I was.
Q. Okay. And back on April 20 of 1990, you were also convicted of three counts of forgery and uttering?
A. Yes, ma'am.
Q. Okay. Now is Thomas Lamb here today?
A. No, ma'am.
Q. Is Daeond Newkirk here today?
A. No, ma'am.
Q. So the only person that say that they said these things is you?
A. Yes, ma'am. I'm the only one here, Your Honor. For the last year I been coming to court, I'm the only

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State v. Joyner, 243 N.C. App. 644, 777 S.E.2d 332 (2015):

- "To be timely, an objection to the admission of evidence must be made at the time it is actually introduced at trial." *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (internal quotation marks omitted). Here, defendant opposed the admission of all prior conviction evidence during a *voir dire* hearing held before his testimony, but he failed to object to the evidence in the presence of the jury when it was actually offered. Unfortunately for defendant, his objection was insufficient to preserve the issue for appellate review.

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- In *State v. Phillips*, 836 S.E.2d 866 (N.C. Ct. App. 2019), the defendant first objected to the contested evidence in the jury's presence, and the trial court overruled the objection. *Id.* at 870, 873. The parties then held a *voir dire* of the witness and the defendant again objected. At the conclusion of the *voir dire*, the trial court ruled the objection would "'continue to be overruled,' confirming the discussion and ruling related back to the first objection." *Id.* at 872, 873. However, the defendant did not object when the witness testified to the contested evidence in front of the jury. *Id.* at 872. Nevertheless, this Court held, "Defendant's objection was timely made, renewed and preserved for appellate review." *Id.* at 873.

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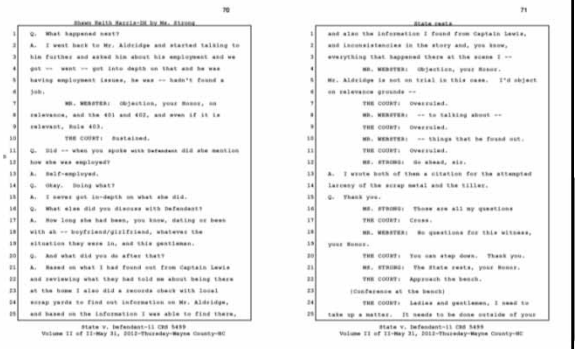

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State v. Kay, 2014 N.C. App. LEXIS 75 (2014) (unpublished):

Notwithstanding her objection immediately following the contested testimony, we conclude that defendant has failed to preserve this issue for appellate review:

> "Where inadmissibility of testimony is not indicated by the question, but appears only in the witness' response, the proper form of objection is a motion to strike the answer, or the objectionable part of it, made as soon as the inadmissibility is evident.' When counsel objects after a witness has answered the question and fails to make a motion to strike, the objection is waived.

State v. Gamez, 228 N.C. App. 329, 331, 745 S.E.2d 876, 877 (2013) (quoting *State v. Goss*, 293 N.C. 147, 155, 235 S.E.2d 844, 850 (1977); citing *State v. Curry*, 203 N.C. App. 375, 387, 692 S.E.2d 129, 138 (2010)). The transcript shows that defendant made no motion to strike Detective Harris' testimony. Accordingly, she waived her objection. Because she has not sought plain error review pursuant to N.C. R. App. P. 10(a)(4), her argument is overruled.

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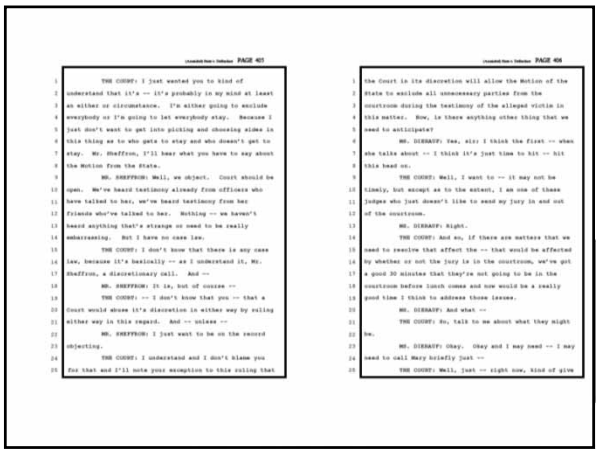

THE COURT: I just wanted you to kind of understand that it's -- it's probably in my mind at least an either or circumstance. I'm either going to exclude everybody or I'm going to let everybody stay. Because I just don't want to get into picking and choosing aides in this thing as to who gets to stay and who doesn't get to stay. Mr. Steffron, I'll hear what you have to say about the Motion from the State.

MR. STEFFRON: Well, we object. Court should be open. We've heard testimony already from officers who have talked to her, we've heard testimony from her friends who've talked to her. Nothing -- we haven't heard anything that's strange or need to be really embarrassing. But I have no case law.

THE COURT: I don't know that there is any case law, because it's basically -- as I understand it, Mr. Steffron, a discretionary call. And --

MR. STEFFRON: It is, but of course --

THE COURT: -- I don't know that you -- that a Court would abuse it's discretion in either way by ruling either way in this regard. And -- unless --

MR. STEFFRON: I just want to be on the record objecting.

THE COURT: I understand and I don't blame you for that and I'll note your exception to this ruling that

the Court in its discretion will allow the Motion of the State to exclude all unnecessary parties from the courtroom during the testimony of the alleged victim in this matter. Now, is there anything other thing that we need to anticipate?

MS. DIBRAFF: Yes, sir; I think the first -- when she talks about -- I think it's just time to hit -- hit this head on.

THE COURT: Well, I want to -- it may not be timely, but except as to the extent, I am one of those judges who just doesn't like to send my jury in and out of the courtroom.

MS. DIBRAFF: Right.

THE COURT: And so, if there are matters that we need to resolve that affect the -- that would be affected by whether or not the jury is in the courtroom, we've got a good 30 minutes that they're not going to be in the courtroom before lunch comes and now would be a really good time I think to address those issues.

MS. DIBRAFF: And what --

THE COURT: So, talk to me about what they might be.

MS. DIBRAFF: Okay. Okay and I may need -- I may need to call Mary briefly just --

THE COURT: Well, just -- right now, kind of give

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State v. Rollins, 221 N.C. App. 572, 729 S.E.2d 73 (2012):

- Defendant objected based on his contention that "[c]ourt should be open." We hold that it was apparent from the context that defendant was objecting to the prosecution's attempt to close the trial in violation of defendant's constitutional right to a public trial. *See* N.C.R. App. P. 10(a)(1) (2012) (stating that an objection is preserved so long as the specific ground for the objection is "apparent from the context"). Defendant's argument is, therefore, preserved for appellate review.

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State v. Campbell, 846 S.E.2d 804, 808 (2020):

A verbatim transcript need not be furnished in every case for us to review whether a defendant established a *prima facie Batson* claim before the trial court. *See State v. Sanders*, 95 N.C. App. 494, 499, 383 S.E.2d 409, 412 (1989) (acknowledging even without a verbatim transcript of jury selection, the record contained "the barest essentials" to permit review: "the racial composition of the jury, the number of [African American] jurors excused, and the State's proffered reasons for their exclusion. The record also contains defense counsel's response to the prosecutor's explanations and the trial judge's conclusions."). Yet a defendant must include some evidence in the record, in one form or another, shedding light on the aforementioned factors to enable appellate review of a *Batson* claim. A narrative summary of *voir dire* proceedings, made during the *Batson* hearing and agreed to by defense counsel, the prosecutor, and the trial court, as was done here, may suffice to permit review. Moreover, the narrative summary in this case was minimally sufficient to enable review.

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- **RULE 9(C)(1) STATEMENT REGARDING JURY SELECTION**
- The following jurors are Caucasian/white: Kristina Richardson, Michael Howard, Mary Lane, Celia Heneghan, Alicia Fiammetta, Thomas Bullock, Angela Garrison, Tyler Ashbridge, Kirsten Patterson, Roger Young, David Line, Barbara Litschert, Thomas Nickolopolous, Jean Jones, William Montgomery, Linda Cook, Nathan Spanheimer, Jamie Rimany, James Slonneger, Megan Coffey, Sue Flood, and Skye Klink. The following jurors are Hispanic: Rene Rosales and William Behena. The following jurors are African-American/black: Kelly Taylor, Latasha Pearson, Pernell Harris, Darrell Summers, Kristen Wiley, and Leon Coleman. Mr. Dontae Anthony and Mr. Deangelo Johnson are African-American/black. Mr. Lehman Evans is Caucasian/white.

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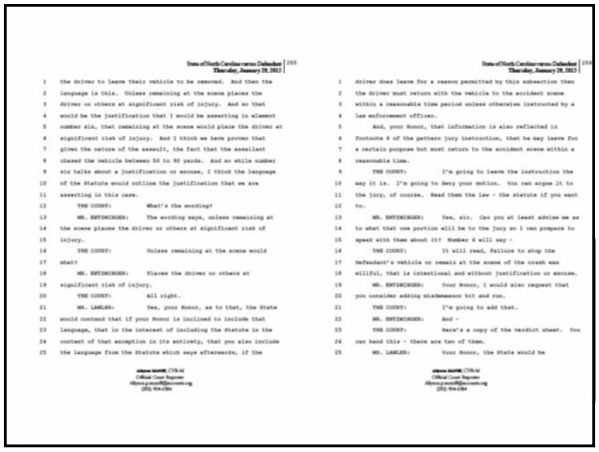

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State v. Yaw, 2016 N.C. App. LEXIS 758 (2016) (unpublished):

However, that request was made orally rather than in writing, and, for that reason, Yaw's argument on appeal fails. Requesting modifications to pattern jury instructions is "tantamount to a request for special instructions." *State v. McNeill*, 346 N.C. 233, 240, 485 S.E.2d 284, 288 (1997), *cert. denied*, 522 U.S. 1053, 118 S. Ct. 704, 139 L. Ed. 2d 647 (1998). In North Carolina, requests for special jury instructions must be written and submitted to the trial judge at or before the charge conference. *See* N.C. Gen. Stat. § 15A-1231 (2015); Gen. R. Pract. Super. and Dist. Ct. 21, 2015 Ann. R. N.C. 16. Our Supreme Court has held that where a defendant "did not submit . . . his proposed modifications in writing, . . . it was not error for the trial court to fail to charge as requested." *McNeill*, 346 N.C. at 240, 485 S.E.2d at 288. Because Yaw's modification request was not made in writing, as a matter of law, there was no error in the trial court's denial of his request.

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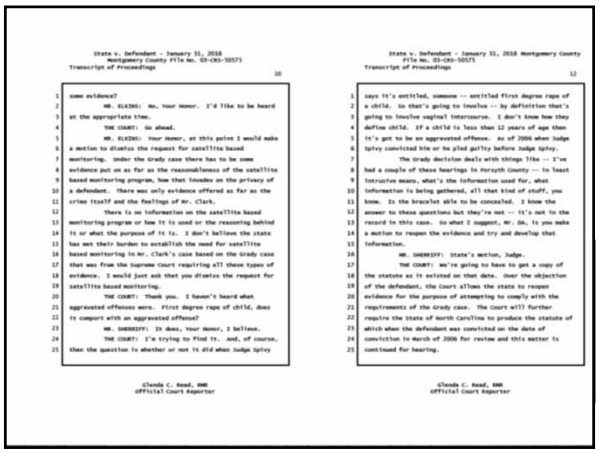

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Montgomery County File No. 03-CRS-50575
Transcript of Proceedings
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some evidence?
MR. ELKINS: No, Your Honor. I'd like to be heard at the appropriate time.
THE COURT: Go ahead.
MR. ELKINS: Your Honor, at this point I would make a motion to dismiss the request for satellite based monitoring. Under the Grady case there has to be some evidence put on as far as the reasonableness of the satellite based monitoring program, how that invades on the privacy of a defendant. There was only evidence offered as far as the crime itself and the feelings of Mr. Clark.
There is no information on the satellite based monitoring program or how it is used or the reasoning behind it or what the purpose of it is. I don't believe the state has met their burden to establish the need for satellite based monitoring in Mr. Clark's case based on the Grady case that was from the Supreme Court requiring all these types of evidence. I would just ask that you dismiss the request for satellite based monitoring.
THE COURT: Thank you. I haven't heard what aggravated offenses were. First degree rape of child, does it comport with an aggravated offense?
MR. SHERRIFF: It does, Your Honor, I believe.
THE COURT: I'm trying to find it. And, of course, then the question is whether or not it did when Judge Spivy

Glenda C. Read, RMR
Official Court Reporter

State v. Defendant - January 31, 2018 Montgomery County
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says it's entitled, someone -- entitled first degree rape of a child. So that's going to involve -- by definition that's going to involve vaginal intercourse. I don't know how they define child. If a child is less than 12 years of age then it's got to be an aggravated offense. As of 2006 when Judge Spivy convicted him or he pled guilty before Judge Spivy.
The Grady decision deals with things like -- I've had a couple of these hearings in Forsyth County -- to least intrusive means, what's the information used for, what information is being gathered, all that kind of stuff, you know. Is the bracelet able to be concealed. I know the answer to these questions but they're not -- it's not in the record in this case. So what I suggest, Mr. DA, is you make a motion to reopen the evidence and try and develop that information.
MR. SHERRIFF: State's motion, Judge.
THE COURT: We're going to have to get a copy of the statute as it existed on that date. Over the objection of the defendant, the Court allows the state to reopen evidence for the purpose of attempting to comply with the requirements of the Grady case. The Court will further require the State of North Carolina to produce the statute of which when the defendant was convicted on the date of conviction in March of 2006 for review and this matter to continued for hearing.

Glenda C. Read, RMR
Official Court Reporter

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N.C.G.S. §1A-1, Rule 46(b):

- With respect to pretrial rulings, interlocutory orders, trial rulings, and other orders of the court not directed to the admissibility of evidence, formal objections and exceptions are unnecessary. In order to preserve an exception to any such ruling or order or to the court's failure to make any such ruling or order, it shall be sufficient if a party, at the time the ruling or order is made or sought, makes known to the court the party's objection to the action of the court or makes known the action that the party desires the court to take and the party's grounds for its position. If a party has no opportunity to object or except to a ruling or order at the time it is made, the absence of an objection or exception does not thereafter prejudice that party.

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Issues that are automatically preserved for appeal:

- 1. Subject matter jurisdiction
- 2. Non-waivable state constitutional rights (*e.g.*, N.C. Const. Art. I, Section 24)
- 3. Violations of a statutory mandate. *See In re E.D.*, 827 S.E.2d 450 (N.C. 2019)
- 4. Sentencing errors (but not unpreserved constitutional claims)
- 5. Deviations from promised pattern jury instructions
- 6. Trial court calling or questioning a witness.

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What to do if you have a preservation problem: (not nothing)

- Fit the issue into an automatically preserved category
- Plain error—FUNDAMENTAL error in admission of evidence or jury instructions that PROBABLY caused the jury to convict
- *Ex mero motu*—Closing arguments
- IAC (Ineffective Assistance of Counsel)
- Rule 2
- If preservation is unclear, ARGUE IN THE ALTERNATIVE

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Please pledge to give an issue preservation talk to your home bar

- Get your colleagues in the trial bar to:
  - Request complete recordation in every case
  - Give proper notice of appeal in criminal cases
  - Give proper written notice of appeal in SBM cases
  - Preserve the denial of a motion to suppress when the client pleads guilty
  - Object every time contested evidence comes in
  - Etc.

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Resources

- IDS website
  - Training Presentations
  - http://www.aoc.state.nc.us/www/ids/
- SOG website
  - Defender Manual
  - http://defendermanuals.sog.unc.edu/
- OAD on-call attorneys

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Ethics in Criminal Appeals

1

Today's topics

1. Common situations in client relationships

2. Responding to the State's brief

2

You're fired.

- Ethics rules: **1.16(a)** Comments 3, 5 and 6; **1.14** Diminished capacity
- Indigent client cannot fire appointed attorney; motion to withdraw must be filed and granted.
- Rules say:
  - Do not move to withdraw until client is informed of consequences.
  - If competence is in doubt, take steps to address.
- See handouts, including separate memo with detailed suggestions about client management strategies.

3

Argue this.

- The appellate lawyer decides what issues to raise and is not required to argue any issue even if it is non-frivolous. *See Jones v. Barnes*, 463 U.S. 745 (1983).
- This case gives you the right to decide what issues to raise, using your professional judgment.

4

Competence questions

- Rule 1.16 (withdrawing)
- Comment [6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.
- Disabilityrightsnc.org

5

RULE 1.14 Client with diminished capacity

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem or guardian.

Disability Rights: disabilityrightsnc.org

6

Rule 3.3 Candor toward the tribunal

(a) A lawyer shall not knowingly:

(1) **make a false statement** of material fact or law to a tribunal or **fail to correct a false statement** of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

7

Rule 3.4 Fairness to opposing party and counsel

Comment [9] .... **Refraining from abusive or obstreperous conduct** is a corollary of the advocate's right to speak on behalf of litigants. **A lawyer may stand firm against abuse by a judge but should avoid reciprocation;** the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, **and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.**

8

Rule 3.4 Fairness (continued)

Comment [10] As professionals, lawyers are expected to **avoid disruptive, undignified, discourteous, and abusive behavior**. [This includes] **angry outbursts, insults, slurs, personal attacks, and unfounded personal accusations** as well as to threats, bullying, and other attempts to intimidate or humiliate judges, opposing counsel, litigants, witnesses, or court personnel. **Zealous advocacy does not rely upon such tactics and is never a justification for such conduct**. ....

Similarly, insults, slurs, threats, personal attacks, and groundless personal accusations **made in documents filed** with the tribunal are **also prohibited** by this Rule.

9

True examples

- Specious. Absurd. Delusional. Hypertechnical. Laughable.
- Wrong. Nonsense. Not so.

- These are all taken from one State's brief in an old case of mine:
  - Defendant misreads the law.
  - Defendant relies on "wistful language taken out of context."
  - Defendant imagines intent that did not exist.
  - It is telling that defendant attempts such puffery.
  - "Curiously, after initially conceding ... Defendant later equivocates ...

10

The panel over the course of its opinion repeatedly buries those crucial details. ... "The only information in the affidavit linking Mr. Client to 7085 Laurinburg Road," it says, "is the fact that officers arrested Client at that location." Id. at 216. For a robbery he had just fled and in the presence of the possible get-away car from a recent similar robbery nearby, one is impelled to add silently. "The only information in the affidavit tying Client to 7085 Laurinburg Road," continues the panel (this time getting part of the way there), "is the statement that Hoke County officers observed a dark blue Nissan Titan 'at the residence of 7085 Laurinburg Road ... when serving a felony arrest - 10 - warrant on Client issued by Smithfield Police Department.'" Id. at 217. After he had just been seen fleeing a robbery that possessed all the hallmarks of three robberies committed nearby in the preceding thirty days, the first of which had featured none other than a dark blue Nissan Titan get-away car. And lastly, fancies the panel, "from the information in the affidavit, 7085 Laurinburg Road could have been a someone [sic] else's home....[t]hat Client visited." Id. Ditto. To be sure, magistrates must strive to be "neutral and detached." Allman, 369 N.C. at 294-296, 794 S.E.2d at 303-304. But bending this far backward risks detaching probable cause doctrine from its animating corpus juris entirely.

11

Which is stronger?

Name-calling	Polite firmness	Positive statement
The State's argument is STUPID (or insert other adjective from list), because the evidence was insubstantial	Contrary to the State's assertion (State's Brief at 9), the piece of evidence they cite did not constitute substantial evidence. Explain...	(Gives no oxygen to State's arguments) The State's evidence on the element of X was insubstantial. Explain ...

12

Patient firmness:

In its Brief, the State argued that [.....] (State's Brief at 10-11) This argument does not recognize that, even if there was probable cause to search the Kia, a warrant was required because the Kia was on private property and no exception to the warrant requirement applied under these facts. Officer K. was not entitled to search the Kia without a warrant, and therefore was not entitled to walk into the private yard to peer inside the Kia in hopes of discovering evidence.

The State has urged this Court .... In response to this argument, Mr. Client refers the Court to the Fourth Amendment, and to this wisdom from the United States Supreme Court:

13

Thanks everyone

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OAD 2020

FAQ about Client Relationships

Q. I have written the client, but the client has not responded. What do I do?

A. Continue writing the client with updates and proceed with the appeal.

Q. I found no non-frivolous issues in my case. I have written the client, but the client has not responded. What do I do?

Submit the case to OAD for Anders review. Once you hear back from OAD, send the client an update. Proceed with the appeal, including the filing of an Anders brief, until instructed otherwise by the client. However, if your client is not in prison and you cannot locate your client after making reasonable efforts, you could consider filing a motion to withdraw as counsel based on a theory of constructive discharge. See R.P.C. 223. Before filing such a motion, you should consult with the Appellate Defender.

Q. By oral or written communication, the client said he wanted to withdraw the appeal. The client has not returned the signed notice of withdrawal of appeal for filing. What do I do?

A. Contact the client again forwarding another notice of withdrawal of appeal. In the interim, obtain any necessary extensions to prevent the appeal from falling out of time. If an extension is needed from the COA, the motion could assert the reason without revealing confidential information: "An additional 30 days is required to file the brief because Ms. Smith has important decisions to make regarding the direction the direction of this appeal. The additional 30 days is needed to allow time for communication with Ms. Smith regarding how to proceed in this case." If the client never returns the signed withdrawal of appeal notice, you are required to continue with the appeal, even if you ultimately file an Anders brief. However, if your client is not in prison and you cannot locate your client after making reasonable efforts, you could consider filing a motion to withdraw as counsel based on a theory of constructive discharge. See R.P.C. 223. Before filing such a motion, you should consult with the Appellate Defender.

Q. My client demands that I include certain issues in the brief, or demands to review a draft of the brief before filing. What should I do?

A. Although your client has a right to be informed of the appellate process and to receive copies of pleadings, your client does not have a right to direct the way in which you proceed with the appeal. *See Jones v. Barnes*, 463 U.S. 745 (1983). As the appointed appellate attorney, you decide which issues are to be raised in the brief. The client can suggest issues or ideas to you, but is not entitled to review the brief before you file it. It is your choice to what extent you want to engage with the client over the content of the brief. However, you should try to maintain your relationship with your client by providing your client with a frank and thorough assessment of the issues your client wants you to raise.

Q. My client wants to fire me; or says he wants a different appellate attorney.

A. Explain to your client the rules that apply and the potential consequences. Indigent persons on appeal are entitled to the appointment of appellate counsel pursuant to N.C. Gen. Stat. § 7A-451. Because you are appointed, the client cannot fire you; you have to ask the court for permission to withdraw. And there is no right to appointed counsel of choice. Explain that you would need to file a motion to withdraw as counsel, and you would include his wishes in the motion – asking either to proceed pro se or to have the Office of the Appellate Defender appoint new counsel. Explain the possible outcomes, and that there is no way to know which one will happen: (1) the Court could ignore the motion; (2) the Court could deny the motion, leaving you as the appellate lawyer; (3) the Court could grant the motion with a variety of remedies: reappoint OAD; allow the client to proceed pro se; order the client to proceed pro se against his wishes; be silent on the remedy.

Also, consider the context. Is there any issue of competence? Are the client's reasons already clear to you? If not, ask what his reasons are and try to address them. Consider a call or in-person visit if you think it will help resolve the problem, or if you think it is necessary to be sure the client understands his decision.

If you are satisfied that the client is making an informed choice and still wants you to withdraw, then promptly move to withdraw either in the trial court or the appellate court (depending on the current posture of the case).

* See separate detailed memo on this topic.

Q. Should I send a copy of pleadings to my client? Which ones?

A. You should always send a copy of the record on appeal, appellant's brief, State's brief, and appellant's reply brief to the client as soon as practicable after they are filed. Do not wait until you have received all appellate pleadings before sending them. It is the client's appeal and the client should receive the documents as they are filed. Include a cover letter to your client explaining what the document is.

Q. The client writes and wants his file. Or, an attorney contacted me and wants the client's file and has sent a release that appears to have been signed by the client. What do I do?

A. The client owns the file. Send it. If you are concerned it's a fake release, verify it first. You can exclude "personal notes and incomplete work product." To save paper and effort, it is fine to ask the client (or the attorney) which parts of the file he wants; they may not need the whole thing. It is also fine, and practical, to ask the client if it he would prefer you send it electronically to a family member. Clients in prison often lose their files for a variety of reasons.

Q. My client lost and I cannot reach him to discuss PDR. Should I file?

OAD policy states you may only file a PDR with a client's written permission. If you have not heard back from a client, doublecheck his location and take reasonable steps to be sure he has received your letter. If the client does not respond and you are satisfied he received the notice and understands it, you should not file the PDR. If the client is out of prison and has disappeared, you should not file the PDR unless there are exceptional circumstances. In that situation, call OAD to discuss. If the client reaches you after the deadline and does want to file, you (or he) can still file a petition for certiorari.

Q. My client gave oral permission to file the PDR but I haven't received written permission.

Contact OAD and ask for a waiver on the "written permission" rule.

SOME RELEVANT ETHICS RULES

Rule 1.16(a) Declining or terminating representation

(a)(3) A lawyer .. shall withdraw from the representation of a client if … the lawyer is discharged.

But see comments:
[3] appointed counsel needs permission of court
[5] client seeking to discharge appointed counsel should be given a full explanation of the consequences
[6] if client may have diminished capacity, make special effort to help client consider consequences; take protective actions in Rule 1.14

Rule 1.16(d) Assisting client upon withdrawal.

Comments:

[10] The lawyer may never retain papers to secure a fee. Generally, anything in the file that would be helpful to successor counsel should be turned over. This includes papers and other things delivered to the discharged lawyer by the client such as original instruments, correspondence, and canceled checks. Copies of all correspondence received and generated by the withdrawing or discharged lawyer should be released as well as legal instruments, pleadings, and briefs submitted by either side or prepared and ready for submission. *The lawyer's personal notes and incomplete work product need not be released.*

[11] A lawyer who represented an indigent on an appeal which has been concluded and who obtained a trial transcript furnished by the state for use in preparing the appeal, must turn over the transcript to the former client upon request, the transcript being property to which the former client is entitled.

Rule 3.1 Meritorious claims and contentions. A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Rule 3.3 Candor toward the tribunal.

(a) A lawyer shall not knowingly:
(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel….

Memo to Members of the Appeals Roster from Staples Hughes
Re: Circumstances Requiring a Motion to Withdraw
April 8, 2005

Folks: as a result of recent contacts from several of you and following a discussion with Ms. Alice Mine at the State Bar, I would like to try to clarify the ethical responsibility we each face when a client contacts us and asks that we withdraw from the representation so new counsel can be appointed. This is a difficult area, and when you are uncertain about what to do in a specific situation, I think it's probably a good idea to talk it through with a colleague or with Bar staff counsel. I called Ms. Mine because I became aware that I didn't fully understand the principles governing these situations. I now offer the following as a starting point for figuring out what to do:

1. First, an ounce of prevention, etc. It bears repeating that much of the time, complaints from clients and requests that we withdraw are the result of not keeping the client informed about the course of the litigation. My worst relationships with clients have been the result of neglect on my part.

2. When you receive a request to withdraw, first try to establish or reestablish communication with the client. If the client simply wants to hear from you and makes a conditional statement concerning withdrawal, my suggestion would be that you immediately write to him to address his concerns and to update him.

3. If the client clearly has demanded that you withdraw from the representation, I suggest that you visit the client in person to attempt to address his concerns. You will, of course, be compensated for this activity. Most of the time, it will be in the client's interest (and the fiscal interest of the taxpayers) that you take the time to communicate in person. It well may be that an in-person visit will be sufficient to assure the client that you are on his side and are doing everything you can to help him. It may take multiple attempts to establish communication to resolve the matter, particularly if your initial impression is that the client's request is product of frustration with his situation in general, or anxiety or anger rooted in some specific incident in the prison environment.

   Again, it would be my suggestion that in every case, you attempt to clarify that the difficulty in the relationship between you and the client cannot be rectified. Jumping the gun on moving to withdraw just because the client is difficult may simply burden a colleague with an unnecessarily problematic attorney-client relationship that can be made into a satisfactory, if not entirely pleasant, relationship simply by spending some time communicating with the client.

4. If after you take appropriate steps to try to address the client's concerns, the client is steadfast in his intent to discharge you, you are ethically bound to move to withdraw. Rule of Professional Conduct 1.16(a)(3). All rules cited below are Rules of Professional Conduct.

5. The situations in which the client expresses an intent to discharge appointed appellate counsel will tend to fall on a spectrum between two situations:

   A. You cannot establish or maintain an attorney-client relationship. The attorney client relationship is not difficult -- it is impossible. For example, the client is specifically threatening you or your loved ones with harm and you find the threats genuinely unsettling, or he is so consistently personally offensive that he has gotten under your skin and inside your head. Whether or not the client wants new counsel, you want to withdraw, not because you dislike the client, find him offensive, or have serious conflicts, but because it has become impossible to communicate with him. The attorney-client relationship has completely broken down from your point of view. This should be a very rare situation.

   B. The typical situation is that the client's demand that you withdraw is a function of completely unreasonable and unrealistic expectations, naïve and ill-informed legal theories, or absurd proposed courses of action. The client wants you to argue X, or file Y, or do Z, when X, Y, and Z at best will weaken the overall presentation of the client's case to the reviewing court. The client may be unpleasant or obnoxious, but that's not the problem. The problem is that you cannot do what the client wants and fulfill your duty of zealous representation, or that what the client wants is simply impossible, and you cannot make the client understand. The client may be mentally ill or retarded or just a fool. You believe that the client's desire that you be discharged will not serve the goal of getting the client relief from the trial court judgment and could hurt him or her, if only because substitution of counsel will delay a resolution of the appeal.

6. You must very narrowly tailor any disclosure of confidential communications you make in the motion to withdraw. You can disclose such information only to the extent that the disclosure is necessary to accomplish your ethical responsibility. See generally, Rule 1.6. Your ethical responsibility may be to end the relationship (i.e., situation A above). Your ethical responsibility may be to make the motion to withdraw, but not necessarily to advocate that the court relieve you of the representation (i.e., situation B above).

7. One way to avoid a problem with the extent of disclosure is to give your client a draft of your motion and get his written consent to file it (which may have the effect of sobering him up). You still should limit disclosure only to what is necessary to the specific situation. Even after the attorney-client relationship ends, we have a continuing duty of loyalty to our clients, see Rule 1.9, so don't gratuitously disadvantage the client just because you don't like him. While this seems an obvious point of correct ethical and professional behavior, there is certainly a temptation to take a shot at someone who has been difficult.

8. If your client will not consent to the filing of your draft motion, one approach is to make use of citation to the Rules. If the client is mentally ill and is making demands clearly rooted in dementia or paranoia, you might simply make the motion, recount the number of times you have written to the client and visited him, cite Rule 1.16(b)(4), Rule 1.14

(Client with Diminished Capacity), and Rule 3.1 (Meritorious Claims and Contentions), and attach a copy of those rules to the motion. The implicit message to the court is, "My client is mentally ill or retarded and is asking me to get out because I won't take irrational actions, but withdrawal would not be in his best interest."

9. Similarly, if the client is consistently ill-informed and persistent in ignoring the accurate information you provide, insisting that you raise a clearly unsupported claim or even a just a claim that will impair the effectiveness of the brief, you might cite Rule 1.16(a)(3), Rule 3.1 (Meritorious Claims and Contentions), and Jones v. Barnes, 463 U.S. 745, 77 L.Ed.2d 987 (1983), which holds that appellate counsel is not obligated to raise even a non-frivolous claim the client demands be raised if counsel determines that the overall effectiveness of the representation will be enhanced by not raising the claim. The message to the court is, "My unsophisticated, obnoxious, and ignorant client is asking me to run issues that will hurt him, and withdrawal is not in his best interest."

10. If you are actually seeking to terminate the representation, and the client will not consent to disclosure of specific information, you might recount your contacts with the client, state that you believe that you cannot continue to provide effective assistance of counsel, cite Rule 1.4(a)(5) ["A lawyer shall … consult with the client about any relevant limitation on the lawyer's conduct with the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law."], and/or Rule 1.16(a)(2) ["the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client"]. You explicitly tell the court you need to get out because you've tried to establish an attorney client relationship, but have found it impossible to do so. Again, this should be a rare situation, one that many of us may never encounter.

11. If the appropriate court denies the motion, you continue as counsel of record. You are obligated to communicate with the client as if the motion to withdraw had never been filed, and to continue to represent him zealously. If the court grants the motion, you are out. In that case, please document the circumstances of the withdrawal by attaching a copy of your withdrawal motion and the resulting order to your final fee application.

12. We all know that there are some people on the planet who were put here to test our patience and our senses of perspective and humor. If the rule is that we attempt to deal with them with patience, perspective, and humor, the greater good is served. If it can't be done, it can't be helped. Absent an explicit demand that you withdraw, however, a motion to withdraw will be appropriate only when there is a complete breakdown of the attorney-client relationship.

13. In a motion to withdraw in which you really are trying to terminate the representation (situation A above), please include in your motion a request that the Office of the Appellate Defender be reappointed should the motion be granted.

Thanks for your hard work and continued participation on the roster.

Trends in Fourth Amendment Cases

By Michele Goldman
Michele.A.Goldman@nccourts.org

1

Overview

1. Revival of the trespass theory for Fourth Amendment violations
2. Technology and the Fourth Amendment
3. Dissecting a traffic stop

2

You Create the Trends

Looking back to move ahead:

- Original motivation for the protection
- Original promises from *Terry v. Ohio*
- Original bases for exceptions

Distinguishing the future from the past:

- New technology needs a new understanding of 4th Amendment protection

3

Revival of the Trespass Theory for Fourth Amendment Violations

United States v. Jones, 565 U.S. 400 (2012); *Florida v. Jardines*, 569 U.S. 1 (2013); *Grady v. North Carolina* (*Grady I*), 575 U.S. 306 (2015) (*per curiam*)

A search occurs where the government physically occupies a constitutionally protected area to obtain information.

- There is tension on the Court between Trespass and Expectation of Privacy rationales.
- Whether a search occurred is a separate question from the question of reasonableness.
- Even under a trespass theory, expectations of privacy and personal security can be relevant in analyzing reasonableness.
  - Example: In SBM cases since *Grady I*, the government has not shown a significant problem (recidivism) or SBM's ability to rectify the problem (efficacy of SBM).

4

Looking Ahead

- The established exceptions based on reasonable expectation of privacy are vulnerable -- e.g. private-search doctrine; third-party doctrine. (See Gorsuch's dissent in *Carpenter*)
- *State v Falls*, No. COA20-40: Look for a possible refinement of the scope of the limited license to approach our homes

5

Technology and the Fourth Amendment

Riley v. California, 573 U. S. 373 (2014)

Carpenter v. United States, 201 L. Ed. 2d 507 (2018)

- Both cases used the reasonable expectation of privacy analysis, borrowing from concurrences in *Jones*.
  - The question in *Riley*: Is the search of a cellphone incident to arrest reasonable?
  - The question in *Carpenter*: Is obtaining CSLI from a third party a Fourth Amendment search?

6

State v. Gore

- Holding:
  - Federal claim: Good faith applies; no exclusion.
  - State constitutional claim: *Carpenter* requires pc for historical CSLI.
    - Order here supported by valid finding of pc.
- Dillon's concurrence:
  - Order was not supported by valid finding of pc.
  - BUT
    - Good faith exception applies to violations of both state and federal constitutions.
    - *State v. Perry* (obtaining CSLI is not a search) is still good law and is binding.

7

Looking Ahead

"When confronting new concerns wrought by digital technology, this Court has been careful not to uncritically extend existing precedents." *Carpenter* at 526.

- A lot of new technology is being used by law enforcement. Constitutional challenges are percolating through the courts.
  - See Shea Denning's blog posts.
- It is important to raise trespass and reasonable expectation of privacy theories.
  - Creative uses of trespass theory, e.g. Electronic trespass of electrons from GPS device through body.

8

Dissecting a Traffic Stop

Initial Stops

- *Kansas v. Glover*

Extending Detentions

- During stop
  - *State v. Duncan*
    - Cabins *Bullock*: the frisk in *Bullock* was a safety measure in furtherance of the traffic-stop purpose. A search for contraband in *Duncan* was not.
    - Unlawful search invalidates the stop
- After stop
  - *State v. Reed*:
    - Consent: looked at the totality of the circumstances
    - RAS: "Consistent with innocent travel"

Frisks

- *Duncan*:
  - Armed AND Dangerous

9

Looking Ahead: What You Can Do

- Seek enhanced protection under the NC constitution.
- Think about raising issues related to race.
  - As to the facts of your case (seizure; voluntariness of consent)
    - *State v. Bartlett*, 260 N.C. App. 579, 584 (2018): Race may be a relevant factor as to voluntariness of consent.
  - In support of the need for greater state constitutional protection
    - *State v. Johnson*, COA20-564: Pretextual stops leading to disproportionate stops and searches of young Black men amounts to a general warrant prohibited by NC constitution.
  - As an equal protection claim
    - *State v. Johnson*, COA19-520, *PDR granted by special order.*
- Develop a full record at the MTS hearing.
- Reserve the right to appeal the denial of MTS in the transcript of plea.
- Object when evidence you sought to suppress is admitted at trial.

10

Trends in Fourth Amendment Cases

1. **Revival of the trespass theory for Fourth Amendment violations**

United States v. Jones, 565 U.S. 400 (2012),
https://www.supremecourt.gov/opinions/11pdf/10-1259.pdf
Where the government physically occupies private property to obtain information, a search has occurred.
GPS device placed on Jones' wife's car. GPS was monitored for four weeks. Five justice majority opinion, two concurring opinions. Sotomayor would have found a 4th Amendment violation under both trespass and *Katz* theories. Four concurring justices (Alito, Breyer, Ginsburg, and Kagan) would have decided the case on *Katz* alone.

Grady v. North Carolina (*Grady I*), 575 U.S. 306 (2015) (*per curiam*)
https://www.supremecourt.gov/opinions/14pdf/14-593_o7jq.pdf
Applying *Jones* to SBM of sex offenders. It doesn't matter that SBM is a civil program, when the government trespasses on an individual for the purpose of obtaining information, a search has occurred.
Sent back to North Carolina to determine the reasonableness of the search.

Since *Grady I*, our courts have assessed the reasonableness of SBM searches. The decisions focus on the significant intrusions—on both personal security and expectations of privacy. In virtually all cases, our courts have found those intrusions outweigh the government's interest in monitoring. The government has not shown a significant problem (recidivism) or SBM's ability to rectify the problem (efficacy of SBM).
See State v. Grady (*Grady III*), 372 N.C. 509 (2019)
https://appellate.nccourts.org/opinions/?c=1&pdf=38471

Florida v. Jardines. 569 U.S. 1 (2013)
https://www.supremecourt.gov/opinions/12pdf/11-564_5426.pdf
Implied license used for knock and talks is limited by the habits of the country. These include place and purpose: "The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose."

North Carolina cases have applied *Jardines* and invalidated back-door knocks. *See e.g. State v. Huddy*, 253 N.C. App. 148 (2017). Watch for *State v Falls*, No. COA20-40, recently argued:
https://www.youtube.com/watch?v=8agUT-XUhdM&t=16s. *Falls*, may

further define the scope of the implied license as to time and purpose. There, officers approached Falls' home at 9:00 p.m. for a knock and talk. As they approached, they saw a man, believed to be Mr. Falls, in a car in the driveway, backing out. The officers cut across the curtilage to get to the car, approached the car in the driveway, and talked to Falls. They smelled marijuana, and things went downhill from there.

Looking ahead:

Established exceptions that grew out of the *Katz* reasonable expectation of privacy analysis are vulnerable—*e.g.* private-search doctrine; third-party doctrine. (*See* Gorsuch's dissent in *Carpenter*, discussed below.)

2. Technology and the Fourth Amendment

Riley v. California, 573 U. S. 373 (2014)

https://www.supremecourt.gov/opinions/13pdf/13-132_8l9c.pdf

Cell phones cannot be searched incident to arrest. The Court conducted a balancing test, government interest v. privacy intrusion to reach its decision. The justifications for warrantless searches incident to arrest (officers' safety, preservation of evidence) are not served by a search of a cell phone's contents. On the other side, there are significantly greater privacy interests at play in the search of a cell phone than of a physical object, like a wallet.

The decision recognized advancing technology's impact on Fourth Amendment analysis, quoting Sotomayor's concurrence in *Jones*.

Carpenter v. United States, 201 L. Ed. 2d 507 (2018)

https://www.supremecourt.gov/opinions/17pdf/16-402_h315.pdf

The Court addressed whether accessing an individual's cell site location information (CSLI) from his mobile carrier constituted a search. It does. The Court used a reasonable expectation of privacy analysis to reach its holding. The Court relied in part on the five concurring justices in *Jones*, who expressed the view that individuals have a reasonable expectation of privacy in the whole of their physical movements. This privacy interest was not defeated merely because the information was maintained by a third party.

The *Carpenter* Court acknowledged that technology has vastly increased the amount of information now available to the government. The Fourth Amendment analysis attempts to balance these technological advances with traditional expectations of privacy rather than uncritically applying old precedents to the modern world. "When

confronting new concerns wrought by digital technology, this Court has been careful not to uncritically extend existing precedents." *Id*. at 526.

Carpenter did not raise a trespass theory or seek to invalidate the third-party doctrine. Gorsuch dissented, indicating he may have concurred in the result had the trespass theory been raised. *Id*. at 583.

Post *Carpenter* issues: See Shea Denning's 3-part discussion on the UNC SOG blog: Conducting Surveillance and Collecting Location Data in a Post-Carpenter World. https://nccriminallaw.sog.unc.edu/conducting-surveillance-and-collecting-location-data-in-a-post-carpenter-world-part-iii/

State v. Gore, 846 S.E.2d 295 (N.C. Ct. App. 2020), https://appellate.nccourts.org/opinions/?c=2&pdf=38876, NOA filed, PDR pending, No. 336P20, https://www.ncappellatecourts.org/show-file.php?document_id=270100

A man was shot dead in the street, and a white Altima associated with the victim was seen leaving the area. An officer followed the car into an apartment complex. A Black male got out of the car and ran. The dead man's cellphone was found in the abandoned car. The call log on the phone showed several incoming and outgoing calls around the time of the shooting from a number that belonged to Gore. Police got a court order for Gore's cell phone records, including CSLI for 4 days. The issuing judge found:

> the applicant has shown Probable Cause that the information sought is relevant and material to an ongoing criminal investigation, involving a First Degree Murder.

Gore argued his state and federal constitutional rights were violated by the search of his cell phone records without a warrant supported by probable cause. The Court of Appeals disagreed:

- As to the Fourth Amendment challenge, the Court held the order was supported by probable cause, and even if not, the good faith exception would apply to the federal constitutional claim.
- As to the state constitutional claim, "in keeping with *Carpenter*" the Court held "a warrantless search of historical CSLI constitutes an unreasonable search in violation of a defendant's rights under the North Carolina Constitution." Slip op. *8.
    - The Court affirmed the denial of the MTS, holding that the application had sufficient information to establish probable cause, and the trial court's order found probable cause to obtain the information.
    - Problems with the decision: The affidavit did not support a finding of pc, and the order did not find pc to believe that evidence of a crime or the identity of the perpetrator would

be found in the place to be searched—instead only that the material sought was relevant to an ongoing investigation.

- Dillon concurred in part and concurred in the result in part:
  - Disagreed with majority that the application and order met the demands of a warrant.
    - The affidavit did not establish pc: "[T]he mere fact that a person happens to be talking to someone on the cellphone shortly before that someone is killed, without anything more, does not constitute probable cause that the person killed the victim." Slip op. *4 (Dillon, J., concurrence)
  - Result is correct because:
    - There is a good faith exception to the exclusionary rule for violations of both state and federal constitutions.
    - Retrieval of CSLI data is not a search under our state constitution, even though it is under the federal constitution. Dillon believes *State v. Perry*, 243 N.C. App. 156 (2015) survives *Carpenter* and is binding.

3. Dissecting a traffic stop

- Initial Stops

  - Look at the violation alleged to justify the initial stop. Was there RAS of a traffic violation?
  - RAS: *Kansas v. Glover*, 589 U.S. __ (2020) https://www.supremecourt.gov/opinions/19pdf/18-556_e1pf.pdf
    RAS to stop a car after running the registration and learning the owner had a revoked license. Information negating the inference that the registered owner is driving may affect the analysis.
    - Concurrence (Kagan and Ginsburg) relied on the fact that Kansas only revokes for serious, driving related offenses = history of disregarding the rules. This supports inference that owner would continue to drive despite revocation. Not so if license was merely suspended.
    - Sotomayor dissents.
  - RAS: *State v. Reed*, No. 365A16-2 (N.C. Feb. 28, 2020) https://appellate.nccourts.org/opinions/?c=1&pdf=39109
    Traffic stop of Reed, passenger, and pooch. Reed was placed in a patrol car while the officer processed the ticket. After finishing, the officer asked about illegal substances and asked for permission to search the car. Reed deferred to the passenger, who had rented the car, and the officer told Reed to "sit tight."

The trial court found reasonable suspicion to continue the detention. The majority disagreed, discounting the articulated reasons:

- Rental car outside of geographic restriction, but officer determined possession was lawful.
- Paid cash for the rental car.
- Trash , energy drinks, pillows, sheets in the car, without more, "utterly unremarkable."
- Dog food was explained by presence of the dog.
- Reed's nervousness about closing the patrol car door was ordinary nervousness.
- Travel statements were not contradictory.

Davis dissented, finding RAS to extend the detention, adding that

- There were inconsistent statements about travel plans.
- Dog food was a tactic used by drug traffickers to distract K-9 units.
- Air fresheners

As to whether the encounter became consensual, the majority relied on totality of the circumstances to hold that a reasonable person would not have felt free to leave, even though the officer had returned all paperwork. Newby dissented.

- Exit the car—Usually not an issue, but look for ways that the rationale underlying *Mimms* does not apply. Exit orders at checkpoints? *See Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6 (1977).

- Frisk—Supported by RAS that the person was armed AND dangerous?
  - *State v. Duncan*, 846 S.E.2d 315 (N.C. Ct. App. 2020) https://appellate.nccourts.org/opinions/?c=2&pdf=39412 is helpful here.
    Duncan was stopped by two officers in broad daylight in downtown Charlotte for a malfunctioning taillight. One officer saw a closed, 4 or 5-inch pocket-knife on the console. He got Duncan out of the car to frisk him. Duncan objected but acquiesced. The frisk turned into a search of Duncan's pocket. Duncan objected again. The officer did not stop, and Duncan ran. Drugs were found near the arrest site.
    - As to the frisk issue, the trial court held, and the COA affirmed, that the presence of the pocket-knife alone did not provide justification for the frisk. The opinion

discusses and distinguishes *Malachi* and *Robinson*(both gun cases), which is helpful.

- Search—probable cause to believe contraband on D or in car?

- Putting D in patrol car—Reason? Argue it increases intrusiveness of the stop and must have some justification beyond the officer's desire to develop RAS to detain further.

- Extending the detention—Either during traffic stop or after it is complete.

    - Need either RAS or consent to extend beyond completed traffic stop. *Rodriguez v. United States*, 575 U.S. 348 (2015) https://www.supremecourt.gov/opinions/14pdf/13-9972_p8k0.pdf; *Reed*, No. 365A16-2 (N.C. Feb. 28, 2020).
    - Need RAS to depart from traffic-stop mission during the stop. *Rodriguez*; *United States v. Sharpe*, 470 U. S. 675, 685 (1985) (officer must diligently pursue a means of investigation that will quickly confirm or dispel his suspicions)
        - *Duncan* recognizes that searches for contraband are unrelated to the traffic stop's mission and render the seizure unlawful.
    - Under Fourth Amendment analysis, going outside the scope is a violation only if it increases the duration of the detention. *Rodriguez*; *State v. Bullock*, 370 N.C. 256 (2017). Unrelated questions are okay as long as they do not add time to the stop.
        - Ripe for NC Constitutional challenge. Argue that our constitution affords greater protection: investigative detentions must be limited in scope and duration. Briefed in *State v. Johnson*, https://www.ncappellatecourts.org/show-file.php?document_id=274610 (pp 23-34)
        - Generally, look for areas where federal protections have been watered down and think about raising state constitutional challenge—Ex. Exclusionary rule watered down by good faith exception. Our Supreme Court declined to adopt a good faith exception for violations of the NC constitution in *State v. Carter*, 322 N.C. 709 (1988)
          See e.g. State v. Tabb, COA20-131, arguing that finding RAS based on high-crime neighborhood would violate our constitution's prohibition of general warrants and guarantee of equal protection:

https://www.ncappellatecourts.org/show-file.php?document_id=264315 (pp 19-25)

- Think about requests for consent to frisk or search—if no RAS to believe drugs or weapons, request unlawfully extends the stop.

- Attenuation doctrine: Good discussion in *Duncan*: People have the right to reasonably resist an unlawful search or seizure. Such resistance is not a new crime.

EVOLVING ISSUES IN DEFENSIVE FORCE CASES

Amanda Zimmer
Assistant Appellate Defender

1

OVERVIEW

- For offenses committed on or after December 1, 2011, expanded versions of the Castle Doctrine and other statutes relating to the use of defensive force apply.
- Despite the statutes being nearly 10 years old, there are still unanswered questions about the statutes.
- It is absolutely vital to thoroughly research and present all available **common law**, **statutory**, and **constitutional claims** for the use of defensive force.

2

HABITATION

The Castle Doctrine

3

COMMON LAW DEFENSE OF HABITATION

"[U]nder the defense of habitation, the defendant's use of force, even deadly force, before being physically attacked would be justified to prevent the victim's entry provided that the defendant's apprehension that he was about to be subjected to serious bodily harm or that the occupants of the home were about to be seriously harmed or killed was reasonable and further provided that the force used was not excessive."

State v. Blue, 356 N.C. 79, 88, 565 S.E.2d 133, 139 (2002).

4

STATUTORY DEFENSE OF HABITATION

A lawful occupant of a home, motor vehicle, or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using deadly defensive force, *i.e.* defensive force that is intended or likely to cause death or serious bodily harm, if:

- the person against whom the defensive force was used was in the process of unlawfully and forcefully entering or had unlawfully and forcibly entered a home, motor vehicle, or workplace OR if that person had removed or was attempting to remove another against that person's will from the home, motor vehicle, or workplace

AND

- the person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

N.C.G.S. § 14-51.2(b).

5

CONTINUED CONFUSION

Common Law

- Limited to attempted entry to the house. *State v. Blue*, 356 N.C. 79, 88, 565 S.E.2d 133, 139 (2002)
- Once inside, common law self-defense only defense appliable. *Id.*
- No duty to retreat from the attack.

Statutory Law

- Extends to terminating an unlawful entry.
- Expands the definition of home.
  - Home -- "A building or conveyance of any kind, to include its curtilage, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed as a temporary or permanent residence." N.C.G.S. § 14-51.2(a)(1).

6

STATE V. COLEY

846 S.E.2D 455 (N.C. 2020)

- The defendant was charged with assault in his home and requested instructions on both self-defense and habitation.
- No defensive force instruction given.
- "In determining whether a defendant has presented competent evidence sufficient to support a self-defense instruction, we **take the evidence as true and consider it in the light most favorable to the defendant**."
- Dismissed dissenting judge's concerns about the defendant stating he fired a "warning shot" and that the victim may have been a "lawful resident" of the house by stating "it is appropriately within the purview of the jury to resolve any conflicts in the evidence presented at trial and to render verdicts upon **being properly instructed** by the trial court based upon the evidence which competently and sufficiently supported the submission of such instructions to the jury for collective consideration."

7

CURTILAGE

- Curtilage includes "the yard around the dwelling and the area occupied by barns, cribs, and other outbuildings." *State v. Blue*, 356 N.C. 79, 86, 565 S.E.2d 133, 138 (2002).
- The decedent was "standing beside the porch on the ground, within the curtilage" of defendant's property when defendant fired the fatal shot. Accordingly, the defendant was entitled to the habitation instruction even though the decedent did not attempt to enter the porch or trailer. *State v. Kuhns*, 260 N.C. App. 281, 287, 817 S.E.2d 828, 832 (2018).
- But when the defendant testified that he did not know where the property line was and that the intruder was 10-15 feet from his house, the defendant was not entitled to an instruction on habitation. *State v. Dilworth*, No. 20-179 (N.C. Ct. App. October 20, 2020).

8

BEWARE OF THE PATTERN INSTRUCTION

- The instruction does not incorporate the statutory definition of home.
- "The absence of a definition for 'home' or 'curtilage' in the pattern instruction, and the reference to *State v. Blue* and the now repealed statute, is not consistent with the current statute. The pattern instruction should be reviewed and updated to reflect the formal and expanded definition of 'home' as is now required by N.C. Gen. Stat. § 14-51.2." *State v. Copley*, 265 N.C. App. 254, 267, 828 S.E.2d 35, 44 (2019), *rev'd and remanded on other grounds*, 374 N.C. 224, 232, 839 S.E.2d 726, 731 (2020).
- It is clear that under the statutes including the instruction on habitation is more favorable to defendants than an instructed limited to self-defense alone. *See State v. Kuhns*, 260 N.C. App. 281, 288, 817 S.E.2d 828, 832 (2018) (recognizing that a jury instruction on the common-law defense of habitation would be more favorable to a defendant than would an instruction limited to self-defense and that "[t]his remains true pursuant to N.C. Gen. Stat. §§ 14-51.2 and 14-51.3").

9

FELONS AND SELF-DEFENSE

10

DISQUALIFICATION BASED ON COMMISSION OF A FELONY

- Under N.C.G.S. § 14-51.4, "The justification described in G.S. 14-51.2 and G.S. 14-51.3 is not available to a person who used defensive force and who: (1) Was attempting to commit, committing, or escaping after the commission of **a felony**."
- Under N.C.G.S. § 14-51.2(c), the presumption of reasonable fear of imminent death or serious bodily harm of this section "shall be rebuttable and does not apply" when "(3) The person who uses defensive force is engaged in, attempting to escape from, or using the home, motor vehicle, or workplace to further **any criminal offense that involves the use or threat of physical force or violence** against any individual."

11

STATE V. CRUMP

815 S.E.2D 415 (N.C. CT. APP. 2018), *REV. ALLOWED*, 371 N.C. 786, 820 S.E.2D 811 (2018)

- In *Crump*, the defendant "raised the statutory justifications of protection of his motor vehicle and self-defense pursuant to N.C.G.S. §§14-51.2, -51.3[.]" The trial court instructed the jury that under N.C.G.S. § 14-51.4, statutory self-defense was not available to a person who was attempting to commit, committing, or escaping after the commission of a felony.
- The Court held that under the plain language of section 14-51.4(1), there was no requirement of a **causal nexus** between the commission of a felony and the perceived need to use defensive force.

12

POSSESSION OF A FIREARM BY A FELON

- The defendant "was committing the offense of possession of a firearm by a felon … Therefore, Defendant is not entitled to statutory self-defense under Section 14-51.4." *State v. McLymore*, No. COA19-428, 2020 N.C. App. LEXIS 333(May 5, 2020)(unpublished), *PDR filed*, No. 270P20 (N.C. June 10, 2020)
- "Because the General Assembly intended for Section 14-51.4 to supplant common law self-defense, Defendant could only seek relief under statutory self-defense." *Id.*
- "[I]n narrow and extraordinary circumstances, justification may be available as a defense to a charge under N.C.G.S. § 14-415.1." *State v. Mercer*, No. 257PA18, 2020 N.C. LEXIS 104, at *7 (Feb. 28, 2020).

13

PREPARE TO DISTINGUISH *CRUMP*

- *Crump* should only be read to preclude **statutory** claims of self-defense but *McLymore* extended this to common law self-defense. The felony disqualification should not apply to common law and constitutional claims of self-defense.
- Other states have required a causal nexus would likely eliminate the possession of a firearm by a felon problem.
- If there is a defense to the alleged felony, check the instructions to see if it was instructed on.
- Remember that *Crump* is still pending in the Supreme Court.

14

STATUTORY IMMUNITY

15

STATUTORY IMMUNITY

"A person who uses force as permitted by this section is **justified** in using such force and is **immune from civil or criminal liability for the use of such force**, unless

- the person against whom force was used is a law enforcement officer or bail bondsman who was **lawfully acting in the performance of his or her official duties and**
- the officer or bail bondsman **identified himself or herself** in accordance with any applicable law **or the person using force knew or reasonably should have known** that the person was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties."

N.C.G.S. § 14-51.2(e) and N.C.G.S. § 14-51.3(b).

16

PRETRIAL DETERMINATION OF IMMUNITY

- N.C.G.S. § 15A-954(a) says "[t]he court on motion of the defendant *must dismiss* the charges . . . if *it determines* that: . . . (9) The defendant has been granted immunity by law from prosecution."
- A motion under § 15A-954 can be made at anytime
- Issue was litigated in *State v. Austin*, 294PA17, but not addressed because the Court determined that review was improvidently allowed.
- Immunity should provide the opportunity to avoid trial altogether.

17

TRIAL DETERMINATION OF IMMUNITY

- If there is no pretrial determination, immunity must be determined at trial.
- Issue currently pending in *State v. Austin*, 20-198.
- Immunity is different than proving the defense at trial and is an extra protection.
  - Is a question of law for the court's determination, not a jury question.
  - But these are open questions.

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COMMON LAW AND/OR STATUTORY SELF-DEEFNSE?

19

STATE V. LEE

370 N.C. 671, 811 S.E.2D 563 (2018)

Chief Justice Martin's Concurring Opinion

- Recognizes that N.C.G.S. § § 14-51.3 and 14-51.4 "at least partially abrogated—and may have completely replaced—our State's common law concerning self-defense and defense of another."
- Under the statutory framework, "a defendant who uses deadly force to protect an initial aggressor who used non-deadly force against an attacker who responds with deadly force should be entitled to perfect self-defense, as long as that defendant was not attempting to commit or committing a felony, or escaping after committing a felony, in the process." 370 N.C. at 679.
- But, a defendant who uses deadly force to protect an initial aggressor who used deadly force against an attacker who responds with deadly force would not be entitled to perfect self-defense because the word "unlawful" from the first sentence of 14-51.3 must be imputed to the second sentence. Because a victim who uses deadly force to defend against an initial aggressor using deadly force would be acting lawfully, a third party in this situation would not be defending against unlawful force. 370 N.C. at 679. (See Hypo #5).

20

ABROGATION OF THE COMMON LAW?

- Since the statutes' enactment in 2011, the Court of Appeals has issued several published decisions recognizing the distinction between common-law and statutory self-defense, and continuing to apply common-law self-defense even after the enactment of N.C.G.S. § 14-51.3.
- The mere fact that the General Assembly has enacted statutes substantially overlapping the common law of self-defense simply is not enough to abrogate the common law.
- "[B]ecause the General Assembly did not carve out a similar common law exception in Section 14-51.4, common law self-defense is now supplanted by statutory self-defense in situations where (1) the defendant 'was attempting to commit, committing, or escaping after the commission of a felony'; (2) the defendant '[i]nitially provokes the use of force against himself or herself' unless he or she was 'in imminent danger of death or serious bodily harm'; or (3) "the person who was provoked continues or resumes the use of force' after the defendant withdraws. N.C. Gen. Stat. § 14-51.4." *McLymore*, 2020 N.C. App. LEXIS 333.
- The problem with this is that § 14-51.4 refers only to the justification offered under § 14-51.2 and § 14-51.3 and § 14-51.2(g) says it does not limit the common law defense.

21

FINAL THOUGHTS

22

FINAL THOUGHTS

- Defensive force is fact specific and there are a lot of cases.
- The common law defense will sometimes provide more protection to a defendant and other times the statutory defenses will provide more protection to a defendant.
- The pattern jury instructions do not distinguish between the common law defense and the statutory defense. Instructions must be thoroughly reviewed.
- Until the Supreme Court says that the statutes abrogated the common law, we must continue to raise both.

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Litigating Common Law, Statutory, and Constitutional Claims of Defensive Force

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I. Overview

For offenses committed on or after December 1, 2011, North Carolina adopted an expanded version of the Castle Doctrine and other statutes relating to the use of defensive force. The new statutes contain important justification defenses, presumptions, disqualifications, and immunity provisions. Whether and how the new statutes abrogate or expand the common law of defensive force are still open questions. The answers to those questions will depend upon how we litigate these complex cases. Thus, it is absolutely vital to thoroughly research and present all available **common law**, **statutory**, and **constitutional claims** for the use of defensive force. Part II briefly discusses certain common law, statutory, and constitutional defensive force claims. Parts III through V analyze the statutory presumptions, disqualifications, and immunity provisions. Part VI provides practical advice for litigating defensive force cases. Finally, Part VII lists some resources available to you.

II. The Three Categories of Defensive Force Claims: Common Law, Statutory, and Constitutional.

A. Common Law Defensive Force

i. Common law perfect self-defense has four elements:

(1) it appeared to defendant and he/she believed it to be necessary to kill the deceased (or use non-deadly force) in order to save himself/herself or others from death or great bodily harm (or bodily injury/offensive physical contact);

(2) defendant's belief was reasonable in that the circumstances as they appeared to the defendant at that time were sufficient to create such a belief in the mind of a person of ordinary firmness;

(3) defendant was not the aggressor in bringing on the affray, *i.e.,* he/she did not aggressively and willingly enter into the fight without legal excuse or provocation; and

(4) defendant did not use excessive force, *i.e.*, did not use more force than was necessary or reasonably appeared to him/her to be necessary under the circumstances to protect himself/herself from death or great bodily harm.

State v. Lyons, 340 N.C. 646, 661, 459 S.E.2d 770, 778 (1995); *State v. Clay*, 297 N.C. 555, 563, 256 S.E.2d 176, 182 (1979).

ii. Common law defense of habitation:

"[U]nder the defense of habitation, the defendant's use of force, even deadly force, before being physically attacked would be justified to prevent the victim's entry provided that the defendant's apprehension that he was about to be subjected to serious bodily harm or that the occupants of the home were about to be seriously harmed or killed was reasonable and further provided that the force used was not excessive."

State v. Blue, 356 N.C. 79, 88, 565 S.E.2d 133, 139 (2002).

B. Statutory Defensive Force

i. Statutory Self-Defense

N.C.G.S. §14-51.3(a) provides that **non-deadly force** can be used against another "when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force." It also provides a person may use **deadly force** and there is **no duty to retreat** if:

- He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another, OR

- Under the circumstances permitted by N.C.G.S. § 14-51.2.

ii. Statutory Defense of Habitation (the Castle Doctrine)

Under N.C.G.S. § 14-51.2(b), a lawful occupant of a home, motor vehicle, or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using deadly defensive force, *i.e.* defensive force that is intended or likely to cause death or serious bodily harm, if both of the following apply:

- the person against whom the defensive force was used was in the process of unlawfully and forcefully entering or had unlawfully and forcibly entered a home, motor vehicle, or workplace OR if that person had removed or was attempting to remove another against that person's will from the home, motor vehicle, or workplace

AND

- the person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

Subsection (d) further provides, "A person who unlawfully and by force enters or attempts to enter a person's home, motor vehicle, or workplace is presumed to be doing so with the intent to commit an unlawful act involving force or violence."

Subsection (e) provides, "A person who uses force as permitted by this section is justified in using such force[.]" Unfortunately, none of the other subsections expressly permit the use of force at all. However, it would be absurd to interpret the statute as not permitting the use of force as that would render section 14-51.2(e) completely meaningless. Also, section 14-51.3 states a person is justified in using deadly force "under the circumstances permitted pursuant to G.S. 14-51.2." Moreover, section 14-51.4 refers to the "justification described in G.S. 14-51.2." A conservative interpretation of the statute would that if the presumptions in 14-51.2(b) and (d) apply and none of the exceptions in 14-51.2(c) or 14-51.4 apply, then the use of force, including deadly force, is justified.

Be aware that the statute defines "home" to include the curtilage. N.C.G.S. §14-51.2(a)(1). Therefore, if something happens in a driveway, yard, free-standing garage, or an outbuilding sufficiently close to the home, it is legally the same as if it took place within the four walls of the home.

iii. Recent Case Law

In *State v. Lee*, 370 N.C. 671, 811 S.E.2d 563 (2018), the defendant's cousin, Walker, and the decedent argued a few times on New Year's Eve. The defendant and Walker later met the decedent in the street. Walker and the decedent continued to argue. Walker punched the decedent in the face, and the decedent shot Walker and continued to shoot him as Walker fled. The decedent then turned and pointed the gun at the defendant and the defendant shot the decedent, killing him. The State charged the defendant with first-degree murder.

Our Supreme Court recognized that under N.C.G.S. §14-51.3(a), "a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if … [h]e or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another." The Court held the trial court erred by failing to instruct the jury that the defendant had no duty to retreat. The Court also found the error entitled the defendant to a new trial because the omission "permitted the jury to consider defendant's failure to retreat as evidence that his use of force was unnecessary, excessive, or unreasonable."

In *State v. Bass*, 371 N.C. 535, 819 S.E.2d 322 (2018), the defendant was convicted of AWDWISI. The defendant's evidence showed that the victim approached the defendant on the grounds of the apartment complex where the defendant lived. The victim reached for a large knife in a sheath attached to his pants and the defendant shot him and ran. The Supreme Court recognized that "wherever an individual is lawfully located—whether it is his home, motor vehicle, workplace, or any other place where he has the lawful right to be—the individual may stand his ground and defend himself from attack when he reasonably believes such force is necessary to prevent imminent death or great bodily harm to himself or another." *Bass*, 371 N.C. at 541, 819 S.E.2d at 326. It further stated, "it is clear that a defendant entitled to any self-defense instruction is entitled to a complete self-defense instruction, which includes the relevant stand-your-ground provision." *Id.* at 542, 819 S.E.2d at 326. A new trial was required due to the failure to include this portion of the instruction.

In *State v. Copley*, 265 N.C. App. 254, 267, 828 S.E.2d 35, 44 (2019), *rev'd and remanded on other grounds*, 374 N.C. 224, 232, 839 S.E.2d 726, 731 (2020), the Court of Appeals recognized one potential problem with the pattern jury

instructions related to habitation and self-defense. Despite the statutory changes, the pattern instruction refers to *Blue* for the definition of home. As discussed above, there is now a broader statutory definition. The Court of Appeals concluded, "The absence of a definition for 'home' or 'curtilage' in the pattern instruction, and the reference to *State v. Blue* and the now repealed statute, is not consistent with the current statute. The pattern instruction should be reviewed and updated to reflect the formal and expanded definition of 'home' as is now required by N.C. Gen. Stat. § 14-51.2." *Copley*, 265 N.C. App. at 269, 828 S.E.2d at 44-45. *Copley* is again pending in the Court of Appeals due to the remand from the Supreme Court.

It is clear that under the statutes including the instruction on habitation is more favorable to defendants than an instructed limited to self-defense alone. *See State v. Kuhns*, 260 N.C. App. 281, 288, 817 S.E.2d 828, 832 (2018) (recognizing that a jury instruction on the common-law defense of habitation would be more favorable to a defendant than would an instruction limited to self-defense and that "[t]his remains true pursuant to N.C. Gen. Stat. §§ 14-51.2 and 14-51.3").

C. Constitutional Claims of Self-Defense

Constitutionalize your requests for jury instructions on both common law and statutory forms of self-defense. Our Supreme Court has recognized that "'[t]he first law of nature is that of self-defense[;]'" it is "a 'primary impulse' that is an 'inherent right' of all human beings." *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010) (quoting *State v. Holland*, 193 N.C. 713, 718, 138 S.E. 8, 10 (1927)). Thus, (1) argue self-defense instructions are required under state and federal **substantive due process**. Also, (2) argue self-defense instructions are required in order to effectuate the **right to present a defense** pursuant to the state and federal constitutions. Finally, if the use of defensive force involves a firearm, (3) argue self-defense instructions are also required under the **Second Amendment**. *McDonald v. Chicago*, 561 U.S. 742, 177 L. Ed. 2d 894 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 171 L. Ed. 2d 637 (2008).

III. Statutory Presumptions

As stated above, section 14-51.2(b) creates a presumption that a lawful occupant of a home, vehicle or workplace has a reasonable fear of imminent death or great bodily harm when using deadly defensive force if: (1) the person against whom the force is used was in the process of unlawfully and forcefully

entering, had unlawfully and forcibly entered, or was trying to remove another against their will from a covered location; and (2) the person using defensive force knew or had reason to know of the unlawful and forcible entry or act.

Section 14-51.2(c) states that the presumption discussed in subsection (b) is rebuttable and does not apply in five enumerated circumstances, including use of force against LEOs, other lawful residents, or intruders who have abandoned the intrusion and left the premises, and where the defendant is engaged in or using the place to further any criminal offense "that involves the use or threat of physical force or violence against any individual."

Section 14-51.2(d) creates a second presumption that the unlawful and forcible intruder is presumed to intend to commit an unlawful act involving force or violence. Unlike the presumption in subsection (b), nothing in the statute says this presumption is rebuttable.

IV. Statutory Disqualifications

A. Statutory justifications unavailable to a person who was "attempting to commit, committing, or escaping after the commission of a felony."

N.C.G.S. §14-51.4(1) provides that "[t]he justification described in G.S. 14-51.2 and G.S. 14-51.3 is not available" if the person using defensive force "[w]as attempting to commit, committing, or escaping after the commission of a felony."

In *State v. Crump*, 259 N.C. App. 144, 815 S.E.2d 415 (2018), the defendant was tried for, *inter alia*, AWDWIK and "raised the statutory justifications of protection of his motor vehicle and self-defense pursuant to N.C.G.S. §§14-51.2, -51.3[.]" The trial court instructed the jury that under N.C.G.S. § 14-51.4, statutory self-defense was not available to a person who was attempting to commit, committing, or escaping after the commission of a felony.

On appeal, the defendant argued the trial court erred by failing to instruct the jury that commission of a felony only disqualifies statutory self-defense when a defendant's "felonious acts directly and immediately caused the confrontation that resulted in the deadly threat to him." The Court of Appeals rejected that argument. The Court recognized that N.C.G.S. §14-51.4(1) does not contain any qualifying or limiting language modifying the

word "felony." That absence contrasts with N.C.G.S. §14-51.2(c)(3), which denies the presumption of reasonableness of the perceived need to use force to safeguard the home, workplace, or vehicle to one using that place "to further any criminal offense *that involves the use of threat of physical force or violence against any individual*." Thus, the Court held that under the plain language of section 14-51.4(1), there was no requirement of a causal nexus between the commission of a felony and the perceived need to use defensive force.

Be prepared to distinguish *Crump*. *Crump* should only be read to preclude *statutory* claims of self-defense. Thus, the felony disqualification should not apply to common law and constitutional claims of self-defense. However, the Court of Appeals has extended *Crump* in an unpublished opinion to claims of common law self-defense. *State v. McLymore*, No. COA19-428, 2020 N.C. App. LEXIS 333(May 5, 2020) (unpublished).

Be prepared to preserve arguments. It seems like the obvious intent of the statute was to prevent a robber, rapist, or burglar who meets with armed resistance to rely on the statute to overcome that resistance. However, under *Crump*, the felony disqualification could prevent a defendant who was committing tax fraud from defending against a home invasion. Or, it could prevent a person who constructively possessed cocaine in his home from defending himself if someone punched him in a bar. That would be absurd. *Crump* remains pending in the Supreme Court. Oral argument was held on October 12, 2020. *See State v. Crump*, No. 151PA18 (N.C. 2018).

B. Statutory justifications unavailable to a person who "[i]nitially provokes the use of force against himself or herself."

N.C.G.S. §14-51.4(2) provides the statutory justifications are unavailable to a person who "[i]nitially provokes the use of force against himself or herself." However, a person who provoked the use of force is justified if

> (a.) the force used by the person who was provoked "is so serious that the person using defensive force reasonably believes that he or she was in imminent danger of death or serious bodily harm," there was no reasonable means to retreat, and the use of deadly force was the only way to escape the danger.
>
> OR

(b.) the person who used defensive force withdraws from physical contact with the person who was provoked and clearly indicates the desire to withdraw and terminate the use of force, but the person who was provoked continues or resumes the use of force.

In *State v. Holloman*, 369 N.C. 615, 799 S.E.2d 824 (2017), the State's evidence showed that the defendant approached the decedent with a gun and fired before the decedent could retrieve his gun. Under that view of the evidence, the Court held the defendant was an aggressor using deadly force.

The Court stated that under N.C.G.S. §14-51.4, an aggressor can regain the right to use self-defense where, *inter alia*, "[t]he force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he or she was in imminent danger of death or serious bodily harm[.]" The Court first recognized that the statute does not "distinguish between situations in which the aggressor did or did not utilize deadly force." However, the Court ultimately interpreted the statute to mean that only an aggressor using non-deadly force could regain the right to self-defense; an aggressor using deadly force could not. As a result, the Court held the trial court correctly instructed the jury that an aggressor using deadly force forfeits the right to use deadly force in self-defense.

The Court also recognized the defendant's evidence showed that the defendant walked up to the decedent with his gun at his side to determine if the decedent had assaulted his girlfriend. Under that view of the evidence, the Court held the defendant was not an aggressor at all. Thus, the Court held the trial court did not err by failing to instruct the jury that the defendant could have regained the right to self-defense if it found he was an aggressor using non-deadly force because the instruction "would not have constituted an accurate statement of the law arising upon the evidence."

V. Statutory Immunity

A. Statutory Immunity Provisions

N.C.G.S. §§14-51.2(e) and 14-51.3(b) both provide: "A person who uses force as permitted by this section is justified in using such force and is **immune from civil or criminal liability** for the use of such force, unless the person against whom force was used is a law enforcement officer or bail bondsman who was lawfully acting in the performance of his or her official duties and the officer or bail bondsman identified himself or herself in accordance with any

applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties."

Under N.C.G.S. § 15A-954(a)(9), "The court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that … (9) The defendant has been granted immunity by law from prosecution." N.C.G.S. § 15A-954(c) provides: "A motion to dismiss for the reasons set out in subsection (a) may be made at any time."

B. Overview

Assuming the North Carolina Supreme Court recognizes a right to a pretrial determination of immunity under the statues (as every other State Supreme Court opinion addressing similar statutes in other states has), this represents a major departure from prior North Carolina procedure regarding self-defense. Although N.C.G.S. §14-51.2 (the Castle doctrine statute) is relatively narrow, N.C.G.S. §14-51.3 is extremely broad – essentially covering every case of self-defense unless one of the enumerated exceptions applies (i.e., not against a law enforcement officer or bail bondsman acting lawfully, or if §14-51.4 applies either because the defendant was committing a felony or was the initial aggressor). These immunity provisions are not limited to homicide charges and apply in assault cases as well.

The question of whether defendants are entitled to a pretrial determination of immunity was raised in the case of *State v. Austin*, 294PA17. The pleadings are available at www.ncappellatecourts.org under case number 294PA17. The Supreme Court found that certiorari was improvidently granted in this case and the appeal following Ms. Austin's conviction is now pending in the Court of Appeal in *State v. Austin*, 20-198.

C. Tactical Considerations

There are a number of tactical benefits to filing a pretrial motion for immunity in an appropriate case. In addition to the obvious opportunity to get charges dismissed prior to trial, other potential advantages include: (1) the opportunity to pin down witness testimony and to preview the State's case – an immunity hearing should be an evidentiary hearing and you should have the right to call any necessary witnesses to establish the client's right to immunity, including law enforcement witnesses (e.g., CSI, officers taking statements) as well as eye witnesses to the use of defensive force (including the

victim in an assault case); (2) even if the judge does not dismiss on immunity grounds, the hearing may be a time to get a judge to set a realistic bond; and (3) gaining leverage for plea negotiations.

The downsides include: (1) previewing your own case for the State; (2) the possibility that you may need to put the client on the stand to establish immunity, especially if you are proceeding exclusively under section 14-51.3 and the client will not be entitled to the benefit of the statutory presumption of reasonable fear under section 14-51.2(b).

D. Practice Tips

i. Drafting the motion

The legal basis for the motion is simple. You should be citing N.C.G.S. §§14-51.2(e) (if applicable), 14-51.3(b) (always), and 15A-954(a)(9) and (c) (always). Sections 14-51.2(e) and 14-51.3(b) establish the substantive right to immunity, while section 15A-954(a)(9) provides the procedural mechanism for obtaining a dismissal on immunity grounds. Section 15A-954(c) says your motion under 15A-954(a)(9) can be raised "at any time." Even if you think the castle doctrine statute, section 14-51.2, applies, you should also cite to section 14-51.3(b). This gives you a fallback position even if there is some evidentiary problem or question regarding whether section 14-51.2 applies.

The factual basis portion of the motion should be fairly detailed. If you are proceeding under section 14-51.2, you need to include sufficient details to show: (1) how the client was a lawful occupant of the home, vehicle, or workplace where the defensive force was used; (2) how the intruder's entry onto or into the property in question was both unlawful and forcible; (3) that the defendant was aware of the unlawful and forcible intrusion (usually this should be obvious); and (4) that none of the exceptions in section 14-51.2(c)(1-5) apply.

With respect to section 14-51.3, your motion should explicitly assert that the defendant actually and reasonably believed the use of non-deadly force was necessary to defend the defendant or another from the imminent use of unlawful force, or that the defendant actually and reasonably believed it was necessary to use deadly force to prevent imminent death or great bodily harm. You must also allege enough factual background to back up your assertion – enough so that a judge reading the motion will have a sufficient understanding

of your client's side of the story to agree that the defendant had an actual and reasonable belief in the necessity to use defensive force.

To the extent possible, it may be advantageous to base your factual allegations exclusively or almost exclusively on materials received from the State during discovery. This avoids revealing factual information the State might not have and has the additional benefit that it will be hard for the State to challenge the authenticity of the information.

ii. Conducting a hearing

At an evidentiary hearing, you should expect to have the burden of proof by a preponderance of the evidence. Although there are no cases specifically interpreting 15A-954(a)(9), cases interpreting other subsections of 15A-954(a) have said that this is the defendant's burden. *E.g., State v. Williams*, 362 N.C. 628, 669 S.E.2d 290 (2008) (defendant has burden of proof under preponderance standard for claims under 15A-954(a)(4)). There is no reason to expect 15A-954(a)(9) to work differently.

Give very careful consideration to what witnesses to call, and especially whether or not to call the client as a witness for the hearing. If you are proceeding under section 14.51.2 and can establish through discovery materials that the presumptions under sections 14-51.2(b) and (d) unquestionably apply, it may not be necessary to call the defendant. On the other hand, if you are proceeding under section 14-51.3 without the benefit of the presumptions, a judge (like many juries) may want to hear from the defendant before determining that he or she actually feared imminent death or injury.

Also consider whether you expect the State to hotly contest the underlying facts or whether the underlying facts are largely uncontested and the case turns on whether those facts do or do not show lawful defensive force. If the facts will be hotly contested, consider calling many or all of the State's fact witnesses. If you can show the State's witnesses lack credibility, you may increase the willingness of the judge to rule in your favor, even if it requires the judge to resolve contested factual issues against the State. If nothing else, though, you get a "free" deposition of the State's witnesses.

VI. Practical Advice

A. Make separate and distinct arguments under the common law, the statutes, and the federal and state constitutions. The extent to which the statutes abrogate or expand the common law of defensive force is still an open question. In *Lee*, Chief Justice Martin filed a concurring opinion recognizing that N.C.G.S. §§14-51.3 and 14-51.4 "at least partially abrogated—and may have completely replaced—our State's common law concerning self-defense and defense of another." Also, be aware that section 14-51.2(g) provides, "This section is not intended to repeal or limit any other defense that may exist under the common law." However, section 14-51.3 does not contain such a provision. With that said, you can argue that interpreting section 14-51.3 as abrogating the common law of self-defense would render section 14-51.2(g) meaningless—because there would not be any common law of defensive force to preserve. The main take home message is to ensure that you make separate and distinct arguments under the common law, the statutes, and the federal and state constitutions.

B. Be very careful when your client testifies. In *State v. Cook*, 802 S.E.2d 575 (2017), *aff'd per curiam*, 2018 N.C. LEXIS 52 (N.C. 2018), the defendant was charged with assault with a firearm on a law enforcement officer. The Court of Appeals held that "where a defendant fires a gun as a means to repel a deadly attack, the defendant is not entitled to a self-defense instruction where he testifies that he did not intend to shoot the attacker." Because the defendant testified he did not intend to shoot anyone when he fired his gun, he was not entitled to a self-defense instruction.

The Court further recognized that the castle doctrine under N.C.G.S. §14-51.2 "is an affirmative defense provided by statute which supplements other affirmative defenses that are available under our common law." However, the Court held that "a defendant who testifies that he did not intend to shoot the attacker is not entitled to an instruction under N.C.G.S. §14-51.2 because his own words disprove the rebuttable presumption that he was in reasonable fear of *imminent* harm."

C. Excessive force under the statutes. Nothing in the statutes explicitly discusses the common law concept of excessive force. None of the exceptions in sections 14-51.2(c) or 14-51.4 say a person who uses excessive force does not get the statutory defense. However, G.S. 14-51.2(c)(5) states that the presumption of a reasonable fear of imminent death or serious bodily harm does not apply if the intruder has discontinued all efforts to unlawfully

and forcibly enter and has exited. This provision establishes an outer limit on the use of deadly force.

D. Pay close attention to the pattern jury instructions. Several of the pattern jury instructions contain errors. Therefore, you should ask the judge to modify them when appropriate. Also, consider drafting written requests for special jury instructions.

VII. Contact the Office of the Appellate Defender

Feel free to call us any time @ (919) 354-7210. Every week, we have two attorneys on call to consult with trial attorneys across the state. We are happy to discuss potential issues or record preservation whenever you need a sounding board.

Probation Revocation, Guilty Pleas, and Bench Trials

2020 VIRTUAL APPELLATE TRAINING CONFERENCE

DAVID ANDREWS, ASSISTANT APPELLATE DEFENDER

1

Emerging Issues in Probation Revocation Appeals

- Jurisdiction to revoke probation after probation has expired
- Absconding
- Notice
- Confrontation

2

Make a Timeline

- Probation revocation appeals can be very confusing
- A timeline will help you understand the case and spot potential arguments

3

Make a Timeline

- Use the timeline to determine when the probationary period was set to expire
- Determine whether the violation reports were filed before probation expired
- Determine whether the revocation hearing occurred before probation expired

4

Revocation hearing after probation has expired

- N.C. Gen. Stat. § 15A-1344(f): The court can extend, modify, or revoke probation after the expiration of the probationary period if:
  - (1) A violation report was filed before the expiration of probation;
  - (2) The court finds the defendant violated a condition of probation prior to the expiration of the probationary term; and
  - (3) The court finds for "good cause shown and stated" that the probation should be extended, modified, or revoked.

5

Revocation hearing after probation has expired

- If a court revokes probation after the probationary period has expired, the court must specifically find that there was good cause shown and stated for doing so. *State v. Morgan*, 372 N.C. 609 (2019)
- The finding may ***not*** be inferred from the record. *Id*.
- The NCSC remanded the case in *Morgan* for the trial court to determine if good cause existed. The COA vacated the revocation order without remand in *State v. Sasek*, 844 S.E.2d 328 (2020)

6

Grounds for Revocation

- Commission of a new crime
- Absconding
- Violating the conditions of probation after serving two periods of confinement in response to violation ("CRV")

7

Absconding

- There are several cases on what constitutes absconding
- The Criminal Law Blog often has posts that provide updates on recent case law on absconding
- When determining whether the defendant absconded, the court is bound by the dates listed in the violation report. *State v. Melton*, 258 N.C. App. 134 (2018)

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Absconding will usually be found when . . .

- The defendant is unavailable for an extended period of time and fails to let the probation officer know where he is
- The probation officer makes multiple attempts to contact the defendant and identifies specific individuals who can tell the defendant the officer is looking for him
- *State v. Newsome*, 264 N.C. App. 659 (2019); *State v. Trent*, 254 N.C. App. 809 (2017)

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Absconding will usually *not* be found when . . .

- The defendant fails to report for an office visit
- The defendant fails to remain within the jurisdiction
- *State v. Krider*, 258 N.C. App. 111, aff'd, 371 N.C. 466 (2018); *State v. Williams*, 243 N.C. App. 198 (2015)

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Notice

- In order to comply with the notice provision of N.C. Gen. Stat. § 15A-1345(d), the violation report must include a "statement of the actions that [the] defendant has allegedly taken that constitute a violation of a condition of probation." *State v. Moore*, 370 N.C. 338 (2017)
- However, the State is not required to identify the specific condition the defendant violated. *Id*.

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Notice

- In *State v. Cunningham*, 63 N.C. App. 470 (1983), the COA reversed a revocation order where the conduct alleged in violation report was insufficient to support revocation and the trial court based its revocation on evidence of additional conduct not contained in the violation report
- A similar result occurred in *State v. Walton*, 2018 N.C. App. LEXIS 847 (unpublished)

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Confrontation

- At a revocation hearing, the defendant "may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation." N.C. Gen. Stat. § 15A-1345(e)
- *State v. Jones*, 838 S.E.2d 686 (2019): The right to confrontation is not preserved unless the defendant asks the court to make a good cause finding or issues a subpoena the witness to testify at the revocation hearing

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Confrontation

- *Jones* is currently pending in the NCSC on a PDR
- The opinion in *Jones* arguably violates *State v. Coltrane*, 307 N.C. 511 (1983) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973)

14

Guilty Plea Appeals

- Be aware of arguments that might undo the guilty plea or the plea agreement
- If you win the argument, there is a risk that the client will get a higher sentence on remand
- You should get the client's permission to raise arguments that entail the risk of a higher sentence

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Guilty Plea Appeals

- Be aware of problems that might result in suppression issues being defaulted or waived on appeal
- Failure to include an affidavit in the motion to suppress: Brief and PDR in *State v. Beam*, No. COA17-1232 and No. 245P18
- Failure to give notice of intent to appeal the suppression issue: PWCs in *State v. Perez*, No. COA19-273 and No. 272P20

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Bench Trials

- Beware the failure of the trial judge to make findings of fact: This has the potential to negate the right to appeal for evidentiary errors
- There are two lines of cases that come into conflict in cases involving bench trials with no requirement of findings of fact:
  - ❖ When ruling on a motion to dismiss, the court considers both competent and incompetent evidence
  - ❖ Judges in bench trials are presumed to disregard incompetent evidence.

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CHECKLIST FOR PROBATION REVOCATION APPEALS

1	Did you determine whether the indictment was proper? (See pp. 4-5)	
2	Did you determine whether the trial court had jurisdiction to revoke probation? (See pp. 5-8)	
3	Did you determine whether the defendant was represented by counsel during the original trial or plea hearing? (See p. 8)	
4	Did you determine whether the defendant was represented by counsel during the revocation hearing? (See pp. 8-9)	
5	If the client's probationary term was extended, did you determine whether the extension was proper? (See pp. 5-7)	
6	Did you determine whether the State gave the defendant notice of the conduct that violated the conditions of probation? (See p. 10)	
7	Did you determine whether the trial court revoked probation for a proper reason? (See p. 12)	
8	Did you determine whether the sentence the trial court activated was proper? (See pp. 18-19)	
9	If the defendant received a split sentence, did you determine whether the active portion of the split sentence was proper and whether the split sentence was stayed pending appeal? (See pp. 19-20)	

COMMON ISSUES IN PROBATION REVOCATION APPEALS

North Carolina Appellate Advocacy Foundations
2020 Virtual Appellate Training Conference
David Andrews, Assistant Appellate Defender

Disclaimer: This document is not intended to be an exhaustive list of issues that can be raised in probation revocation appeals. Instead, the purpose of this document is to describe issues that occur with some frequency in such appeals. Please do not rely on this document as a substitute for independent legal research on possible issues.

General Advice: Although probation revocation appeals involve short transcripts and a limited number of issues, they can be very complicated. Below are recommendations for handling some of the complications that arise in probation revocation appeals.

1. For an in-depth discussion of probation cases, be sure to review the Administration of Justice Bulletin on probation violations, which was published by the UNC School of Government. Another helpful resource is Jamie Markham's book, *Probation Violations in North Carolina*, published by the UNC School of Government.

2. Get a complete copy of the court file for your appeal:

    a. If the case involved multiple file numbers, be sure to get the court file for each file number.
    b. Be sure to get all of the documents for each individual file – not just those documents that are directly related to the revocation hearing.
    c. If the case was transferred from another county, be sure to get copies of the files from both counties.

3. Create a timeline of the trial court proceedings:

    a. You should create a numbered list of events in chronological order from the date of offense to the notice of appeal. This list will help you identify which statutes apply to your case and determine whether the trial court had jurisdiction to revoke the defendant's probation.

4. Consider getting transcripts of proceedings that occurred before the revocation hearing:

    a. Some issues in probation revocation appeals require an understanding of proceedings that occurred prior to the revocation hearing. If you believe you need a transcript for a hearing that is not reflected in the order of appellate entries, you should file a motion and proposed order for production of transcript. As part of the motion, you would explain that the additional transcript will facilitate appellate review and enable

you to discharge your duty as the defendant's appellate counsel.

5. Determine which statutes apply to your case:

    a. In recent years, the General Assembly has significantly modified the conditions that can result in revocation and the provisions that involve tolling. Once you have created a timeline for your case, be sure to determine which provisions apply to the appeal.

The Right to Appeal: Be sure to identify the type of order the defendant is appealing. Not every order involving probation can be appealed.

6. Under N.C. Gen. Stat. § 15A-1347, only certain types of orders involving probation can be appealed. Those orders include:

    a. An order that finds the defendant in violation of probation and that activates the defendant's sentence.

    b. An order that finds the defendant in violation of probation and that imposes special probation.
        i. Special probation is a split sentence involving periods of imprisonment as defined in N.C. Gen. Stat. § 15A-1344(e). A blank probation order is included in the appendix. (App. 7-10). The section for special probation is at the top of third page of the form. (App. 9).

    c. An order imposing a terminal period of Confinement in Response to Violation (CRV). The attached order contains a section that a court can use to impose CRV. (App. 10). Although the Court of Appeals has not yet conclusively held that such an order may be appealed, it has suggested that there might be a right to appeal such an order. *State v. Romero*, 228 N.C. App. 348, 351 n.1, 745 S.E.2d 364, 366 n.1 (2013).
        i. In *State v. Wood*, No. COA13-1258, 2014 N.C. App. Lexis 519, *3-4 (May 20, 2014) (unpub.) and *State v. Lancaster*, No. COA14-1018, 2015 N.C. App. Lexis 142, *2-3 (March 15, 2015) (unpub.), the Court also conducted an *Anders* review without expressing an opinion about whether there is a right to appeal a terminal CRV.

    d. If you file a brief in a probation appeal, be sure to specify in the Statement of the Grounds for Appellate Review that the defendant appeals pursuant to N.C. Gen. Stat. §§ 7A-27 and 15A-1347.

    e. The legislature amended N.C. Gen. Stat. § 15A-1347(c), effective for offenses committed on or after December 1, 2016, to clarify that supervision continues upon appeal only when the person is released on bail during the pendency of the appeal. Session Law 2016-77, § 7.

7. There is no right to appeal the following types of orders:

    a. An order modifying probation that does not result in special probation. *State v. Edgerson*, 164 N.C. App. 712, 714, 596 S.E.2d 351, 353 (2004).

    b. An order imposing a non-terminal period of Confinement in Response to Violation (CRV). *State v. Romero*, 228 N.C. App. 348, 351-52, 745 S.E.2d 364, 367 (2013).
        i. In *State v. Robinson*, No. COA13-415, 2013 N.C. App. Lexis 1288 (Dec. 3, 2013) (unpub.), the Court of Appeals appeared to hold that a non-terminal CRV in which probation was terminated at the conclusion of the CRV was not appealable (at least from district court to superior court).
        ii. You may seek appellate review of a non-terminal CRV by filing a petition for writ of certiorari. *See State v. McCurry*, No. COA15-271, 2015 N.C. App. LEXIS 1004, *6-8 (Dec. 15, 2015) (unpub.) (reviewing merits of issues at violation hearing resulting in 90-day CRV after Court of Appeals allowed defendant's petition for writ of certiorari in No. COAP14-482).

    c. An order revoking probation based on the defendant's voluntary decision to serve his sentence. *State v. Ikard*, 117 N.C. App. 460, 461, 450 S.E.2d 927, 928 (1994)

    d. If you are appointed to a case involving an order that cannot be appealed, review the court file and transcript for error. If something egregious happened, consider filing a petition for writ of certiorari or an application for writ of habeas corpus in the Court of Appeals. If the court file and transcript do not reveal any significant errors, write a letter to the judge explaining that you have determined that further review in the Court of Appeals is not appropriate. Be sure to send a copy of the letter to the clerk, prosecutor, trial attorney, and defendant.

8. Revocation orders in district court:

    a. If a district court revokes the defendant's probation, the defendant can only appeal to superior court. *State v. Hooper*, 358 N.C. 122, 126, 591 S.E.2d 514, 517 (2004). If the defendant appeals to the Court of Appeals, the appeal will be dismissed for lack of jurisdiction. *Id*. at 127, 591 S.E.2d at 518.

    b. If a defendant waives a revocation hearing in district court, the finding of a violation of probation, activation of sentence, or imposition of special probation may not be appealed to the superior court. N.C. Gen. Stat. § 15A-1347(b).

9. Mootness:

    a. A probation revocation appeal is not moot if the defendant is released from prison before the appeal ends because there are collateral consequences to an order revoking probation. *State v. Black*, 197 N.C. App. 373, 377, 677 S.E.2d 199, 202 (2009). Specifically, a court can impose an aggravated sentence in a future prosecution if a trial court found the defendant to be in willful violation of the conditions of probation

during the previous ten years. N.C. Gen. Stat. § 15A-1340.16(d)(12a). *State v. Peed*, 257 N.C. App. 842, 844, 810 S.E.2d 777, 779 (2018); *but see State v. Posey*, 255 N.C. App. 132, 133, 804 S.E.2d 580, 581-82 (2017) (over a dissent, the Court dismissed the defendant's appeal as moot because although the trial court erred by revoking defendant's probation for absconding, the trial court's written order also found that defendant violated his curfew).

Subject Matter Jurisdiction: Be sure to determine whether the trial court had jurisdiction over the defendant's case when it revoked probation or imposed special probation.

10. Make sure the original charging document was sufficient to confer subject matter jurisdiction onto the trial court.

    a. Be sure to review the original charging document and determine whether it is proper:
        i. If the defendant was convicted on an indictment, make sure that the indictment contains all of the essential elements of the original charge. If the defendant pled on an information, make sure that both the defendant and his attorney signed the information as required by N.C. Gen. Stat. §§ 15A-642(c) and 15A-644(b).
        ii. Two good resources for reviewing indictment case law are: (1) The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment by Jessica Smith at the UNC School of Government and (2) 2017 Update to Arrest Warrant and Indictment Forms prepared by Jeffrey B. Welty at the UNC School of Government.

    b. **Caution:** If you are assigned to a probation revocation appeal in which there is a defect in the original charging document and the court imposed probation after the defendant pled guilty to the offense in the charging document, be sure to explain the risks of making a jurisdictional challenge as part of the appeal. If the client understands the risks and wants to you to make the argument, be sure to get the client's written permission. The risks that the client faces include the following:
        i. If you win the argument, any concessions that the State offered the defendant as part of a plea agreement will no longer be valid. *State v. Rico*, 218 N.C. App. 109, 720 S.E.2d 801 (2012), *rev'd per curiam*, 366 N.C. 327, 734 S.E.2d 571 (2012).
        ii. If the State re-prosecutes the defendant, he will not be protected from receiving a higher sentence if he committed the offense after December 1, 2013. N.C. Gen. Stat. § 15A-1335 (2013). If the defendant committed the offense before December 1, 2013 and is subject to an earlier version of N.C. Gen. Stat. § 15A-1335, there is still a risk that he will not be protected from receiving a higher sentence because a court might conclude that the statute should not apply to a defendant who successfully attacks a plea agreement that he himself negotiated.
        iii. If you successfully challenge the original judgment through an application for writ of habeas corpus, the defendant should be entitled to jail credit under

N.C. Gen. Stat. § 15-196.1 if the State successfully re-prosecutes him later. This is true even if the State prosecutes the defendant for a different charge arising from the incident that led to his original conviction. The statute was amended in 2015 to state that the defendant is entitled to credit toward the "charge that culminated in the sentence or the incident from which the charge arose." N.C. Gen. Stat. § 15-196.1. As explained in the Criminal Law Blog, the amended language "will clearly require the court to credit confinement on an earlier charge for the same behavior that eventually results in a conviction on a different charge . . . .".

iv. Any relief from a defective charging document will not occur immediately. If you file an application for writ of habeas corpus, the Court of Appeals might remand the case for a hearing or order briefing on the merits.

c. According to *State v. Pennell*, 367 N.C. 466, 471, 758 S.E.2d 383, 387 (2014), a defendant may not challenge a defective indictment on direct appeal from an order revoking probation. Such an argument is an impermissible collateral attack on the original judgment imposing probation. After *Pennell*, there are two ways to challenge a defective charging document on appeal:
    i. Present the argument to the Court of Appeals through a motion for appropriate relief. *Pennell*, 367 N.C. at 472, 758 S.E.2d at 387; *State v. Smith*, No. COA13-742, 2014 N.C. App. LEXIS 874, *4-5 (Aug. 5, 2014) (unpub.).
    ii. Present the argument to the Court of Appeals through an application for writ of habeas corpus under N.C. Gen. Stat. §§ 17-1 *et. seq*. *Pennell*, 367 N.C. at 472, 758 S.E.2d at 387.

11. Make sure the trial court had jurisdiction to revoke probation:

a. Be sure to determine when the probationary term began.
    i. In general, a period of probation "commences on the day it is imposed[.]" N.C. Gen. Stat. § 15A-1346(a).
    ii. If the defendant is already serving a period of imprisonment or the court imposes probation at the same time it imposes a period of imprisonment, the period of probation runs concurrently with any period of imprisonment unless the court states that it should begin at the end of the period of imprisonment. N.C. Gen. Stat. § 15A-1346(b). *State v. Harwood*, 243 N.C. App. 425, 428-30, 777 S.E.2d 116, 119 (2015).

b. Be sure to determine whether the original term of probation was proper.
    i. A defendant sentenced to community punishment for a felony can be placed on probation for not less than 12 nor more than 30 months. N.C. Gen. Stat. § 15A-1343.2(d)(3). A defendant sentenced to intermediate punishment for a felony can be placed on probation for not less than 18 nor more than 36 months. N.C. Gen. Stat. § 15A-1343.2(d)(4).
    ii. Be sure to check the sentencing grid in N.C. Gen. Stat. § 15A-1340.17 to determine whether community punishment or intermediate punishment is allowed for the class of offense and the defendant's prior record level. If the

court imposes a probationary sentence that exceeds 30 months as part of a judgment imposing community punishment, the Court of Appeals might consider the mistake to be a clerical error. *See State v. Hauser*, ___ N.C. App. ___, ___, 844 S.E.2d 319, 325 (2020).

iii. If the trial court determines at sentencing that a longer period of probation is necessary, the court may impose a longer period. N.C. Gen. Stat. § 15A-1343.2(d). However, that period may not exceed five years. *Id*. The court is not required to provide any rationale to impose a longer term. *State v. Wilkerson*, 223 N.C. App. 195, 200, 733 S.E.2d 181, 184 (2012). Instead, all the court needs to do is make a finding that a longer term is needed. *Id*.

iv. The trial court cannot run multiple periods of probation consecutively. Instead, a period of probation must run concurrently with any other period of probation. N.C. Gen. Stat. § 15A-1346(a). *State v. Canady*, 153 N.C. App. 455, 460, 570 S.E.2d 262, 266 (2002).

c. Be sure to determine whether the trial court extended the probationary term. Three different statutes permit the court to extend probation:

i. Under N.C. Gen. Stat. §§ 15A-1342(a) and 15A-1343.2(d), the court can extend probation (1) for up to three years, (2) with the consent of the defendant, (3) to complete a program of restitution or medical or psychiatric treatment ordered as a condition of probation, (4) if the extension is ordered in the last six months of the original period of probation. If the sentencing court imposed a five-year probationary period, an extension under this provision could result in an eight-year probationary period. An extension under N.C. Gen. Stat. § 15A-1343.2(d) does not apply to impaired driving or defendants sentenced as violent habitual felons. N.C. Gen. Stat. § 15A-1343.2(a).

ii. Under N.C. Gen. Stat. § 15A-1344(d), the court can extend probation multiple times "after notice and a hearing and for good cause shown." *See State v. Craig*, No. COA16-1027, 2017 N.C. App. Lexis 287, *17-20 (April 18, 2017) (unpub.) (trial court erred by extending defendant's probation under § 15A-1344(d) where defendant was not given notice of hearing, no hearing was held, and the defendant was not represented by counsel); *State v. Lawrence*, No. COA08-1231, 2009 N.C. App. Lexis 760 (June 16, 2009) (unpub.) (trial court lacked subject matter jurisdiction to revoke defendant's probation where defendant did not receive notice and hearing prior to the earlier extension of his probation). However, an extension under this provision cannot increase the period of probation beyond the statutory maximum of five years.

iii. Note that it would be improper for a court to extend a period of probation to five years under N.C. Gen. Stat. § 15A-1344(d) and then extend probation from five to eight years under either N.C. Gen. Stat. §§ 15A-1342(a) or 15A-1343.2(d). Extensions under N.C. Gen. Stat. §§ 15A-1342(a) or 15A-1343.2(d) can only occur in the last six months of the original period of probation. Once the court has issued an extension under N.C. Gen. Stat. § 15A-1344(d), it cannot use N.C. Gen. Stat. §§ 15A-1342(a) or 15A-1343.2(d) to extend the period of probation further. Further discussion of extensions of probation can be found on the North Carolina Criminal Law Blog.

iv. If the trial court improperly extended your client's probation, you should determine whether there was a hearing and, if so, get a transcript of the hearing. If the trial court extended the defendant's probation without a hearing, you should consider arguing that the trial court lacked subject matter jurisdiction to revoke the defendant's probation because the extension was improper. In the unpublished opinion in *State v. Craig*, the defendant successfully argued that the trial court lacked jurisdiction to revoke his probation and activate the suspended sentence because the order extending his probation was invalid, and as a result, his probation expired prior to the date on which his probation officer filed a violation report. *State v. Craig*, No. COA16-1027, 2017 N.C. App. Lexis 287 (April 18, 2017) (unpub.). The unpublished decision in *Craig* can be found here and the briefs can be found here.

d. Be sure to determine whether there are grounds to make a jurisdictional challenge:
   i. If the trial court revoked the defendant's probation after the original period of probation expired, the defendant may raise a jurisdictional argument on appeal. *State v. Reinhardt*, 183 N.C. App. 291, 644 S.E.2d 26 (2007).
   ii. Jurisdiction may only be established by documents that were presented to the trial court. *State v. Peele*, 246 N.C. App. 159, 163-64, 783 S.E.2d 28, 32-33 (2016) (declining to allow State to amend the record to include documents that would confer jurisdiction upon the trial court).
   iii. The State must file the violation report *before* the defendant's probation expires. N.C. Gen. Stat. § 15A-1344(f). *See Peele*, 246 N.C. App. at 163-64, 783 S.E.2d at 32-33. The best evidence that the report was timely-filed is a file stamp. *State v. Moore*, 148 N.C. App. 568, 570, 559 S.E.2d 565, 566 (2002). If there is no other evidence that the motion was filed in a timely manner, the lack of a file stamp is "fatal" to the court's jurisdiction to revoke probation. *State v. High*, 230 N.C. App. 330, 336-37, 750 S.E.2d 9, 11 (2013). A sample violation report with a file stamp is included in the appendix. (App. 5-6). In *High*, the Court of Appeals held that a handwritten date and signature of the clerk did not establish that the violation report was filed in a timely manner. *High*, 230 N.C. App. at 336-37, 750 S.E.2d at 11.
   iv. If the trial court revoked the defendant's probation *after* purporting to extend the period of probation following the expiration of probation, the defendant may raise a jurisdictional argument on appeal. *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008); *State v. Surratt*, 177 N.C. App. 551, 629 S.E.2d 341 (2006).
   v. If the trial court revoked probation during the period of probation, but after improperly extending probation, the defendant may raise a jurisdictional argument on appeal. *State v. Peed*, 257 N.C. App. 842, 844, 810 S.E.2d 777, 779-81 (2018) (substance abuse treatment not a permissible ground for special purpose extension of probation); *State v. Gorman*, 221 N.C. App. 330, 334, 727 S.E.2d 731, 734-35 (2012). *See State v. Lawrence*, COA08-1231, 2009 N.C. App. LEXIS 760 (June 16, 2009) (unpub.) (trial court lacked jurisdiction to revoke probation where prior order extending probation was without notice

and hearing). However, if the defendant failed to make the jurisdictional argument either when the court extended the period of probation or when it revoked the defendant's probation, the Court of Appeals might consider the argument waived. *See, e.g.*, *State v. Rush*, 158 N.C. App. 738, 742, 582 S.E.2d 37, 39 (2003) (stating that the defendant's argument that the trial court improperly extended probation was waived because the defendant "did not raise this issue in the revocation hearing").

vi. Under N.C. Gen. Stat. § 15A-1344(f), a court can extend, modify, or revoke probation *after* the expiration of the probationary period if (1) a violation report was filed before the expiration of the probationary term; (2) the court finds the defendant violated a condition of probation prior to the expiration of the probationary term; and (3) "the court finds for good cause shown and stated that the probation should be extended, modified, or revoked."

1. In *State v. Morgan*, 372 N.C. 609, 616, 831 S.E.2d 254, 259 (2019), the Supreme Court held that the "specific finding" described in N.C. Gen. Stat. § 15A-1344(f)(3) "must actually be made by the trial court" and that the finding "cannot simply be inferred from the record."
2. The remedy for the lack of a good cause finding depends on the record in the case. When the record contains sufficient evidence for the trial court to determine whether there was good cause to revoke probation after the defendant's probation expired, the appellate court will remand the case for the trial court to rule on the question of good cause. *Morgan*, 372 N.C. at 618, 831 S.E.2d at 260. However, if the record does not indicate why the violation hearing was not held until after probation expired, the order revoking probation will be vacated. *State v. Sasek*, ___ N.C. App. ___, ___, 844 S.E.2d 328, 335 (2020).

12. Make sure the defendant's probation was revoked in the proper judicial district:

    a. If the defendant's probation originated in another judicial district, there must be some record or evidence that the defendant's probation was modified in the new judicial district or that the defendant resided in or violated probation in the new judicial district as required by N.C. Gen. Stat. § 15A-1344(a). *State v. Mauck*, 204 N.C. App. 583, 585, 694 S.E.2d 481, 483 (2010).

The Right to Counsel: Be sure to determine whether the defendant was represented by counsel at the revocation hearing and at the hearing in which the court imposed probation.

13. Make sure the defendant was represented by counsel at his original trial, plea hearing, or earlier hearing that resulted in an extension of probation:

    a. The court cannot revoke probation if the defendant was not represented by an attorney when the original judgment was entered and the record does not show that the trial court complied with N.C. Gen. Stat. § 15A-1242. *State v. Neeley*, 307 N.C. 247, 250, 297 S.E.2d 389, 392 (1982).

i. Be sure to review to the original judgment to determine whether the defendant had an attorney. A blank judgment form is included in the appendix. (App. 1-4). The section addressing whether the defendant was represented by counsel is at the top of the first page.
ii. If the judgment indicates that the defendant was not represented by counsel, consider acquiring a transcript of the proceedings to determine whether the trial court engaged in a proper colloquy with the defendant before allowing him to represent himself.

b. A signed and certified waiver of counsel form is proof that the defendant's waiver of counsel was proper. *State v. Warren*, 82 N.C. App. 84, 89, 345 S.E.2d 437, 441 (1986). However, if the transcript of the earlier proceeding shows that the trial court failed to comply with N.C. Gen. Stat. § 15A-1242, the written waiver form will not bar relief. *State v. Wells*, 78 N.C. App. 769, 773, 338 S.E.2d 573, 575 (1986).

14. If the defendant waived his right to counsel at the revocation hearing, make sure the trial court conducted a proper colloquy under N.C. Gen. Stat. § 15A-1242.

a. An indigent defendant has the right to counsel at a probation revocation hearing under N.C. Gen. Stat. § 15A-1345(e). *See State v. Moore*, No. COA16-422, 2016 N.C. App. Lexis 1199, *7-10 (Dec. 6, 2016) (unpub.) (reversing revocation order and concluding that defendant did not forfeit right to counsel at probation violation hearing).

b. The trial court's failure to conduct a proper colloquy at a probation hearing is reversible error. *State v. Evans*, 153 N.C. App. 313, 316, 569 S.E.2d 673, 675 (2002).

Capacity to Proceed: Be sure to determine whether the defendant had the capacity to proceed at the revocation hearing.

15. If there is some indication that the defendant lacked the capacity to proceed at the revocation hearing, the defendant can raise the issue of capacity on appeal. *State v. Martin*, No. COA15-566, 2016 N.C. App. LEXIS 156, *4-12 (Feb. 16, 2016) (unpub.); *State v. Jones*, No. COA04-1185, 2005 N.C. App. LEXIS 2425, *3-4 (Nov. 15, 2005) (unpub.).

a. N.C. Gen. Stat. § 15A-1001(a) sets forth the general standard of capacity to proceed. Under the statute, a defendant lacks capacity to proceed if, by reason of mental illness or defect, he or she is unable to understand the nature and object of the proceedings, comprehend his or her situation in reference to the proceedings, or assist in the defense in a rational or reasonable manner.

The Decision to Revoke Probation: Be sure to determine whether the procedures the trial court employed to revoke the defendant's probation were proper.

16. Be aware that while probation revocation hearings are generally informal, defendants still have important rights at such hearings:

    a. A defendant must receive "full due process" before a court can revoke probation. *State v. Hunter*, 315 N.C. 371, 377, 338 S.E.2d 99, 104 (1986). The right to due process at probation revocation hearings includes: (a) written notice of the alleged violations, (b) disclosure of the evidence of the violations, (c) an opportunity to be heard and present evidence, (d) the right to confront and cross-examine adverse witnesses (unless the judge specifically finds good cause for not allowing confrontation); (e) a neutral and detached judge; and (f) a written statement by the judge of the evidence and reasons for revoking probation. *Gagnon v. Scarpelli*, 411 U.S. 778, 786, 36 L. Ed. 2d 656, 664 (1973). A defendant's due process rights at a probation revocation hearing are codified in N.C. Gen. Stat. § 15A-1345(e). *State v. Moore*, 370 N.C. 338, 345, 807 S.E.2d 550, 556 (2017) (Ervin, J., concurring).

    b. It is not clear whether the defendant has the burden of showing prejudice from a violation of § 15A-1345(e). *Compare State v. Coltrane*, 307 N.C. 511, 515-16, 299 S.E.2d 199, 202 (1983) (reversing revocation without discussing whether defendant was prejudiced by the violations of her rights under § 15A-1345(e)), *with State v. Terry*, 149 N.C. App. 434, 438, 562 S.E.2d 537, 540 (2002) (applying harmless error analysis in evaluating whether a violation of defendant's constitutional and statutory rights under § 15A-1345(e) was reversible error).

17. Make sure the defendant received notice of the conditions of probation:

    a. Under N.C. Gen. Stat. § 15A-1343(c), the defendant "must be given a written statement explicitly setting forth the conditions on which he is being released." "Oral notice to defendant of his conditions of probation is not a satisfactory substitute for the written statement required by statute." *State v. Lambert*, 146 N.C. App. 360, 369, 553 S.E.2d 71, 78 (2001).

    b. If the trial court modifies the conditions of probation, the defendant must receive written notice of the modifications. N.C. Gen. Stat. § 15A-1343(c). "[T]he provision requiring written notice of any modifications made in the terms of probation is mandatory." *State v. Suggs*, 92 N.C. App. 112, 113, 373 S.E.2d 687, 688 (1988). *But see State v. Ellis*, No. COA16-1220, 2017 N.C. App. Lexis 579, *5-6 (July 18, 2017) (unpub.) (upholding modification of conditions of probation made outside of defendant's presence on the ground that modification was a clerical correction of the special condition of probation announced at sentencing).

    c. If the defendant did not assert at or before the revocation hearing that he had no notice of the conditions of probation, the Court of Appeals might consider the argument waived. *See State v. Cooper*, 304 N.C. 180, 183-84, 282 S.E.2d 436, 439

(1981) (holding that a defendant who challenges conditions of probation must do so "no later than the hearing at which his probation is revoked"); *but see State v. Williams*, No. COA10-1343, 2011 N.C. App. LEXIS 1322, *5 (June 7, 2011) (unpub.) (holding that the State's failure to give notice in violation of the statutory mandate in N.C. Gen. Stat. § 15A-1343(c) is preserved without objection). In addition, the Court of Appeals will likely reject an argument that the defendant did not receive notice of the original conditions of probation because the AOC judgment form for judgments imposing probation contains the regular conditions of probation. *See State v. Solomon*, No. COA11-513, 2011 N.C. App. LEXIS 2357, *5 (Nov. 15, 2011) (unpub.) (rejecting argument that the defendant did not receive notice of the original conditions of probation because "the judgment contains all of the terms and conditions of probation in writing, and defendant does not claim she did not receive the written judgment").

18. Make sure the defendant received notice of the conduct that violated the terms of probation:

a. The State must give the defendant notice of the revocation hearing and a copy of the violation report. N.C. Gen. Stat. § 15A-1345(e). A defendant's statutory right to due process requires the State to give the defendant "notice of the hearing and its purpose, including a statement of the violations alleged." N.C. Gen. Stat. § 15A-1345(e). Our Supreme Court interpreted this provision as requiring the State to provide the defendant with "a statement of the actions that [the] defendant has allegedly taken that constitute a violation of a condition of probation." *State v. Moore*, 370 N.C. 338, 345, 807 S.E.2d 550, 555 (2017). The Court explained that N.C. Gen. Stat. § 15A-1345(e) "does not require a statement of the underlying conditions that were violated." *Moore*, 370 N.C. at 341, 807 S.E.2d at 552. Further discussion of the notice requirement and the Supreme Court's decision in *Moore* can be can be found on the North Carolina Criminal Law Blog.

b. In an earlier case, the Court of Appeals said an order for arrest that is served on the defendant and that states the defendant failed to comply with the conditions of probation is sufficient to satisfy the notice requirement. *State v. Gamble*, 50 N.C. App. 658, 659-60, 274 S.E.2d 874, 875 (1981). *Gamble* relied on *State v. Baines*, 40 N.C. App. 545, 551, 253 S.E.2d 300, 304 (1979), which held that a defendant is only entitled to a statement that the defendant "has wilfully failed, without lawful excuse, to abide by the conditions of probation or suspended sentence." The holdings in *Gamble* and *Baines* conflict the Supreme Court's decision in *Moore*, which holds the State must give the defendant a "statement of the actions that [the] defendant has allegedly taken that constitute a violation of a condition of probation." *Moore*, 370 N.C. at 345, 807 S.E.2d at 555. Therefore, it appears *Gamble* and *Baines* are no longer good law.

c. "Without prior and proper statutory notice and a statement of violations provided to Defendant, the trial court lack[s] jurisdiction" to revoke a defendant's probation. *State v. McCaster*, 257 N.C. App. 824, 828, 811 S.E.2d 211, 214 (2018). In addition, a defendant does not waive his right to prior statutory notice by voluntarily appearing

before the court and participating in his revocation hearing. *Id.* at 826-27, 811 S.E.2d at 213-15 (trial court lacked jurisdiction to revoke defendant's probation where trial court did not inform defendant that the purpose of the hearing was to revoke probation or provide defendant with any notice of the alleged violations).

d. Be sure to compare the allegations in the violation report to the evidence at the probation violation hearing. Revocation of a defendant's probation is improper when based, even in part, on violations involving conduct for which the defendant has not received notice. *State v. Walton*, No. COA17-1359, 2018 N.C. App. Lexis 847 (Sep. 4, 2018) (unpub.); *State v. Cunningham*, 63 N.C. App. 470, 475, 305 S.E.2d 193, 196-97 (1983); *cf. State v. Hubbard*, 198 N.C. App. 154, 157-59, 678 S.E.2d 390, 393-94 (2009) (concluding the defendant received sufficient notice under N.C. Gen. Stat. § 15A-1345(e) where the evidence at the violation hearing established the "same facts" alleged in the violation report). Because the State is required to give the defendant notice of the conduct that violated probation, the State may not rely on evidence of conduct not described in the violation report to revoke the defendant's probation. *See State v. Melton*, 258 N.C. App. 134, 137, 811 S.E.2d 678, 681 (2018) (explaining trial court's finding of a violation is limited to the dates and conduct alleged in the violation report).

e. To the extent *State v. Kornegay*, 228 N.C. App. 320, 323-24, 745 S.E.2d 880, 883 (2013), and *State v. Tindall*, 227 N.C. App. 183, 186-87, 742 S.E.2d 272, 275 (2013), hold that a defendant must receive notice of the condition of probation that the defendant has allegedly violated, those decisions are no longer good law. *State v. Moore*, 370 N.C. 341-45, 807 S.E.2d 550, 552-55 (2017) (although the violation report did not specify the condition the defendant allegedly violated, it was sufficient to give notice to the defendant because it alleged pending criminal charges).

19. Determine whether the trial court violated the defendant's right to confrontation:

a. At a revocation hearing, the defendant "may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation." N.C. Gen. Stat. § 15A-1345(e). A discussion of the defendant's right to confrontation at a probation violation hearing can be found on the North Carolina Criminal Law Blog.

b. In *State v. Coltrane*, 307 N.C. 511, 515-16, 299 S.E.2d 199, 202 (1983), our Supreme Court reversed a revocation order because the trial court did not permit the defendant to cross-examine two adverse witnesses and did not make any finding that there was good cause for not permitting the defendant to cross-examine the witnesses.

c. In *State v. Jones*, ___ N.C. App. ___, ___, 838 S.E.2d 686, 690 (2019), the Court of Appeals held that the defendant's right to confrontation at the revocation hearing was not preserved because the defendant did not ask the court to make a good cause finding or issue a subpoena for a police officer to testify at the revocation hearing. However, *Jones* is currently pending on a petition for discretionary review in the Supreme Court of North Carolina. In addition, the opinion in *Jones* arguably conflicts

with *Coltrane* and *Gagnon*. For example, neither *Coltrane* nor *Gagnon* require defendants to subpoena witnesses for the sole purpose of cross-examining them at a revocation hearing. The Court in *Coltrane* also ruled on the merits of the defendant's confrontation argument even though the defendant did not object on confrontation grounds at the revocation hearing. This suggests that the language in N.C. Gen. Stat. § 15A-1345(e) is a statutory mandate, which does not require an objection by the defendant. *See, e.g., State v. Hucks*, 323 N.C. 574, 579, 374 S.E.2d 240, 244 (1988) (violation of statutory language is preserved for appeal without an objection if the statute is "clearly mandatory, and its mandate is directed to the trial court").

20. Make sure the court revoked probation for a proper reason:

a. The decision to revoke probation is governed by N.C. Gen. Stat. § 15A-1344. In 2011, the General Assembly amended N.C. Gen. Stat. § 15A-1344 to limit the circumstances in which a court can revoke probation. Session Law 2011-192. The amendment applies to "probation violations" occurring on or after December 1, 2011. *Id*. According to the amendment, the trial court can only revoke probation in the following three circumstances:
    i. The defendant committed a criminal offense.
    ii. The defendant violated the absconding condition as defined by N.C. Gen. Stat. § 15A-1343(b)(3a).
    iii. The defendant previously received two CRV periods.

b. What happens when the trial court's oral pronouncement contains different findings than the written judgment revoking the defendant's probation? The Court of Appeals has answered this question differently on many occasions:
    i. The following cases are examples of when the trial court's <u>oral pronouncement</u> controlled: *State v. Trent*, 254 N.C. App. 809, 821, 803 S.E.2d 224, 232-33 (2017) (remanding for correction of clerical error where the trial court's written findings differed from the court's oral findings); *State v. Jones*, 225 N.C. App. 181, 185-87, 736 S.E.2d 634, 637-638 (2013) (remanding for correction of a clerical error contained in the written judgment so that the judgment would contain the finding stated in open court); *State v. Odum*, No. COA11-610, 2011 N.C. App. LEXIS 2654, *5-6 (Dec. 20, 2011) (unpub.) (remanding for correction of "clerical error" stating variance in oral pronouncement and written findings "was a mistake in recording the trial court's oral findings"); *State v. Green*, No. COA11-109, 2011 N.C. App. LEXIS 2303, *14 (Nov. 1, 2011) (unpub.) (finding clerical error where written judgment included violation that was dismissed during violation hearing); *State v. Thompson*, No. COA12-1193, 2013 N.C. App. LEXIS 244, *3 fn.1 (March 19, 2013) (unpub.) (clerical error in written judgment); *State v. Osborne*, No. COA06-191, 2007 N.C. App. LEXIS 571, *7-8 (March 20, 2007) (unpub.) (remanding to correct "clerical mistakes in the recording of the trial court's judgment" revoking probation).
    ii. The following cases are examples of when the trial court's <u>written order</u> controlled over the trial court's oral pronouncement: *State v. Hancock*, 248

N.C. App. 744, 748-49, 789 S.E.2d 522, 525 (2016); *State v. Bailey*, No. COA16-356, 2016 N.C. App. Lexis 1084, *3-5 (Nov. 1, 2016) (unpub.).

21. If the trial court revoked probation based on the defendant's commission of a new criminal offense, make sure the court followed the proper procedure:

    a. The court cannot revoke probation based solely on a conviction for a Class 3 misdemeanor. N.C. Gen. Stat. § 15A-1344(d).
        i. Effective December 1, 2013, the following three offenses were changed from Class 1 misdemeanors to Class 3 misdemeanors and, thus, cannot support an order revoking probation. Session Law 2013-360.
            1. Driving while license revoked (except revocation for impaired driving, which remains a Class 1 misdemeanor). N.C. Gen. Stat. § 20-28.
            2. Conversion by bailee. N.C. Gen. Stat. § 14-168.1.
            3. Operation of a motor vehicle without insurance. N.C. Gen. Stat. § 20-313(a).
        ii. Possession of marijuana drug paraphernalia is also a Class 3 misdemeanor. N.C. Gen. Stat. § 90-113.22A.

    b. The court cannot revoke probation based solely on the existence of a pending criminal charge. *State v. Guffey*, 253 N.C. 43, 45, 116 S.E.2d 148, 150 (1960). Rather, the court can revoke probation if the State presents evidence that the defendant committed a new crime and the court makes independent findings based on the evidence of new crime. *State v. Monroe*, 83 N.C. App. 143, 146, 349 S.E.2d 315, 317 (1986).

    c. The court cannot revoke probation for a new criminal conviction if the same conviction or pending charge was the basis of a previous modification. *State v. Schimmelpfenning*, No. COA15-1315, 2016 N.C. App. LEXIS 886, *6-10 (Sep. 6, 2016) (unpub.). *See State v. Bridges*, 189 N.C. App. 524, 526-27, 658 S.E.2d 527, 528 (2008) (suggesting that where the trial court adjudicates violations, the trial court lacks jurisdiction to respond to the same violations at a later hearing). *But see State v. Hancock*, 248 N.C. App. 744, 748-51, 789 S.E.2d 522, 525-26 (2016) (conduct supporting violation of use, possess or control condition used to support finding of pending criminal charge); *State v. Powell*, No. COA16-499, 2016 N.C. App. Lexis 1143, *5-6 (Nov. 15, 2016) (unpub.) (conduct supporting violation of possession of a firearm used to support finding that defendant committed a new criminal offense). This topic is further discussed on the North Carolina Criminal Law Blog.

    d. If the new criminal charge stemmed from a warrantless probation search, determine whether the underlying search was proper.

        i. Since 2009, all probationers are subject to a regular condition of probation allowing warrantless searches of their person, vehicle, and premises by a probation officer. Since 2009, a warrantless probation search must be "for purposes *directly related* to the probation supervision." N.C. Gen. Stat. §15A-

1343(b)(13).

ii. In *State v. Powell*, the Court of Appeals held that the trial court erred by denying the defendant's motion to suppress evidence of firearm because warrantless search violated N.C. Gen. Stat. § 15A-1343(b)(13) because the warrantless search was not "directly related" to the defendant's probation. *State v. Powell*, 253 N.C. App. 590, 601-06, 800 S.E.2d 745, 752-54 (2017). The Court of Appeals' decision in *Powell* is discussed in more detail on the North Carolina Criminal Law Blog.

22. If the trial court revoked probation based on absconding, make sure the evidence showed that the defendant violated that condition:

a. "Absconding" is defined as "willfully avoiding supervision or…willfully making the defendant's whereabouts unknown to the supervising probation officer." N.C. Gen. Stat. § 15A-1343(b)(3a). Absconding is one of the most commonly-discussed topics on the Criminal Law Blog. If you believe absconding is an issue in your case, be sure to search for "absconding" on the Criminal Law Blog. Absconding does not occur when the defendant violates other regular conditions of probation such as leaving the jurisdiction or failing to notify the State of a change in address. *State v. Williams*, 243 N.C. App. 198, 205, 776 S.E.2d 741, 746 (2015): *State v. Nolen*, 228 N.C. App. 203, 205-206, 743 S.E.2d 729, 731 (2013). Instead, absconding occurs through "persistent avoidance of supervision and a continual effort to make [the defendant's] whereabouts unknown." *State v. Newsome*, 264 N.C. App. 659, 665, 828 S.E.2d 495, 500 (2019).

b. In *State v. Crompton*, ___ N.C. App. ___, 842 S.E.2d 106 (2020), a majority of the Court of Appeals held that some violations of the regular conditions of probation could constitute absconding where the violations show that the defendant willfully avoided supervision or willfully made his whereabouts unknown. However, the case is currently pending in the Supreme Court of North Carolina on the basis of a dissent.

c. Examples of cases where the defendant absconded include the following:

i. *State v. Newsome*, 264 N.C. App. 659, 828 S.E.2d 495 (2019): The defendant's probation officer was unable to locate the defendant during a two-month period "after numerous attempts to contact [him] at the last known address" and where defendant admitted at the violation hearing that he knew he had to report to probation office within 72 hours of release from jail and failed to do so.

ii. *State v. Trent*, 254 N.C. App. 809, 817-21, 803 S.E.2d 224, 228-32 (2017): The defendant admitted that, over the course of two weeks, he made no attempt to contact his probation offer, was not home for two home visits, and failed to notify his probation officer that he would be out of town over an eight-day period.

iii. *State v. Johnson*, 246 N.C. App. 132, 136-38, 782 S.E.2d 549, 553-54 (2016): The defendant moved from Nash County to McDowell County without notifying probation officer and did not contact probation officer for several months.

d. Examples of cases where the defendant's conduct did not satisfy the definition of

absconding:

i. *State v. Krider*, 258 N.C. App. 111, 810 S.E.2d 828, *modified and aff'd by*, 371 N.C. 466, 818 S.E.2d 102 (2018): The defendant was not present at his reported address when his probation officer visited the residence on one date, the probation officer was advised by an unidentified woman that defendant did not live at the address, and the probation officer did not subsequently try to contact defendant or verify the unidentified woman's claim.

ii. *State v. Melton*, 258 N.C. App. 134, 811 S.E.2d 678 (2018): The defendant failed to attend scheduled meetings, and the defendant's probation officer was unable to reach the defendant after two days of attempts and leaving messages with defendant's relatives.

iii. *State v. Johnson*, 246 N.C. App. 139, 783 S.E.2d 21 (2016): The defendant told his probation officer he would not attend an office visit the following day and the failed to report for the visit.

iv. *State v. Williams*, 243 N.C. App. 198, 776 S.E.2d 741 (2015): Despite lack of valid North Carolina address, repeated travel to New Jersey, and multiple missed appointments, the Court of Appeals concluded the defendant was <u>not</u> absconding where the defendant's whereabouts were generally known based on phone conversations with his probation officer. The Court deemed the absconding violation as "simply a re-alleging" of technical violations for change of address, leaving the jurisdiction, and failing to report.

23. Make sure the evidence was sufficient to establish that the defendant violated the conditions of probation:

a. The State bears the burden of proving that the defendant violated the conditions of probation, *State v. Seagraves*, 266 N.C. 112, 145 S.E.2d 327 (1965), and must produce "substantial evidence" of the violations. *State v. Millner*, 240 N.C. 602, 605, 83 S.E.2d 546, 548 (1954).

b. Be sure to determine whether the defendant's failure to comply with the condition of probation was willful or without lawful excuse.

i. "Willful" is defined as "the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law." *State v. Arnold*, 264 N.C. 348, 349, 141 S.E.2d 473, 474 (1965).

ii. In the past, a lack of willfulness was a defense to violating probation. *State v. Sellars*, 61 N.C. App. 558, 561, 301 S.E.2d 105, 106 (1983); *State v. Floyd*, 213 N.C. App. 611, 612-15, 714 S.E.2d 447, 449-50 (2011).

c. The order revoking probation must be supported by "competent evidence." *State v. Sherrod*, 191 N.C. App. 776, 777, 663 S.E.2d 470, 472 (2008). *See State v. Millner*, 240 N.C. 602, 605, 83 S.E.2d 546, 548 (1954); *State v. Rogers*, No. COA16-1087, 2017 N.C. App. Lexis 446, *2-4 (Jun. 6, 2017) (unpub.) (trial court erred by revoking defendant's probation where the record contained no competent evidence defendant previously served two periods of confinement in response to violations).

i. In 1967, our Supreme Court held that a verified violation report is competent

evidence to revoke a defendant's probation. *State v. Duncan*, 270 N.C. 241, 246, 154 S.E.2d 53, 58 (1967). *Duncan* is the basis for a line of cases supporting this assertion from *State v. Gamble*, 50 N.C. App. 658, 274 S.E.2d 874 (1981) through *State v. Hancock*, 248 N.C. App. 744, 789 S.E.2d 522 (2016). However, *Duncan* predated *Gagnon v. Scarpelli*, 411 U.S. 778, 786, 36 L. Ed. 2d 656, 664 (1973), and the enactment of N.C. Gen. Stat. § 15A-1345. Under *Gagnon* and N.C. Gen. Stat. § 15A-1345, the trial court may not revoke the defendant's probation unless the State presents evidence that the defendant violated the conditions of probation. *Gagnon* and N.C. Gen. Stat. § 15A-1345 also grant the defendant the right to confront and cross-examine adverse witnesses. Because a verified violation report alone could not satisfy these due process requirements, *Duncan* is no longer controlling. Therefore, if the State relies on *Duncan* to assert that the revocation order should be upheld, you should argue that the State cannot rely solely on a verified violation report to establish the alleged violation.

ii. Hearsay can also serve as the basis of the court's decision to revoke probation. *State v. Murchison*, 367 N.C. 461, 465, 758 S.E.2d 356, 359 (2014). However, it was proper for the court to rely on hearsay in *Murchison* because the hearsay statements were made by the defendant's mother and were supported by a computer printout from the Administrative Office of the Courts. *Id*. If the trial court relied on less reliable hearsay to revoke the defendant's probation, consider distinguishing *Murchison* and arguing that the revocation was improper.

d. Be sure to compare the specific violations that the trial court found with the evidence presented at the revocation hearing. If the court revoked probation based on a violation in a report from a specific date, but the evidence does not support that violation, you should argue that the court revoked probation based on insufficient evidence. A sample revocation order is included in the appendix. (App. 11-12). In the "Findings" section on the second page of the order, the court is required to specify the violations that support its order. (App. 12).

e. If the trial court *did* check the box stating that "each violation is, in and of itself, a sufficient basis to revoke probation," and you have a case where there are non-revocable and revocable violations alleged, you should consider arguing the judge abused it discretion by revoking probation because probation could only be revoked for the commission of a new criminal offense or absconding. *See, e.g., State v. Newsome*, 264 N.C. App. 659, 828 S.E.2d 495 (2019) (although judgment indicated that "each violation is, in and of itself, a sufficient basis to revoke probation," the Court of Appeals concluded this was a clerical error because the trial court also checked the box indicating that probation could only be revoked for committing a new criminal offense or absconding). The box appears under number 4 in the "Findings" section of the attached revocation order. (App. 12).

f. If the defendant admits through counsel that he violated probation, the court is not required to personally examine the defendant regarding the voluntariness of his

admission. *State v. Sellers*, 185 N.C. App. 726, 728-29, 649 S.E.2d 656, 657 (2007).

g. However, even if a defendant *admits* that he violated a condition of his probation, he is not precluded from challenging the revocation of his probation on appeal. *See, e.g.*, *State v. Peed*, 257 N.C. App. 842, 810 S.E.2d 777 (2018) (although defendant admitted he violated a condition of probation, the Court reversed for lack of jurisdiction); *State v. Crowder*, No. COA18-185, 2018 N.C. App. LEXIS 956, *2-4 (Oct. 2, 2018) (unpub.) (reviewing merits of defendant's appeal and affirming revocation where defendant admitted he was avoiding supervision at revocation hearing); *State v. Hurley*, No. COA16-1202, 2017 N.C. App. Lexis 889, *9-18 (Oct. 17, 2017) (unpub.) (same).

24. Make sure the trial court did not revoke probation for a violation that was litigated at an earlier hearing:

a. In *State v. Jacobs*, No. COA11-679, 2012 N.C. App. LEXIS 363 (Mar. 20, 2012) (unpub.), the Court of Appeals considered this problem under theories of collateral estoppel and *res judicata*. However, a claim of collateral estoppel or *res judicata* is waived if it is not raised in trial court. *In re D.R.S.*, 181 N.C. App. 136, 140, 638 S.E.2d 626, 628 (2007). *But see State v. Powell*, No. COA16-499, 2016 N.C. App. Lexis 1143, *3-4 (Nov. 15, 2016) (unpub.) ("constitutional prohibition against double jeopardy does not apply to a probation revocation proceeding").

25. Make sure the trial court exercised discretion before revoking the defendant's probation:

a. It is error for the trial court to revoke probation on the ground that it has no discretion in determining whether to revoke, modify, or extend probation after finding a revocable violation. *State v. Bailey*, No. COA16-356, 2016 N.C. App. LEXIS 1084, *3-4 (Nov. 1, 2016) (unpub.) (noting that failure to exercise discretion at probation violation hearing is error); *State v. Everette*, No. COA12-1500, 2013 N.C. App. LEXIS 973, *13-14 (Sep. 17, 2013) (unpub.).

b. An error in the findings may be deemed harmless if the revocation order was supported by at least one proper finding that the defendant violated a revocable condition of probation. *State v. Hancock*, 248 N.C. App. 744, 748, 789 S.E.2d 522, 525 (2016) ("A trial court's ruling must be upheld if it is correct upon any theory of law[,] and thus it should not be set aside merely because the court gives a wrong or insufficient reason for [it]."). However, if the trial court failed to check the box on the judgment specifying that "each violation "in and of itself" would be a sufficient reason for revocation, the Court of Appeals may remand the case to superior court to determine whether the court would have revoked probation if it had not found that each violation was sufficient to revoke probation. *State v. Sitosky*, 238 N.C. App. 558, 565, 767 S.E.2d 623, 627–28 (2014).

Activating the Defendant's Sentence: Be sure to determine whether the trial court's decisions regarding the defendant's sentence were proper.

26. Make sure any decisions about reducing the defendant's sentence were proper:

    a. Courts generally prohibit a defendant from challenging the sentence that the trial court imposed in the original judgment placing the defendant on probation. Such a challenge is normally considered an impermissible collateral attack. *State v. Holmes*, 361 N.C. 410, 413, 646 S.E.2d 353, 355 (2007). Appellate courts reason that if the defendant wanted to challenge the original judgment, he should have done so through a direct appeal from the original judgment itself. *Id*.

    b. Nevertheless, there are some sentencing arguments that can be made on appeal from the order revoking probation. For example, under N.C. Gen. Stat. § 15A-1344(d1), the trial court may reduce the defendant's sentence when it revokes probation. If the sentence the court initially imposed was too high, you should consider arguing that the court's failure to reduce the sentence at the end of a revocation hearing was an abuse of discretion. *But see State v. Leonard*, No. COA14-182, 2015 N.C. App. LEXIS 53, *4-5 (Feb. 3, 2015) (unpub.) (holding that a challenge to the original sentence constituted an impermissible collateral attack).

    c. If the trial court believed that it did not have authority to reduce the sentence, the defendant "is entitled to a new revocation of probation hearing." *State v. Partridge*, 110 N.C. App. 786, 788, 431 S.E.2d 550, 551-52 (1993); *see also State v. Holmes*, No. COA18-1023, 2019 N.C. App. Lexis 287, *5-6 (March 26, 2019) (unpub.).

27. Make sure any decisions about the structure of the defendant's sentence were proper:

    a. If the trial court re-structured the defendant's sentences to run consecutively without the defendant present, the case must be remanded for resentencing. *State v. Hanner*, 188 N.C. App. 137, 142, 654 S.E.2d 820, 823 (2008).

    b. If the transcript indicates that the trial court decided to run the defendant's sentences consecutively because the defendant contested the allegations in the violation report, you should consider arguing that the trial court improperly punished the defendant for exercising his right to a revocation hearing. *See, e.g.*, *State v. Cannon*, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990) (holding that the trial court cannot impose a higher sentence based on the defendant's demand for a jury trial).

28. Make sure the trial court gave the defendant sufficient credit for time served:

    a. Be sure to determine from the court file how much credit the defendant was due for time served in jail and compare that to the credit the judge gave the defendant in the judgment revoking probation.

    b. Under N.C. Gen. Stat. § 15-196.1, the defendant is entitled to credit for time served in

jail before the revocation hearing or as part of special probation. *State v. Farris*, 336 N.C. 552, 556, 444 S.E.2d 182, 184-85 (1994).

c. In 2016, the legislature amended the CRV jail credit rules for defendants subject to multiple sentences. The legislature amended N.C. Gen. Stat. § 15-196.2, effective for offenses committed on or after December 1, 2016, to state that upon revocation of two or more consecutive sentences as a result of a probation violation, credit for time served on concurrent CRVs may be credited to one sentence only. Session Law 2016-77, § 5. The new jail credit provision is explained in more detail on the North Carolina Criminal Law Blog.

d. Be aware that if the defendant did not ask the trial court to give him credit for time served, the Court of Appeals will not review the defendant's jail credit for the first time appeal. *State v. Cloer*, 197 N.C. App. 716, 722, 678 S.E.2d 399, 403 (2009). If the defense attorney did not ask the trial court to give the defendant jail credit, you should consider raising the issue under Appellate Rule 2. As an alternative, you should consider asking the trial attorney to ask the judge to give the defendant the correct amount of jail credit. This might require you to assemble the relevant documents from the court file and draft a letter outlining the number of days that should be credited to the client.

Special Probation / Split Sentences: Be sure to determine whether the trial court sentenced the defendant to proper periods of active time and probation.

29. Make sure the active portion of the split sentence is proper:

a. Special probation, commonly referred to as a "split sentence," allows a judge to impose a mix of imprisonment and probation when sentencing a defendant to intermediate punishment. Split sentence confinement occurs *within* the period of probation. N.C. Gen. Stat. § 15A-1351(a).

b. The active portion of the split sentence counts against the total length of the probation period. N.C. Gen. Stat. § 15A-1351(a). The combined length of the split sentence and probation cannot exceed sixty months except as provided in N.C. Gen. Stat. § 15A-1342(a).

c. The total of all periods of special probation confinement (split sentence) "may not exceed one-fourth the maximum sentence of imprisonment imposed for the offense[.]" N.C. Gen. Stat. § 15A-1351(a).

d. A detailed discussion on special probation can be found on the North Carolina Criminal Law Blog.

30. Make sure the defendant received the proper jail credit:

a. In imposing a split sentence, the judge may credit any time spent as a result of the charge "to either the suspended sentence or to the imprisonment required for special probation." N.C. Gen. Stat. § 15A-1351(a).

b. Upon revocation of probation, a defendant is entitled to receive credit for any active time served as part of a split sentence. *State v. Farris*, 336 N.C. 552, 555-56, 444 S.E.2d 182, 184-85 (1994).

31. Make sure that the split sentence was stayed when the defendant gave notice of appeal:

a. "When a defendant has given notice of appeal . . . special probation is stayed." N.C. Gen. Stat. § 15A-1451(a)(4).

b. If the split sentence was not stayed, the proper remedy is to file a petition for writ of supersedeas in the Court of Appeals to stay the sentence. *State v. Stover*, 200 N.C. App. 506, 510, 685 S.E.2d 127, 131 (2009). However, if the defendant was given a split sentence and the split sentence was not stayed, and the defendant has fully served the split sentence, a challenge to the split sentence may be rendered moot. *Id.* at 509-510, 685 S.E.2d at 130-31.

STATE OF NORTH CAROLINA

_____County _____ Seat of Court

NOTE: *[Use AOC-CR-310 for DWI offense(s).]*

File No.

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

STATE VERSUS

Name Of Defendant

Race | Sex | Date Of Birth

JUDGMENT SUSPENDING SENTENCE - FELONY
PUNISHMENT: ☐ COMMUNITY ☐ INTERMEDIATE
(STRUCTURED SENTENCING)
(For Offenses Committed On Or After Dec. 1, 2016)
G.S. 15A-1341, -1342, - 1343, -1343.2, -1346

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

The defendant was found guilty/responsible, pursuant to ☐ plea (☐ pursuant to *Alford*) (☐ of no contest) ☐ trial by judge ☐ trial by jury, of

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

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

The Court ☐ 1. has determined, pursuant to G.S. 15A-1340.14, the prior record points of the defendant to be _____. Any prior record level point under G.S. 15A-1340.14(b)(7) is based on the determination of this issue by the trier of fact beyond a reasonable doubt or the defendant's admission to this issue.
☐ 2. makes no prior record level finding because none is required.

PRIOR RECORD LEVEL: ☐ I ☐ II ☐ III ☐ IV ☐ V ☐ VI

The Court (**NOTE:** *Block 1 or 2 MUST be checked.*):
☐ 1. makes no written findings because the prison term imposed is within the presumptive range of sentences authorized under G.S. 15A-1340.17(c).
☐ 2. makes the Determination of aggravating and mitigating factors on the attached AOC-CR-605.
☐ 3. makes the Findings of Extraordinary Mitigation set forth on the attached AOC-CR-606.
☐ 4. finds the defendant has provided substantial assistance pursuant to G.S. 90-95(h)(5).
☐ 5. adjudges the defendant to be *(check only one)* ☐ a habitual felon to be sentenced four classes higher than the principal felony *(no higher than Class C)*. ☐ a habitual breaking and entering status offender, to be sentenced as a Class E felon.
☐ 6. finds enhancement pursuant to: ☐ G.S. 90-95(e)(3) (drugs). ☐ G.S. 14-3(c) (hate crime). ☐ G.S. 50B-4.1 (domestic violence). ☐ G.S. 14-50.22 (gang misdemeanor). ☐ Other: _____. This finding is based on the determination of this issue by the trier of fact beyond a reasonable doubt or the defendant's admission.
☐ 7. finds the above-designated offense(s) is a reportable conviction under G.S. 14-208.6 and therefore imposes the special conditions of probation set forth on the attached AOC-CR-603D, Page Two, Side Two, and makes the additional findings and orders on the attached AOC-CR-615, Side Two.
☐ 8. finds the above-captioned offense(s) involve the *(check all that apply)* ☐ physical or mental ☐ sexual abuse of a minor. ☐ *(If No. 7 not found)* and therefore imposes the special conditions of probation set forth on the attached AOC-CR-603D, Page Two, Side Two.
☐ 9. finds that a ☐ motor vehicle ☐ commercial motor vehicle was used in the commission of the offense and that it shall be reported to DMV.
☐ 10. finds this is an offense involving assault, communicating a threat, or an act defined in G.S. 50B-1(a), and the defendant had a personal relationship as defined by G.S. 50B-1(b) with the victim.
☐ 11. *(offenses committed on or after Dec. 1, 2017, only)* finds that the offense was committed as part of criminal gang activity as defined in G.S. 14-50.16A(2) ☐ and that the defendant was a criminal gang leader or organizer as defined in G.S. 14-50.16A(3). This finding is based on the determination of this issue by the trier of fact beyond a reasonable doubt or on the defendant's admission.
☐ 12. finds the above-designated offense(s) involved *(check one)* ☐ *(offenses committed Dec. 1, 2016 - Nov. 30, 2017)* criminal street gang activity ☐ *(offenses committed on or after Dec. 1, 2017)* criminal gang activity. G.S. 14-50.25.
☐ 13. did not grant a conditional discharge under G.S. 90-96(a) because *(check all that apply)* ☐ the defendant refused to consent. ☐ the Court finds, with the agreement of the District Attorney, that the offender is inappropriate for a conditional discharge for factors related to the offense.
☐ 14. finds that the defendant used or displayed a firearm while committing the felony. G.S. 15A-1382.2.
☐ 15. finds that this was an offense involving child abuse or an offense involving assault or any of the acts as defined in G.S. 50B-1(a) committed against a minor. G.S. 15A-1382.1(a1).

The Court, having considered evidence, arguments of counsel and statement of defendant, Orders that the above offenses, if more than one, be consolidated for judgment and the defendant be imprisoned

for a minimum term of _____ months | for a maximum term of _____ months in the custody of the N.C. DACJJ.

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

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

SUSPENSION OF SENTENCE

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

☐ 1. The Court finds that a ☐ longer ☐ shorter period of probation is necessary than that which is specified in G.S. 15A-1343.2(d).
☐ 2. The Court finds that it is NOT appropriate to delegate to the Section of Community Corrections the authority to impose any of the requirements in G.S. 15A-1343.2(e) for community punishment or G.S. 15A-1343.2(f) for intermediate punishment.
☐ 3. This period of probation shall begin ☐ when the defendant is released from incarceration ☐ at the expiration of the sentence in the case below.

File No.	Offense	County	Court	Date

☐ 4. The defendant shall comply with the conditions set forth in file number _____.
☐ 5. The defendant shall provide a DNA sample pursuant to G.S. 15A-266.4. (AOC-CR-319 required)

MONETARY CONDITIONS

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

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

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

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

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

Material opposite unmarked squares is to be disregarded as surplusage.

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

NOTE: *Any probationary judgment may be extended pursuant to G.S. 15A-1342.* The defendant shall: (1) Commit no criminal offense in any jurisdiction. (2) Possess no firearm, explosive device, or other deadly weapon listed in G.S. 14-269. (3) Remain gainfully and suitably employed or faithfully pursue a course of study or vocational training, that will equip the defendant for suitable employment, and abide by all rules of the institution. (4) Satisfy child support and family obligations, as required by the Court. (5) Submit to the taking of digitized photographs, including photographs of the defendant's face, scars, marks, and tattoos, to be included in the defendant's records.
If the defendant is on supervised probation, the defendant shall also: (6) Not abscond, by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer. (7) Remain within the jurisdiction of the Court unless granted written permission to leave by the Court or the probation officer. (8) Report as directed by the Court or the probation officer to the officer at reasonable times and places and in a reasonable manner, permit the officer to visit at reasonable times, answer all reasonable inquiries by the officer and obtain prior approval from the officer for, and notify the officer of, any change in address or employment. (9) Notify the probation officer if the defendant fails to obtain or retain satisfactory employment. (10) Submit at reasonable times to warrantless searches by a probation officer of the defendant's person and of the defendant's vehicle and premises while the defendant is present, for purposes directly related to the probation supervision, but the defendant may not be required to submit to any other search that would otherwise be unlawful. (11) Submit to warrantless searches by a law enforcement officer of the defendant's person and of the defendant's vehicle, upon a reasonable suspicion that the defendant is engaged in criminal activity or is in possession of a firearm, explosive device, or other deadly weapon listed in G.S. 14-269 without written permission of the court. (12) Not use, possess, or control any illegal drug or controlled substance unless it has been prescribed for the defendant by a licensed physician and is in the original container with the prescription number affixed on it; not knowingly associate with any known or previously convicted users, possessors, or sellers of any such illegal drugs or controlled substances; and not knowingly be present at or frequent any place where such illegal drugs or controlled substances are sold, kept, or used. (13) 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 and Juvenile Justice for the actual costs of drug or alcohol screening and testing. (14) 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.

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

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

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

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

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

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

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

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

☐ 21. Abstain from alcohol consumption and submit to continuous alcohol monitoring for a period of _____ ☐ days, ☐ months, the Court having found that a substance abuse assessment has identified defendant's alcohol dependency or chronic abuse.

☐ 22. Other:

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

ORDER OF COMMITMENT/APPEAL ENTRIES

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

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

SIGNATURE OF JUDGE

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

CERTIFICATION

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

☐ 1. Appellate Entries (AOC-CR-350)
☐ 2. Judgment Suspending Sentence (AOC-CR-603D, Page Two) (additional conditions of probation)
☐ 3. Felony Judgment Findings Of Aggravating And Mitigating Factors (AOC-CR-605)
☐ 4. Extraordinary Mitigation Findings (AOC-CR-606)
☐ 5. Restitution Worksheet, Notice And Order (Initial Sentencing) (AOC-CR-611)
☐ 6. Judicial Findings As To Required DNA Sample (AOC-CR-319)
☐ 7. Judicial Findings And Order For Sex Offenders - Suspended Sentence (AOC-CR-615, Side Two)
☐ 8. Convicted Sex Offender Permanent No Contact Order (AOC-CR-620)
☐ 9. Additional File No.(s) And Offense(s) (AOC-CR-626)
☐ 10. Other: _____.

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

Material opposite unmarked squares is to be disregarded as surplusage.

STATE VERSUS | *File No.*

Name Of Defendant

NOTE: Use this page with **AOC-CR-603D**, "Judgment Suspending Sentence - Felony"; **AOC-CR-604D**, "Judgment Suspending Sentence - Misdemeanor"; **AOC-CR-619D**, "Conditional Discharge Under G.S. 90-96(a)"; **AOC-CR-621D**, "Conditional Discharge Under G.S. 14-50.29"; **AOC-CR-627D**, "Conditional Discharge Under G.S. 90-96(a1)"; **AOC-CR-628D**, "Conditional Discharge Under G.S. 14-204(b)"; **AOC-CR-632D**, "Conditional Discharge Under G.S. 15A-1341(a4)"; or **AOC-CR-633D**, "Conditional Discharge Under G.S. 15A-1341(a5)"; **for offenses committed on or after Dec. 1, 2016.**

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

In addition to complying with the regular and any special conditions of probation set forth in the "Judgment Suspending Sentence" entered in the above case(s), the defendant shall also comply with the following conditions of probation, which may be imposed for any community or intermediate punishment.

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

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

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

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

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

☐ 5. Abstain from alcohol consumption and submit to continuous alcohol monitoring for a period of _____ ☐ days, ☐ months, the Court having found that a substance abuse assessment has identified defendant's alcohol dependency or chronic abuse.

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

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

INTERMEDIATE PUNISHMENTS

In addition to complying with the regular and any special, community, or intermediate conditions of probation set forth in the "Judgment Suspending Sentence" or herein for the above case(s), the defendant shall also comply with the following intermediate punishment(s) under G.S. 15A-1340.11(6).

☐ **1. Special Probation - G.S. 15A-1351**
For the defendant's active sentence as a condition of special probation, the defendant shall comply with these additional regular conditions of probation: (1) Obey the rules and regulations of the Division of Adult Correction and Juvenile Justice governing the conduct of inmates while imprisoned. (2) Report to a probation officer in the State of North Carolina within seventy-two (72) hours of the defendant's discharge from the active term of imprisonment.
☐ A. Serve an active term of _____ ☐ days ☐ months ☐ hours in the custody of the
☐ N.C. DACJJ. ☐ Sheriff of this County. ☐ Other: _____.
(**NOTE:** *Noncontinuous periods of special probation may not be served in DACJJ. Also, special probation imposed in misdemeanor sentences on or after Oct. 1, 2014, may not be served in DACJJ.*)
☐ B. The defendant shall report in a sober condition to begin serving his/her term on:

Day	Date	Hour	☐ AM ☐ PM

and shall remain in custody until:

Day	Date	Hour	☐ AM ☐ PM

☐ C. The defendant shall again report in a sober condition to continue serving this term on the same day of the week for the next _____ consecutive weeks, and shall remain in custody during the same hours each week until completion of the active term ordered.
☐ D. This term shall be served at the direction of the probation officer within _____ ☐ days ☐ months of this judgment.
☐ E. Pay jail fees. ☐ F. Work release is recommended. ☐ G. Substance abuse treatment is recommended.
☐ H. Other:

☐ **2. Drug Treatment Court - G.S. 15A-1340.11(3a); 15A-1340.11(6)**
Comply with the rules adopted for the program as provided for in Article 62 of Chapter 7A of the General Statutes and report on a regular basis for a specified time to participate in court supervision, drug screening or testing, and drug or alcohol treatment programs.
Other:

INTERMEDIATE CONDITIONS OF PROBATIONS - G.S. 15A-1343(b4)

If subject to intermediate punishment, the defendant shall, in addition to the terms and conditions imposed above, comply with the following intermediate conditions of probation. (1) If required by the defendant's probation officer, perform community service under the supervision of the Section of Community Corrections, and pay the fee required by G.S. 143B-708, but no fee shall be due if the Court imposed community service as a special condition of probation and assessed the fee in this judgment or any judgment for an offense adjudicated in the same term of court. (2) Not use, possess, or control alcohol. (3) Remain within the defendant's county of residence unless granted written permission to leave by the court or the defendant's probation officer. (4) Participate in any evaluation, counseling, treatment, or educational program as directed by the probation officer, keeping all appointments by abiding by the rules, regulations, and direction of each program.

Material opposite unmarked squares is to be disregarded as surplusage.

(Over)

MANDATORY SPECIAL CONDITIONS FOR SEX OFFENDERS AND PERSONS CONVICTED OF OFFENSES INVOLVING PHYSICAL, MENTAL, OR SEXUAL ABUSE OF A MINOR - G.S. 15A-1343(b2)

NOTE: *The following are not defined as intermediate punishments under G.S. 15A-1340.11(6).*
NOTE: *Select **only one** of the three sets of conditions below.*

☐ **1. Special Conditions For Reportable Convictions - G.S. 15A-1343(b2)**

NOTE: *Impose only for a reportable conviction under G.S. 14-208.6.*
The defendant has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4) and must
a. Register as a sex offender and enroll in satellite-based monitoring if required on the attached AOC-CR-615, Side Two.
b. Participate in such evaluation and treatment as is necessary to complete a prescribed course of psychiatric, psychological, or other rehabilitative treatment as ordered by the court.
c. Not communicate with, be in the presence of, or found in or on the premises of the victim of the offense.
☐ d. *(if the Court finds physical, mental, or sexual abuse of a minor)* Not reside in a household with
☐ (1) *(for sexual abuse)* any minor child.
☐ (2) *(for physical or mental abuse)* any minor child ☐ other than the child(ren) named below, for whom the court expressly finds that it is unlikely that the defendant's harmful or abusive conduct will recur and that it would be in the best interest of the child(ren) named below to reside in the same household with the probationer. *(Name minor child(ren) with whom the probationer may reside in the same household)*: _____.
e. Submit at reasonable times to warrantless searches by a probation officer of the defendant's person, of the defendant's vehicle and premises, and of the defendant's computer or other electronic mechanism which may contain electronic data, while the defendant is present, for the following purposes which are reasonably related to the defendant's probation supervision: ☐ child pornography
☐ _____.
f. Other:

☐ **2. Special Conditions For Offenses Involving The Sexual Abuse Of A Minor - G.S. 15A-1343(b2)**

NOTE: *Impose if offense involved sexual abuse of a minor but is **not** a reportable conviction.*
The defendant has been convicted of an offense involving the sexual abuse of a minor and must
a. Participate in such evaluation and treatment as is necessary to complete a prescribed course of psychiatric, psychological, or other rehabilitative treatment as ordered by the court.
b. Not communicate with, be in the presence of, or found in or on the premises of the victim of the offense.
c. Not reside in a household with any minor child. (G.S. 15A-1343(b2)(4))
d. Submit at reasonable times to warrantless searches by a probation officer of the defendant's person, of the defendant's vehicle and premises, and of the defendant's computer or other electronic mechanism which may contain electronic data, while the defendant is present, for the following purposes which are reasonably related to the defendant's probation supervision: ☐ child pornography
☐ _____.
e. Other:

☐ **3. Special Conditions For Offenses Involving The Physical Or Mental Abuse Of A Minor - G.S. 15A-1343(b2)**

NOTE: *Impose if offense involved physical or mental abuse of a minor but is **not** a reportable conviction and did **not** involve sexual abuse.*
The defendant has been convicted of an offense involving the physical or mental abuse of a minor and must
a. Participate in such evaluation and treatment as is necessary to complete a prescribed course of psychiatric, psychological, or other rehabilitative treatment as ordered by the court.
b. Not communicate with, be in the presence of, or found in or on the premises of the victim of the offense.
c. Not reside in a household with
☐ (1) any minor child.
☐ (2) any minor child other than the child(ren) named below, for whom the court expressly finds that it is unlikely that the defendant's harmful or abusive conduct will recur and that it would be in the best interest of the child(ren) named below to reside in the same household with the probationer. *(Name minor child(ren) with whom the probationer may reside in the same household)*:
_____.
d. Submit at reasonable times to warrantless searches by a probation officer of the defendant's person, of the defendant's vehicle and premises, and of the defendant's computer or other electronic mechanism which may contain electronic data, while the defendant is present, for the following purposes which are reasonably related to the defendant's probation supervision: ☐ child pornography
☐ _____.
e. Other

ADDITIONAL CONDITIONS FOR DOMESTIC VIOLENCE

☐ 1. Pursuant to its finding that the defendant is responsible for acts of domestic violence, the Court further finds that:
☐ a. there is an abuser treatment program, approved by the Domestic Violence Commission, reasonably available to the defendant, who shall:
☐ (1) *(for supervised probation)* attend and complete *(check one)* ☐ *(program name)* _____
☐ a program to be identified by the probation officer, and abide by the program's rules. The probation officer shall send a copy of this judgment to the program, which shall notify the officer if the defendant fails to participate or is discharged for violating any of its rules.
☐ (2) *(for unsupervised probation)* attend and complete *(check one)* ☐ *(program name)* _____
☐ a program chosen by the defendant, who shall notify the program and the district attorney of that choice within ten (10) days of the entry of this judgment, and abide by the program's rules. The district attorney shall send a copy of this judgment to the program, which shall notify the district attorney if the defendant fails to participate or is discharged for failure to comply with the program or its rules.
☐ b. there is no approved abuser treatment program reasonably available. ☐ c. it would not be in the best interests of justice to order the defendant to complete an abuser treatment program because _____.
☐ 2. As additional Special Conditions of Probation, the defendant shall:
☐ a. not come within _____ feet of _____ at any time.
☐ b. comply fully with any G.S. Chapter 50B Domestic Violence Protective Order in effect.

The above conditions are incorporated in the "Judgment Suspending Sentence" in the above case(s) and made a part thereof.

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

Material opposite unmarked squares is to be disregarded as surplusage.

App. 5

State of North Carolina > File No. County of Hearing _____
FILED No. County of Origin 12053457

In the General Court of Justice
RUTHERFORD County RUTHERFORD SEP -5 AM 8:56 Court District X Superior

STATE VERSUS RUTHERFORD COUNTY, C.S.C.

MCCURRY , BY_____ VIOLATION REPORT
DOGWOOD LN APT
FOREST CITY NC

AKA: , O.

WHITE MALE DOB: 11/ /1967 G.S. 15A-1345

ADMINISTRATIVE REVIEW

The violations listed on this Violation Report were reviewed with DAVIS, LAMONDA M. Chief Probation Officer on 01/01/0001

OATH AND SIGNATURE OF OFFICER

I have read the Violation Report, and state that the contents are true to my own knowledge except those which are stated upon information and belief, and as to them I believe that they are true.

Signature | Terrence Lenyor (Name (Type or Print)) | PPOII (Title) | 9/5/2013 (Date)

SWORN AND SUBSCRIBED TO _____
Signature of Person Authorized to Administer Oaths.

on 9/5/13 (Date).
X Deputy CSC/Assist CSC __Superior Court Clerk
__Magistrate __Notary Public
Date Commission Expires _____

SIGNATURE OF PROBATIONER

I have received a copy of this Violation Report and understand its contents and that I must appear in Court as directed by my Probation/Parole Officer.

Signature of Probationer 9/5/2013 (Date)

HEARING NOTICE

WHEREFORE, the above signed requests that a hearing on the charge(s) contained in this report be conducted pursuant to G.S. 15A-1345(e) on the date and at the time and place set forth below, that the notice of this hearing be given in any manner provided by law, and that after such hearing the Court take the action which it considers proper under G.S. 15A-1344(d) and/or 15A-1344(e1).

Hearing Date: 11/04/2013 Time: 09:00 AM/PM Place: Superior Court 002.

The probation officer, being duly sworn, states that the defendant was placed on probation pursuant to the following Judgment Suspending Sentence

Date of Judgment	Court	County of Origin	File No.	Offense	Counts
11/07/2012	DIST	RUTHERFORD	12053457	POSSESS SCHEDULE II	001
			12053457	POSSESS SCHEDULE IV	001
			12053458	SELL CONTROL SUBSTANCE	002
			12053458	PWISD COUNTERFEIT CS	001
			12053459	POSSESS SCHEDULE II	001

Length of Sentence Min: 0YR 6MO 0DY Max: 0YR 17MO 0DY
Length of Term of Probation: 0 YRS. 24 MOS. 0 DYS.
Sentencing Judge: POWELL,LAURA A

***THE DEFENDANT HAS PREVIOUSLY SERVED 0 PERIODS OF CONFINEMENT IN RESPONSE TO VIOLATIONS. ***

THE DEFENDANT HAS THE FOLLOWING 2 OR 3 DAY PERIODS OF CONFINEMENT. *

Of the conditions of probation imposed in that judgment, the defendant has willfully violated:

1. Condition of Probation "Not use, possess or control any illegal drug or controlled substance unless it has been prescribed for the defendant by a licensed physician and is in the original container with the prescription number affixed on it..." in that OFFENDER ADMITTED TO USING METH/AMPHETAMINE 08/25/2013 AFTER LYING TO PROBATION OFFICER FOR NEARLY 2 HOURS REFUSING TO SUMMIT URINE SAMPLE.

2. "Report as directed by the Court, Commission or the supervising officer to the officer at reasonable times and places..." in that OFFENDER WAS RELEASED FROM JAIL ON BOND FOR PROBATION VIOLATION 08/14/2013. SUPERVISION PROBATION OFFICER MADE CONTACT WITH OFFENDER OUTSIDE THE RUTHERFORD JAIL 08/16/2013 AND INFORMED OFFENDER TO REPORT TO PROBATION OFFICE FOR OFFICE APPOINTMENT FIRST THING MONDAY MORNING 08/19/2013 AT 0800. OFFENDER AGAIN FAILED TO REPORT TO PROBATION OFFICE GIVING NO NOTICE OF ABSENCE.

STATE OF NORTH CAROLINA

File No.
Co. Of Hearing

_____County _____ Seat Of Court

NOTE: *Use this form for all court-ordered modifications of probation, including changes in conditions, confinement in response to violation under G.S. 15A-1344(d2) or contempt under G.S. 5A-11, and all findings/orders resulting from violation hearings when probation is not revoked completely.*

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

STATE VERSUS

Name Of Defendant		
Race	Sex	Date Of Birth
Defendant's Drivers License No.		State

ORDER ON VIOLATION OF PROBATION OR ON MOTION TO MODIFY
(For All Modifications On Or After Dec. 1, 2011)

G.S. 15A-1344, -1345

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

The defendant was placed on probation pursuant to the following Judgment Suspending Sentence:

Date Of Judgment Suspending Sentence	Name Of County And File No. (County Of Original Conviction)

This matter is before the Court upon:

☐ 1. review under G.S. 15A-1342(b) or (d). After reasonable notice to the defendant, the Court ☐ finds ☐ does not find that termination of probation is warranted by the defendant's conduct and the ends of justice.

☐ 2. motion to modify the defendant's probation without charge of violation. Upon ☐ notice and hearing ☐ consent of the State and the defendant *(see signatures on Side Two if modification entered in chambers)*, the Court ☐ finds ☐ does not find that good cause has been shown to modify the original Judgment Suspending Sentence.

☐ 3. allegation of violation of the conditions of the defendant's probation.

Upon due notice of the alleged violation(s) or waiver of such notice, a hearing was held before the Court. After considering the record in the above-captioned case, the evidence presented, and any statements of the State and the defendant, the Court finds that the defendant admitted or that the Court is reasonably satisfied in the exercise of its discretion that: *(check all that apply)*

☐ 1. the defendant violated the condition(s) of probation set forth in ☐ a. Paragraph(s) _____ in the Violation Report or Notice of Hearing dated _____. ☐ b. Paragraph(s) _____ in the Violation Report or Notice of Hearing dated _____. ☐ c. the attached sheet. Such violation(s) was willful and without valid excuse and occurred at a time prior to the expiration or termination of the period of the probation.

☐ 2. the defendant violated the condition(s) of probation set forth in ☐ a. Paragraph(s) _____ in the Violation Report or Notice of Hearing dated _____, ☐ b. Paragraph(s) _____ in the Violation Report or Notice of Hearing dated _____, ☐ c. the attached sheet, but said violation(s) ☐ was not willful. ☐ is validly excused.

☐ 3. the defendant has not violated any of the conditions of the defendant's probation except those found above, if any.

☐ 4. the defendant is guilty of contempt beyond a reasonable doubt.

ORDER

It is ORDERED that:

☐ 1 the original Judgment is modified as set forth below and, except as specifically so modified, shall remain in full force and effect.

☐ 2. the original Judgment is not modified, but remains in full force and effect.

☐ 3. the defendant's limited driving privilege is REVOKED; the defendant shall surrender all copies of that privilege to the Clerk of Superior Court for transmittal/notification to the Division of Motor Vehicles.

☐ 4. the defendant's probation is terminated. **NOTE:** *When this option is checked, the "Restitution Update Worksheet, Notice And Findings (Revocation Or Termination Of Probation)," AOC-CR-612, must be completed in every case in which the defendant was ordered, as a condition of probation, to pay restitution in an amount in excess of $250 to a Victims' Rights Act victim.*

☐ 5. all charges of probation violation in this case, which are not specifically found above, are dismissed.

☐ 6. the disposition of this matter is continued until _____.

☐ 7. the defendant for willful contempt:
☐ a. be imprisoned for_____ days in the custody of the sheriff. ☐ as provided in AOC-CR-609, Page Two, attached.
☐ b. pay a fine of $ _____. ☐ c. Other: _____.

☐ 8. *(offenses committed on or after October 31, 1998)* the defendant's drivers license is revoked, whether the defendant is present or not. G.S. 143B-708 (**NOTE:** *Select this option whenever the Court finds a willful violation of a community service condition of probation. If this option is selected, complete AOC-CR-317, Side One, and notify DMV.*)

MODIFIED MONETARY CONDITIONS

The "Monetary Conditions" in the Judgment Suspending Sentence are modified to read as follows: The defendant shall pay to the Clerk of Superior Court the "Modified Amount Due" shown below, plus the probation supervision fee, pursuant to a schedule ☐ determined by the probation officer.

☐ set out by the court as follows: _____

_____.

Balance/Obligation Due*	Arrearage/Probation Fee	Atty's Fee This Proceeding	Comm Serv Fee	EHA Fee	SBM Fee	Appt Fee/Misc	Modified Amount Due
$	$	$	$	$	$	$	$

*Equals "Total Amount Due" as shown on original Judgment, less all payments made to date.

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

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

OTHER MODIFICATIONS OF PROBATION

☐ 1. The defendant's term of probation is extended for a period of _____
  ☐ a. for good cause shown, pursuant to G.S. 15A-1344(d). (**NOTE:** *The total of the original period of probation plus all extensions under G.S. 15A-1344(d) may not exceed five years.*)
  ☐ b. with the defendant's consent, pursuant to G.S. 15A-1342(a) or G.S. 15A-1343.2(d). (**NOTE:** *The extension must be for the purpose of allowing the defendant to complete a program of restitution or continue medical or psychiatric treatment ordered as a condition of probation. The extension may be ordered only during the last six months of the original, unextended period of probation and may not exceed three years beyond the original period of probation.*)

☐ 2. The defendant's assignment to intensive supervision is terminated and the defendant is continued on supervised probation.

☐ 3. The defendant is transferred to ☐ unsupervised ☐ supervised probation.

☐ 4. The defendant is allowed until _____ to comply with the following condition(s):
_____.

☐ 5. The special conditions of probation identified below, as numbered and set out in the Judgment Suspending Sentence, are modified as follows: *(State number of each condition to be modified and set out modification.)*

☐ 6. The defendant shall also comply with the following additional special conditions of probation which the Court finds are related to the defendant's rehabilitation:
  ☐ complete _____ hours of community service during the first _____ days after entry of this Order, as directed by the judicial services coordinator. The fee prescribed by G.S. 143B-708 is
    ☐ *(for offenses committed on or after December 1, 2009)* not assessed because it was assessed in the original Judgment or in a case adjudicated during the same term of court.
    ☐ to be paid ☐ pursuant to the schedule set out under Modified Monetary Conditions on Side One ☐ within _____ days of this Order and before beginning service.
  ☐ *(for offenses committed on or after December 1, 2012)* Abstain from alcohol consumption and submit to continuous alcohol monitoring for a period of _____ ☐ days, ☐ months, the Court having found that a substance abuse assessment has identified defendant's alcohol dependency or chronic abuse.
  ☐ Other: *(set out conditions)*

☐ 7. *(not valid for impaired driving probation)* The Court previously
  ☐ a. withheld delegated authority under G.S. 15A-1343.2(e) or (f) but grants it by this Order.
  ☐ b. did not withhold delegated authority under G.S. 15A-1343.2(e) or (f) but now finds that it is NOT appropriate to delegate such authority to the Section of Community Corrections.

☐ 8. The sentence of intermediate punishment is modified, (or) pursuant to G.S.15A-1344(a), the previous sentence of community punishment is modified, as follows: comply with the conditions of intermediate punishment set forth on the attached AOC-CR-609, Page Two, Side One.

☐ 9. *(not valid for impaired driving probation)* The sentence is modified as follows: comply with the additional community and intermediate probation conditions set forth on the attached AOC-CR-609, Page Two, Side Two.

☐ 10. As a result of the willful violation of probation, the defendant shall be incarcerated for the period of confinement in response to violation imposed on the attached AOC-CR-609, Page Two, Side Two. G.S. 15A-1344(d2). (**NOTE:** *For violations occurring on or after Dec. 1, 2011,* ***only****.*)

☐ 11. The defendant shall register as a sex offender and enroll in satellite-based monitoring if required on the attached AOC-CR-615, Side Two. G.S. 15A-1344(e2). (**NOTE:** *Order only if extending probation and defendant was not previously ordered to register/enroll as a condition of probation.*)

ORDER OF COMMITMENT/APPEAL ENTRIES

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

☐ The defendant gives notice of appeal from the Judgment of the District Court to the Superior Court.
NOTE: *For probation violations occurring on or after Dec. 1, 2013, G.S. 15A-1347(b) provides: "If a defendant waives a revocation hearing [in district court], the finding of a violation of probation, activation of sentence, or imposition of special probation may not be appealed to the superior court."*

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

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

SIGNATURE OF JUDGE

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

CERTIFICATION

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

☐ Order On Violation Of Probation Or On Motion To Modify (AOC-CR-609, Page Two)
☐ Restitution Update Worksheet, Notice And Findings (Revocation Or Termination Of Probation) (AOC-CR-612)
☐ Judicial Findings And Order For Sex Offenders - Suspended Sentence (AOC-CR-615, Side Two)
☐ Other: _____.

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

(**NOTE:** *Defendant signs the following statement in all cases of supervised probation unless probation is terminated or not modified. A witness should sign at the same time as the defendant. For in-chambers consent modifications, defendant and prosecutor must sign prior to entry of the Order.*)
I have received a copy of this Order *(check one)* ☐ before its entry, ☐ after a hearing, and I agree to the modification(s) of my probation set out in it. I understand that no person who supervises me or for whom I work while performing community service is liable to me for any loss or damage which I may sustain unless my injury is caused by that person's gross negligence or intentional wrongdoing. I understand that my probation may be extended pursuant to G.S. 15A-1344(d), 15A-1342(a), or 15A-1343.2(d).

Date	*Signature Of Defendant*	*Signature Of Prosecutor*	*Signature Of Witness*

NOTE TO CLERK: *Send certified copies to the Clerk of Superior Court of county of original conviction, if different.*

Material opposite unmarked squares is to be disregarded as surplusage.

STATE VERSUS | *File No.*

Name Of Defendant

INTERMEDIATE PUNISHMENTS - CONTEMPT

NOTE: Use this page in conjunction with **AOC-CR-609,**"Order On Violation Of Probation Or On Motion To Modify"; and **AOC-CR-622**, "Disposition/Modification Of Deferred Prosecution Or Conditional Discharge."

In addition to complying with the regular and any special, community, or intermediate conditions of probation set forth in the "Judgment Suspending Sentence" or herein for the above case(s), the defendant shall also comply with the following intermediate punishment(s) under G.S. 15A-1340.11(6):

☐ **1. Special Probation - G.S. 15A-1344(e)** ☐ **Contempt - G.S. 15A-1344(e1) and 5A-11(a)**

For the defendant's active sentence as a condition of special probation, the defendant shall comply with these additional regular conditions of probation: (1) Obey the rules and regulations of the Division of Adult Correction governing the conduct of inmates while imprisoned. (2) Report to a probation officer in the State of North Carolina within seventy-two (72) hours of the defendant's discharge from the active term of imprisonment.

☐ A. Serve an active term of _____ ☐ days ☐ months ☐ hours in the custody of the ☐ N.C. DAC. ☐ Sheriff of this County. ☐ Other: _____.

☐ B. The defendant shall report in a sober condition to begin serving his/her term on:

Day	*Date*	*Hour*	☐ AM ☐ PM

and shall remain in custody until:

Day	*Date*	*Hour*	☐ AM ☐ PM

☐ C. The defendant shall again report in a sober condition to continue serving this term on the same day of the week for the next _____ consecutive weeks, and shall remain in custody during the same hours each week until completion of the active sentence ordered.

☐ D. This sentence shall be served at the direction of the probation officer within _____ ☐ days ☐ months of this judgment.

☐ E. Pay jail fees. ☐ F. Work release is recommended. ☐ G. Substance abuse treatment is recommended.

☐ H. Other:

☐ **2. Residential Program - G.S. 15A-1340.11(8); 15A-1343(b1)(2)** *(for offenses committed before Dec. 1, 2011, only)*

Attend or reside in _____ *(name program)* residential program for a period of _____ ☐ days, ☐ months, and abide by all rules and after care regulations of that program.

Other:

☐ **3. House Arrest With Electronic Monitoring - G.S. 15A-1340.11(4a); 15A-1343(b1)(3c)** *(for offenses committed before Dec. 1, 2011, only)*

Be assigned to house arrest and electronic monitoring and remain at the defendant's residence for a period of _____ ☐ days, ☐ months, abide by all rules, regulations and directions of the probation officer regarding such monitoring, and pay the fees prescribed in G.S. 15A-1343(c2) as provided under Modified Monetary Conditions. The defendant may leave the residence for the following purpose(s) and as otherwise permitted by the defendant's probation officer: ☐ employment ☐ counseling ☐ a course of study ☐ vocational training.

Other:

☐ **4. Intensive Supervision - G.S. 15A-1340.11(5); 15A-1343(b1)(3b); 143B-704(c)** *(for offenses committed before Dec. 1, 2011, only)*

Submit to intensive supervision pursuant to G.S. 143B-704(c), for a period of _____ months *(6 to 9 months recommended by the Section of Community Corrections)*, and comply with the rules adopted for such supervision by the Section of Community Corrections.

Other:

☐ **5. Day Reporting Center - G.S. 15A-1340.11(3); 15A-1343(b1)(10); 15A-1340.11(6)** *(for offenses committed before Dec. 1, 2011, only)*

Report as directed by the probation officer to the Day Reporting Center for a period of _____ ☐ days, ☐ months, and abide by all rules and regulations of that program.

Other:

☐ **6. Drug Treatment Court - G.S. 15A-1340.11(3a); 15A-1340.11(6)**

Comply with the rules adopted for the program as provided for in Article 62 of Chapter 7A of the General Statutes and report on a regular basis for a specified time to participate in court supervision, drug screening or testing, and drug or alcohol treatment programs.

Other:

INTERMEDIATE CONDITIONS OF PROBATION - G.S. 15A-1343(b4)

NOTE: *These conditions apply only to persons on intermediate punishment for offenses committed on or after December 1, 2009.*

If subject to intermediate punishment, the defendant shall, in addition to the terms and conditions imposed above, comply with the following intermediate conditions of probation: (1) If required by the defendant's probation officer, perform community service under the supervision of the Section of Community Corrections, and pay the fee required by G.S. 143B-708, but no fee shall be due if the Court imposed community service as a special condition of probation and assessed the fee in this judgment or any judgment for an offense adjudicated in the same term of court. (2) Not use, possess, or control alcohol. (3) Remain within the defendant's county of residence unless granted written permission to leave by the court or the defendant's probation officer. (4) Participate in any evaluation, counseling, treatment, or education program as directed by the probation officer, keeping all appointments and abiding by the rules, regulations, and direction of each program.

Material opposite unmarked squares is to be disregarded as surplusage.

(Over)

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

NOTE: *The conditions in this section may not be imposed for offenses committed before Dec. 1, 2011, or for defendants placed on probation for a sentence under G.S. 20-179.* In addition to complying with the regular and any special conditions of probation set forth in the "Judgment Suspending Sentence" entered in the case(s) listed on the reverse, the defendant shall also comply with the following conditions of probation, which may be imposed for any community or intermediate punishment:

☐ 1. Submit to house arrest with electronic monitoring, remain at the defendant's residence for a period of _____ ☐ days, ☐ months, abide by all rules, regulations, and directions of the probation officer regarding such monitoring, and pay the fees prescribed in G.S. 15A-1343(c2) as provided under Modified Monetary Conditions. The defendant may leave the residence for the following purpose(s) and as otherwise permitted by the probation officer: ☐ employment ☐ counseling ☐ a course of study ☐ vocational training.
Other:

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

☐ 3. Submit to the following period(s) of confinement in the custody of the ☐ Sheriff of this County. ☐ _____ *(other local confinement facility)*. ☐ and pay jail fees. The defendant shall report in a sober condition to serve the term(s) indicated below.
NOTE: *Periods of confinement imposed here must be for two-day or three-day consecutive periods, only, for no more than six days in a single month, and in no more than three separate months during the period of probation. To impose special probation under G.S. 15A-1344(e), see INTERMEDIATE PUNISHMENTS, on the reverse.*

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

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

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

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

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

CONFINEMENT IN RESPONSE TO VIOLATION (CRV) - G.S. 15A-1344(d2)

NOTE: *Confinement under this section may be imposed only upon finding of violation of probation when the violation(s) occurred on or after December 1, 2011. Any period of confinement imposed under this section shall run concurrently with any period(s) of confinement imposed in other cases in response to the same violation. Confinement under Nos. 1.a., 1.b., or 1.d. may NOT be ordered if the defendant has previously received two periods of confinement under G.S. 15A-1344(d2). Confinement under this section may not be ordered at all for defendants on probation pursuant to deferred prosecution or conditional discharge.*

In accord with the Court's Other Modification Of Probation No. 10 on AOC-CR-609, Page One, Side Two, the Court ORDERS:

1. The defendant shall be confined for:
NOTE TO COURT: *If imposing confinement for felony probation and more than 90 days remain on the defendant's maximum imposed sentence, select No. a. If 90 days or fewer remain on the maximum imposed sentence for a felony, No. d. must be selected, imposing the entire remainder of the sentence. If imposing confinement for a defendant on probation for a non-Structured Sentencing misdemeanor or a defendant placed on probation before Dec. 1, 2015, for a Structured Sentencing (SSA) misdemeanor, the duration of confinement is within the court's discretion (up to 90 days or the remainder of the suspended sentence, whichever is less): select No. b. if imposing confinement for less than the remainder of the sentence; select No. d. if the confinement is equal to the remaining sentence. If imposing confinement for a defendant placed on probation on or after Dec. 1, 2015, for an SSA misdemeanor select No. c.*
   ☐ a. 90 days, for felony probation.
   ☐ b. _____ days, for misdemeanor probation *(impose only for non-SSA misdemeanor or if placed on probation before Dec. 1, 2015, for SSA misdemeanor)*.
   ☐ c. the period(s) specified in Community And Intermediate Probation Conditions No. 3, above *(impose only if placed on probation for SSA misdemeanor on or after Dec. 1, 2015).*
   ☐ d. *(balance of remaining sentence)* _____ days, the period remaining to be served of the defendant's suspended sentence. Upon completion of this period of incarceration, defendant's probation is terminated.
   NOTE: *AOC-CR-612 must be completed in EVERY CASE in which the defendant was ordered in the original Judgment Suspending Sentence, as a condition of probation, to pay restitution in an amount in excess of $250 to a Victims' Rights Act (VRA) victim. For a restitution award previously docketed for a VRA victim, the clerk may not begin the accrual of interest or issue a writ of execution until AOC-CR-612 is complete and probation terminates on the date specified in No. d.*
2. The period of confinement imposed above shall be served in the custody of the:
   ☐ N.C. DAC. ☐ Sheriff of _____ County. ☐ Misdemeanant Confinement Program. ☐ Other: _____.
   NOTE: *A felony CRV for a probation violation occurring before Oct. 1, 2014, and all non-felony CRVs (regardless of violation date) must be served with the custodian named in the Judgment Suspending Sentence. A felony CRV for a violation occurring on or after Oct. 1, 2014, must be served in DAC.*

☐ 3. The defendant shall be given credit for _____ days confined as a result of the violation and prior to the date of this Order. Any credit found here and not applied by No. 4 to the confinement imposed in No. 1 shall be applied to the remainder of defendant's sentence, if activated.

☐ 4. Of the credit found in No. 3, _____ days shall be applied to the period of confinement imposed in No. 1.
NOTE: *A felony CRV imposed for a probation violation occurring on or after Oct. 1, 2014, may not be reduced by credit for time already served in the case.*

☐ 5. Other:

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

Material opposite unmarked squares is to be disregarded as surplusage.

STATE OF NORTH CAROLINA

File No.
Co. Of Hearing

_____ County _____ Seat Of Court

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

NOTE: *Use this form only for complete revocation of probation. For confinement in response to violation under G.S. 15A-1344(d2), use AOC-CR-609. Enter a separate revocation judgment for each sentence activated, but one revocation judgment is sufficient where the original sentence was imposed on offenses consolidated for judgment.*

STATE VERSUS			JUDGMENT AND COMMITMENT UPON REVOCATION OF PROBATION - FELONY (STRUCTURED SENTENCING) (For Revocation Hearings On Or After Dec. 1, 2011) G.S. 15A-1344, 15A-1345	
Name Of Defendant				
Race	Sex	Date Of Birth		
Attorney For State	☐ Def. Found Not Indigent ☐ Def. Waived Attorney		Attorney For Defendant At Revocation Hearing ☐ Appointed ☐ Retained	Crt Rptr Initials

The defendant was placed on probation pursuant to the following Judgment Suspending Sentence:

Date Of Judgment Suspending Sentence	Name Of Original Sentencing Judge	Name Of County Of Origin

County of Origin File No.(s)	Off. No.	Offense Description	Offense Date	G.S. No.	F/M	CL.	*Pun. CL.

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

In the original Judgment Suspending Sentence, the Court determined, pursuant to G.S. 15A-1340.14, the prior record points of the defendant to be _____, as disclosed by the record.

PRIOR RECORD LEVEL: ☐ I ☐ II ☐ III ☐ IV ☐ V ☐ VI

☐ In the original Judgment Suspending Sentence, the Court found that this was an offense involving assault, communicating a threat, or an act defined in G.S. 50B-1(a), and that the defendant had a personal relationship as defined by G.S.50B-1(b) with the victim.

In the original Judgment Suspending Sentence, the Court sentenced the defendant:

☐ 1. from the presumptive range of minimum durations.
☐ 2. from the minimum durations based upon the Findings of Aggravating and Mitigating Factors.
☐ 3. based upon a finding of Extraordinary Mitigation.
☐ 4. based upon a finding of substantial assistance pursuant to G.S. 90-95(h)(5).
☐ 5. based upon enhancement pursuant to: ☐ G.S. 90-95(e)(3) (drugs). ☐ G.S. 14-3(c) (hate crime). ☐ G.S. 50B-4.1 (domestic violence). ☐ G.S. 14-50.22 (gang). ☐ Other: _____.

CONCLUSION AND ORDER

Based upon the Findings of Fact set out on the reverse side, the Court concludes that the defendant has violated a valid condition of probation upon which the execution of the active sentence was suspended, and that continuation, modification or special probation or criminal contempt is not appropriate, and the Court ORDERS that the defendant's probation be revoked, that the suspended sentence be activated, and the defendant be imprisoned:

for a minimum term of:	for a maximum term of:	in the custody of the: ☐ N.C. DAC.
months	months	☐ Other: _____.

The defendant shall be given credit for _____ days spent in confinement prior to the date of this Judgment as a result of this charge(s).

☐ The sentence activated this date shall begin at the expiration of all sentences which the defendant is presently obligated to serve.
☐ The sentence activated this date shall begin at the expiration of the sentence imposed in the case referenced below:

File No.	Offense	County	Court	Date

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

The Court further Orders: *(check all that apply)*

☐ 1. The Clerk of Superior Court, under G.S. 7A-304(d), shall immediately disburse any undisbursed monies paid by the defendant under the Judgment Suspending Sentence, as provided in that Judgment. In addition, the defendant shall pay to the Clerk the "Total Amount Due" below.

Costs Balance	*Fine Balance*	*Restitution Balance**	*Prior Atty Fees This Case*	*Atty Fees This Proceeding*	*Appt Fee/Misc*	*Total Amount Due*
$	$	$	$	$	$	$

*See attached "Restitution Update Worksheet, Notice and Findings (Revocation Or Termination Of Probation)," AOC-CR-612, which is incorporated by reference.

NOTE: *AOC-CR-612 must be completed whenever Recommendation No. 4 below is checked. Even if Recommendation No. 4 is not checked, AOC-CR-612 must be completed in EVERY CASE in which the defendant was ordered in the original Judgment Suspending Sentence, as a condition of probation, to pay restitution in an amount in excess of $250 to a Victims' Rights Act victim.*

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

3. Any allegation of a violation stated in the Violation Report, Notice or otherwise which is not set forth in Finding No. 3 below is dismissed.

☐ 4. Other:

The Court recommends:

☐ 1. Substance abuse treatment. ☐ 2. Psychiatric and/or psychological counseling. ☐ 3. Work release ☐ should ☐ should not be granted.

☐ 4. Payment as a condition of post-release supervision or from work release earnings, if applicable, of the "Total Amount Due" set out above.
☐ but the Court **does not recommend** restitution be paid ☐ as a condition of post-release supervision. ☐ from work release earnings.

☐ 5. Other:

FINDINGS

After considering the record contained in the files numbered above, together with the evidence presented by the parties and the statements made on behalf of the State and the defendant, the Court finds:

1. The defendant is charged with having violated specified conditions of the defendant's probation as alleged in the:
   ☐ a. Violation Report(s) on file herein, which is incorporated by reference.
   ☐ b. Notice of Hearing on Violation Of Unsupervised Probation on file herein, which is incorporated by reference.
2. Upon due notice or waiver of notice *(check a. or b.)*
   ☐ a. a hearing was held before the Court and, by the evidence presented, the Court is reasonably satisfied in its discretion that the defendant violated each of the conditions of the defendant's probation as set forth below.
   ☐ b. the defendant waived a violation hearing and admitted that he/she violated each of the conditions of his/her probation as set forth below.
3. The condition(s) violated and the facts of each violation are as set forth *(check all that apply)*
   ☐ a. in Paragraph(s) _____ of the Violation Report or Notice dated _____.
   ☐ b. in Paragraph(s) _____ of the Violation Report or Notice dated _____.
   ☐ c. on the attached sheet _____.
4. Each of the conditions violated as set forth above is valid; the defendant violated each condition willfully and without valid excuse; and each violation occurred at a time prior to the expiration or termination of the period of the defendant's probation.
   ☐ Each violation is, in and of itself, a sufficient basis upon which this Court should revoke probation and activate the suspended sentence.

☐ 5. *(***NOTE TO COURT:** *This finding is required when revoking probation for violations occurring on or after December 1, 2011.)*
The Court may revoke defendant's probation (*check all that apply*):
   ☐ a. for the willful violation of the condition(s) that he/she not commit any criminal offense, G.S. 15A-1343(b)(1), or abscond from supervision, G.S. 15A-1343(b)(3a), as set out above.
   ☐ b. because the defendant twice previously has been confined in response to violation under G.S. 15A-1344(d2).

ORDER OF COMMITMENT/APPEAL ENTRIES

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

☐ The defendant gives notice of appeal from the judgment of the Court to the ☐ Superior Court. ☐ appellate division. Appeal entries and any conditions of post-conviction release are set forth on AOC-CR-350.

NOTE: *For probation violations occurring on or after Dec. 1, 2013, G.S. 15A-1347(b) provides, "If a defendant waives a revocation hearing [in district court], the finding of a violation of probation, activation of sentence, or imposition of special probation may not be appealed to the superior court."*

SIGNATURE OF JUDGE

Date	*Name Of Presiding Judge (Type Or Print)*	*Signature Of Presiding Judge*

ORDER OF COMMITMENT AFTER APPEAL

Date Remanded To District Court	*Date Appeal Dismissed*	*Date Withdrawal Of Appeal Filed*	*Date Appellate Opinion Certified*

It is ORDERED that this Judgment be executed. It is FURTHER ORDERED that the sheriff arrest the defendant, if necessary, and recommit the defendant to the custody of the agency named in this Judgment on the reverse and furnish that agency **two** certified copies of this Judgment and Commitment as authority for the commitment and detention of the defendant.

Date	*Signature Of Clerk*	☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court*

CERTIFICATION

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

☐ Appellate Entries (AOC-CR-350) ☐ Judicial Findings As To Forfeiture Of Licensing Privileges (AOC-CR-317)
☐ Restitution Update Worksheet, Notice And Findings (Revocation Or Termination Of Probation) (AOC-CR-612)
☐ Additional File No.(s) And Offense(s) (AOC-CR-626) ☐ Other: _____

Date	*Date Certified Copies Delivered To Sheriff*	*Signature Of Clerk*	☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *CSC* **SEAL**

NOTE TO CLERK: *Send certified copies to the Clerk of Superior Court of county of origin, if different, and to DAC, Attn: Combined Records, Courier Box 53-71-00, or mail to DAC, Attn: Combined Records, 4226 Mail Service Center, Raleigh, NC 27699-4226.*

Material opposite unmarked squares is to be disregarded as surplusage.

CHECKLIST FOR GUILTY PLEA APPEALS

1	Did you determine whether the indictment was proper? (*See* pp. 14-15)	
2	Did you determine whether the trial court properly calculated the defendant's prior record level calculation? (*See* pp. 3-8)	
3	Did you determine whether the trial court imposed a proper sentence based on the offense classification and the defendant's prior record level? (*See* p. 9)	
4	Did you use the correct sentencing grid to check the defendant's sentence? (*See* p. 9)	
5	If the trial court imposed an aggravated sentence, did you determine whether the court complied with N.C. Gen. Stat. § 15A-1340.16? (*See* pp. 2-3)	
6	If the trial court imposed an aggravated sentence, did you determine whether any of the aggravating factors were based on evidence that also supported any elements of the offenses? (*See* pp. 2-3)	
7	If the court imposed probation, did you determine whether the probationary sentence was proper? (*See* pp. 18-19)	
8	If the defendant filed a motion to suppress, did you determine whether the defendant reserved the right appeal the denial of the motion? (*See* pp. 10-11)	
9	If the defendant filed a motion to suppress, did you determine whether the defendant gave notice of appeal from the judgment? (*See* pp. 7-8)	
10	Did you determine whether the defendant's guilty plea was knowing, intelligent, and voluntary? (*See* pp. 15-16)	
11	Did you determine whether the State presented a sufficient factual basis for each element of each charge? (*See* pp. 16-17)	
12	Did you determine whether the defendant can get the benefit of the plea bargain? (*See* p. 17)	

COMMON ISSUES IN GUILTY PLEA APPEALS

Appellate Advocacy Foundations
August 8-9, 2019
David Andrews, Assistant Appellate Defender

Disclaimer: This document is not intended to be an exhaustive list of issues that can be raised in guilty plea appeals. Instead, the purpose of this document is to describe issues that occur with some frequency in such appeals. Please do not rely on this document as a substitute for independent legal research.

A word of caution: Guilty plea appeals often entail risks to client. It is important that you are aware of these risks and that you explain these risks to the client.

If you are assigned to an appeal in which there is an error that, if successfully challenged, could invalidate the guilty plea, you must advise the client of the risks of raising the error on appeal. If the client understands the risks and wants to you to make the argument, be sure to get the client's written permission.

There are at least two risks that guilty plea appeals entail. First, if you make an argument that invalidates all or part of the plea agreement, the plea agreement will no longer be valid. *State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (Steelman, J., dissenting), *rev'd for reasons stated in the dissenting opinion*, 366 N.C. 327, 734 S.E.2d 571 (2012) (per curiam). Second, if the State re-prosecutes the defendant after the case is remanded, the defendant will not be protected from receiving a higher sentence. *See* N.C. Gen. Stat. § 15A-1335 (the protection against receiving a higher sentence after a successful appeal "shall not apply when a defendant . . . succeeds in having a plea of guilty vacated.").

These risks come up in variety of ways. However, the following arguments are examples of where these risks arise:

1. Sufficiency of the evidence to support an aggravated or mitigated sentence.
2. Prior record level calculation.
3. Sentence calculation.
4. Subject matter jurisdiction (defective indictment or information).
5. Factual basis for the guilty plea.
6. Voluntariness of the guilty plea.
7. Benefit of the bargain.
8. Restitution.

This list is not exhaustive. If you identify an argument in a guilty plea appeal, be sure to determine whether it will invalidate the plea agreement or the guilty plea before raising the argument on appeal.

Issues that can be raised on direct appeal: There are only a few issues that can be raised on direct appeal in guilty plea cases. See below for a description of those issues.

1. Evidentiary Issues for Aggravated or Mitigated Sentences (N.C. Gen. Stat. § 15A-1444(a1)):

    a. N.C. Gen. Stat. § 15A-1444(a1) specifies that a defendant may appeal as a matter of right the issue of whether his or her sentence is supported by "evidence introduced at the trial and sentencing hearing . . . ." Although this provision specifically refers to "evidence," the Court of Appeals has held that a defendant who stipulates to an aggravating factor for which the prosecutor has provided a factual basis may appeal under this provision. *State v. Graves*, No. COA17-1380, 2018 N.C. App. LEXIS 1174 at *6 (N.C. Ct. App. Dec. 4, 2018) (unpublished). However, you should also raise the argument in a petition for writ of certiorari out of an abundance of caution because *Graves* is unpublished and therefore not binding.
    b. In order to appeal under this provision, the defendant's sentence must be either in the aggravated or mitigated range. A defendant may not rely on this provision to challenge a presumptive range sentence. *State v. Mungo*, 213 N.C. App. 400, 403, 713 S.E.2d 542, 544 (2011).
        i. This is true even if the minimum sentence is at the top of the presumptive range and overlaps with the aggravated range. *State v. Daniels*, 203 N.C. App. 350, 355, 691 S.E.2d 78, 81 (2010).
    c. If the trial court imposed an aggravated sentence, be sure to scrutinize the evidence supporting the aggravating factors:
        i. If the evidence did not support an aggravating factor, the case must be remanded for re-sentencing. *State v. Thompson*, 64 N.C. App. 354, 354, 307 S.E.2d 397, 398 (1993).
        ii. If the evidence supporting an aggravating factor also supported the underlying conviction, you should consider arguing that the aggravating factor was a form of impermissible double-counting. *State v. Darby*, 102 N.C. App. 297, 301, 401 S.E.2d 791, 793 (1991).
        iii. A stipulation to an aggravating factor will not prevent the defendant from challenging the aggravating factor on appeal. *State v. Bacon*, 228 N.C. App. 432, 434, 745 S.E.2d 905, 907 (2013).
    d. If the defendant received an aggravated sentence, make sure that (1) the State gave notice of the aggravating factors and (2) the defendant either admitted to any aggravating factors after a plea colloquy or the State proved the aggravating factors beyond a reasonable doubt and a jury returned a verdict finding the aggravating factors. N.C. Gen. Stat. § 15A-1340.16.
        i. It is possible that the Court of Appeals will conclude that arguments involving the lack of notice or defects in plea procedures for aggravating factors are not covered by N.C. Gen. Stat. § 15A-1444(a1). If either issue arises in your case, you should consider raising the issues in both a brief and a petition for writ of certiorari.
    e. If the defendant received an aggravated or mitigated sentence, make sure that the trial court did not reject uncontested evidence of mitigating factors.
        i. Even if the defendant received a mitigated sentence, the defendant can still

challenge mitigating factors that were supported by the evidence, but were rejected by the trial court. *State v. Mabry*, 217 N.C. App. 465, 471, 720 S.E.2d 697, 702 (2011).

f. **Caution**: If the plea agreement specifies an aggravated range sentence but the evidence does not support one or more aggravating factors or the aggravating factors are otherwise invalid, be sure to advise the client that there is a risk that the client will receive a higher sentence on remand if the appeal is successful. If the client still wants to proceed with the appeal, get the client's written permission.

2. Prior Record Level Calculation (N.C. Gen. Stat. § 15A-1444(a2)(1)):

   a. Determine whether the defendant or his trial attorney stipulated to the defendant's prior convictions.
      i. The defendant or his trial attorney may stipulate to prior convictions orally or by signing the prior record level worksheet. *State v. Hussey*, 194 N.C. App. 516, 523, 669 S.E.2d 864, 868 (2008). A blank worksheet, which includes a section for stipulating to convictions, is included in the appendix. (A pp 1-2)
      ii. In addition, the defendant or his attorney may stipulate to the classification of the offense. *State v. Arrington*, 371 N.C. 518, 526, 819 S.E.2d 329, 334 (2018); *State v. Salter*, ___ N.C. App. ___, ___, 826 S.E.2d 803, 809 (2019). However, when there is "clear record evidence demonstrating the parties' stipulation was an error or mistaken," the trial court "should defer to the record evidence rather than a defendant's stipulation." *State v. Green*, No. COA18-1114, 2019 N.C. App. LEXIS 606, 12 (N.C. Ct. App. Jul. 16, 2019).
      iii. The defense attorney's silence during the sentencing hearing can sometimes amount to a stipulation. *See State v. Wade*, 181 N.C. App. 295, 298, 639 S.E.2d 82, 85 (2007) (holding that the defense attorney stipulated to convictions listed on a worksheet because he had an opportunity to object to the convictions, but used the opportunity to present mitigating factors).
   b. If the defendant did not stipulate to his prior convictions, make sure that the State proved that the convictions existed as required by N.C. Gen. Stat. § 15A-1340.14(f).
      i. An unsigned prior record level worksheet does <u>not</u> satisfy the State's burden of proof. *State v. Riley*, 159 N.C. App. 546, 557, 583 S.E.2d 379, 387 (2003).
      ii. A Division of Criminal Information printout generally satisfies the State's burden of proof. *State v. Safrit*, 154 N.C. App. 727, 730, 572 S.E.2d 863, 866 (2002).
      iii. If the State's evidence indicates that the defendant was convicted of an offense that could be classified different ways, but the evidence does not indicate which classification is correct, the State has failed to satisfy its burden of proof. *See State v. McNeill*, ___ N.C. App. ___, ___, 821 S.E.2d 862, 864 (2018) (remanding for re-sentencing where the State failed to prove whether the defendant had previously been convicted of the Class 1 misdemeanor version of possession of drug paraphernalia or the Class 3 misdemeanor version).
   c. Make sure the trial court properly calculated the defendant's prior record level points:
      i. For an example of an appeal involving several arguments about a trial court's

improper prior record level calculation, please see Issue II in the defendant's brief in *State v. Glover*, No. COA18-538.

ii. Even if the defendant stipulated to the existence of his prior convictions, you can still challenge the trial court's erroneous calculation of the defendant's prior convictions or sentencing points on appeal. *See, e.g., State v. Fair*, 205 N.C. App. 315, 315, 695 S.E.2d 514, 515 (2010) ("Unlike a stipulation to the existence of a prior conviction, which is binding on appeal, the trial court's determination as to whether a conviction may be counted for felony sentencing purposes is reviewable on appeal.").

iii. It is improper for the court to assess points for convictions that were joined with the conviction that is the subject of the appeal. *State v. West*, 180 N.C. App. 664, 669-70, 638 S.E.2d 508, 512 (2006).

iv. The trial court may not assess any points for prior Class 2 or Class 3 misdemeanors. N.C. Gen. Stat. § 15A-1340.14(b). *State v. Sanders*, 225 N.C. App. 227, 229, 736 S.E.2d 238, 240 (2013).

d. Make sure that any points the trial court assessed for traffic offenses were proper:

i. The only misdemeanor traffic offenses that count toward a defendant's prior record level are impaired driving, impaired driving in a commercial vehicle, and misdemeanor death by vehicle. N.C. Gen. Stat. § 15A-1340.14(b)(5). Thus, a conviction for driving while license revoked, which is a Class 1 misdemeanor in some circumstances, does not provide any sentencing points. *Id.*; *State v. Flint*, 199 N.C. App. 709, 728, 682 S.E.2d 443, 454 (2009).

ii. Although the classification for impaired driving is not defined under N.C. Gen. Stat. § 20-138.1, it is a Class 1 misdemeanor for sentencing purposes. *State v. Armstrong*, 203 N.C. App. 399, 410, 691 S.E.2d 433, 441 (2010).

e. Make sure that any points related to status offenses were proper:

i. Habitual Felon Charges:

1. The trial court may not assess any prior record level points for any of the convictions that the State used to establish the defendant's habitual felon status. N.C. Gen. Stat. § 14-7.6; *State v. Miller*, 168 N.C. App. 572, 576, 608 S.E.2d 565, 567 (2005).
2. An indictment for attaining habitual felon status may be returned before, after, or simultaneously with a substantive felony indictment. *State v. Blakney*, 156 N.C. App. 671, 675, 577 S.E.2d 387, 390 (2003). However, the trial court lacks jurisdiction to sentence a defendant as an habitual felon where the habitual felon indictment is issued before the offense date of the underlying substantive offense. *State v. Flint*, 199 N.C. App. 709, 718, 682 S.E.2d 443, 448 (2009).
3. If the State used more than three prior felony convictions in the habitual felon indictment, it may not use any of those convictions for prior record level points. *State v. Lee*, 150 N.C. App. 701, 704, 564 S.E.2d 597, 598 (2002).
4. If the defendant has multiple convictions that arose before turning 18, the State is only permitted to use one of the convictions to support a judgment for attaining habitual felon status. N.C. Gen. Stat. § 14-7.1.
5. A juvenile adjudication "is not synonymous with the conviction of a

crime," *In re Jones*, 11 N.C. App. 437, 438, 181 S.E.2d 162, 162 (1971), and, thus, will not support a judgment for attaining habitual felon status. *See* N.C. Gen. Stat. § 14-7.1 (defining habitual felon as a person who has been "convicted of or pled guilty" to three felony offenses).

6. The trial court is allowed to assess points for convictions from the same calendar week as convictions the State uses to establish the defendant's habitual felon status. *State v. Truesdale*, 123 N.C. App. 639, 642, 473 S.E.2d 670, 672 (1996).

ii. Other Status Offenses:

1. The trial court may not assess points for a prior conviction of impaired driving that serves as the basis for the defendant's habitual impaired driving sentence. *State v. Gentry*, 135 N.C. App. 107, 111-12, 519 S.E.2d 68, 70-71 (1999).
2. It is permissible for a trial court to count prior DWI convictions that served as the basis for habitual impaired driving convictions in addition to the habitual impaired driving convictions when sentencing the defendant for a later offense. *State v. Hyden*, 175 N.C. App. 576, 581, 625 S.E.2d 125, 128 (2006).
3. The State may use felonies such as habitual impaired driving, habitual misdemeanor assault, and speeding to elude arrest as the substantive felony that is elevated under the habitual felon statutes. *State v. Baldwin*, 117 N.C. App. 713 (1995) (habitual impaired driving); *State v. Smith*, 139 N.C. App. 209 (2000) (habitual misdemeanor assault); *State v. Scott*, 167 N.C. App. 783 (2005) (speeding to elude arrest).
4. The trial court may enter judgment on a conviction for possession of a firearm by a felon and assess prior record level points for the conviction that serves as the basis for the defendant's status as a felon. *State v. Goodwin*, 190 N.C. App. 570, 578, 661 S.E.2d 46, 51 (2008).

f. If the defendant has prior out-of-state convictions, make sure that the State proved that the offenses were substantially similar to North Carolina offenses as required by N.C. Gen. Stat. § 15A-1340.14(e).

i. Although the defendant may stipulate that the conviction was a felony or misdemeanor, *State v. Bohler*, 198 N.C. App. 631, 638, 681 S.E.2d 801, 806 (2009), the defendant may not stipulate that an out-of-state conviction is substantially similar to a North Carolina offense. *State v. Hanton*, 175 N.C. App. 250, 254, 623 S.E.2d 600, 604 (2006).

ii. Make sure the State identified the relevant out-of-state statutes during the sentencing hearing. The State cannot wait until the defendant appeals to identify the relevant statutes. *State v. Sanders*, 367 N.C. 716, 719, 766 S.E.2d 331, 333 (2014); *State v. Henderson*, 201 N.C. App. 381, 388, 689 S.E.2d 462, 467 (2009).

iii. When an out-of-state offense has elements that are similar to multiple North Carolina offenses, the rule of lenity requires appellate courts to interpret the out-of-state statute in favor of the defendant. *State v. Hanton*, 175 N.C. App. 250, 259, 623 S.E.2d 600, 606 (2006).

iv. If the State presented statutes at the sentencing hearing, make sure the statutes were from the year the defendant was convicted. Statutes from later years are generally not sufficient to satisfy the State's burden of proof. *State v. Burgess*, 216 N.C. App. 54, 57-58, 715 S.E.2d 867, 870 (2011). However, evidence indicating that a later version of a statute was in effect when the defendant was convicted can satisfy the State's burden of proof. *State v. Best*, No. COA13-498, slip op. at 12 (N.C. Ct. App. Nov. 5, 2013) (unpublished).

g. Make sure that the prior offenses are all from different dates as required by N.C. Gen. Stat. § 15A-1340.14(d).
   i. If the defendant was convicted of more than one offense during one calendar week in superior court, the court can only use the conviction for the offense with the highest point total. If the defendant was convicted of more than one offense in a single session of district court, the court can only use one conviction.
   ii. If the defendant sustained multiple convictions in both district court and superior court on the same day, the court can only use one district court conviction and one superior court conviction for prior record points. *State v. Fuller*, 179 N.C. App. 61, 70-71, 632 S.E.2d 509, 515 (2006).

h. Make sure that any points that the defendant received for something other than a prior conviction are proper.
   i. The court can assess a point under N.C. Gen. Stat. § 15A-1340.14(b)(7) if the defendant committed the offense while on probation, parole, post-release supervision, while in prison, or while on escape from a correctional institution. However, the State must give the defendant notice of its intent to prove the point and then prove the point to a jury unless the defendant admits to it. N.C. Gen. Stat. § 15A-1340.16(a5). The Court of Appeals has upheld the assessment of a point under N.C. Gen. Stat. § 15A-1340.14(b)(7) despite the lack of a plea colloquy. *See State v. Marlow*, 229 N.C. App. 593, 602, 747 S.E.2d 741, 748 (2013) (a colloquy about the point would have been "inappropriate and unnecessary" under the circumstances). By contrast, the Court remanded a case for re-sentencing when the State failed to give notice of its intent to prove the point even though the defendant stipulated to the point. *State v. Crook*, ___ N.C. App. ___, 785 S.E.2d 771 (2016); *State v. Snelling*, 231 N.C. App. 676, 680, 752 S.E.2d 739, 743 (2014).
   ii. If the trial court assessed a point because all of the elements of the current offense were included in the defendant's prior offenses, make sure the court's ruling on the point was proper.
      1. If the trial court consolidated several offenses for sentencing, the comparison to prior offenses only involves the most serious offense. N.C. Gen. Stat. § 15A-1340.15(b); *State v. Prush*, 185 N.C. App. 472, 479, 648 S.E.2d 556, 560-61 (2007). The same is true even if all of the consolidated offenses were elevated to the same level because of the defendant attained habitual felon status. *State v. Gardner*, 225 N.C. App. 161, 170, 736 S.E.2d 826, 832 (2013).

i. Make sure that the trial court did not assess any points for prior adverse judgments that do not count toward the trial court's prior record level calculation.

i. Prior delinquency adjudications do not qualify for prior record level points. *State v. Tucker*, 154 N.C. App. 653, 659, 573 S.E.2d 197, 201 (2002).

ii. A judgment finding the defendant in criminal contempt does not count toward the defendant's prior record level calculation under the Structured Sentencing Act. *State v. Reaves*, 142 N.C. App. 629, 636, 544 S.E.2d 253, 258 (2001).

iii. A prior conviction that is elevated as part of a sentencing enhancement can only be counted as the original classification for the underlying substantive offense. *State v. Flint*, 199 N.C. App. 709, 729, 682 S.E.2d 443, 454 (2009).

iv. A prior conviction from district court that the defendant appealed to superior court and that is pending at the time of the sentencing hearing does not qualify for prior record level points. N.C. Gen. Stat. § 15A-1340.11(7)(a).

v. The trial court may count a guilty plea or a guilty verdict for which prayer for judgment was continued toward the defendant's prior record level calculation. *State v. Graham*, 149 N.C. App. 215, 220, 562 S.E.2d 286, 289 (2002).

vi. It is proper for the court to count a guilty plea that the defendant entered as part of a conditional discharge under N.C. Gen. Stat. § 90-96(a) and for which the defendant was still on probation at the time of the sentencing hearing. *State v. Hasty*, 133 N.C. App. 563, 571-72, 516 S.E.2d 428, 433 (1999).

j. If the trial court's calculation was wrong, make sure the defendant was prejudiced:

i. An error in the trial court's prior record level calculation is subject to harmless error review. That is, a defendant is not entitled to re-sentencing unless the error resulted in the trial court sentencing the defendant at a higher prior record level. *See State v. Adams*, 156 N.C. App. 318, 324, 576 S.E.2d 377, 382 (2003) (holding that the defendant was not entitled to re-sentencing because his prior record level "would still have been VI" even if the trial court had erroneously determined that all of the elements of his present offense were included in a prior offense).

ii. As far back as 2005, the Court of Appeals held that the defendant is not prejudiced by the trial court's improper prior record level calculation if the sentence the defendant received was within the range of the correct prior record level. *See State v. Ledwell*, 171 N.C. App. 314, 321, 614 S.E.2d 562, 567 (2005). However, *Ledwell* does not appear to be binding because it conflicts with Supreme Court precedent and at least one earlier decision of the Court of Appeals. In *State v. Williams*, 355 N.C. 501, 587, 565 S.E.2d 609, 659 (2002), the Supreme Court held that the defendant was prejudiced by the trial court's decision to sentence him at a higher record level "because the trial court could have sentenced defendant to lesser time . . . if the proper prior record level had been calculated." Based on *Williams*, the Court of Appeals held that the trial court's erroneous prior record level calculation "requires remand." *State v. McNeill*, 158 N.C. App. 96, 99, 580 S.E.2d 27, 29 (2003).

iii. If the trial court sentenced the defendant at the wrong prior record level, be prepared to argue that *Ledwell* is not binding and that re-sentencing is required under *Williams* and *McNeill*.

k. **Caution:** If the plea agreement specifies a particular sentence but there are errors in the trial court's calculation of that defendant's prior record level, think carefully about how to proceed with the appeal.

i. If you intend to challenge the trial court's assessment of points for some of the defendant's prior convictions, you should only do so if you also intend to argue that the entire plea agreement is invalid. Otherwise, arguments about the trial court's prior record level calculation are of no use to the client. To that end, be aware that the Court of Appeals recently held in *State v. Green*, No. COA18-1114, 2019 N.C. App. LEXIS 606, 12 (N.C. Ct. App. Jul. 16, 2019) that the defendant "successfully repudiated" the plea agreement, which specified an "active sentence of 87-117 months bottom mitigated," after successfully challenging the trial court's inclusion of two prior convictions in its prior record calculation.

ii. In addition, if you intend to challenge the trial court's assessment of one or more of the defendant's prior convictions and to argue the plea agreement is invalid in light of the court's improper assessment, be sure to get the client's written permission to do so. If you are successful, there is a risk that the client will receive a higher sentence on remand.

3. Sentence Disposition (N.C. Gen. Stat. § 15A-1444(a2)(2)):

a. Make sure that the type of sentence that the defendant received was proper based on the felony classification and the defendant's prior record level.

i. There are three types of sentence dispositions: (1) community, (2) intermediate, and (3) active. N.C. Gen. Stat. §§ 15A-1340.11, 15A-1340.17(c)(1).

1. A defendant sentenced to community punishment may not be given an active sentence or special probation. N.C. Gen. Stat. § 15A-1340.11(2). However, community punishment may involve supervised or unsupervised probation. N.C. Gen. Stat. § 15A-1341(b).
2. A defendant sentenced to community punishment for the Class A1 misdemeanor of stalking must be placed on supervised probation. N.C. Gen. Stat. §§ 14-277.3A.
3. A defendant convicted of assault or affray, and who inflicts serious injury upon another person or who uses a deadly weapon on a person with whom the person has a personal relationship and in the presence of a minor must be placed on supervised probation if the court imposes community punishment. N.C. Gen. Stat. § 14-33(d).
4. A defendant sentenced to intermediate punishment must be placed on supervised probation. N.C. Gen. Stat. § 15A-1340.11(6). Intermediate punishment may include special probation. *Id*.

ii. A defendant convicted of a Class I felony with a prior record level I, II, or III cannot receive an active sentence. N.C. Gen. Stat. § 15A-1340.17.

iii. Special probation (otherwise known as a split sentence) is only available for defendants who are subject to intermediate punishment. N.C. Gen. Stat. § 15A-1351(a). According to the sentencing grid under N.C. Gen. Stat. § 15A-1340.17, the following defendants are not eligible for intermediate punishment and, therefore, cannot receive split sentences:

1. A defendant convicted of a Class I felony with a prior record level I.

2. A defendant convicted of a Class H felony with a prior record level VI.
3. A defendant convicted of a Class G felony with a prior record level V or VI.
4. A defendant convicted of a Class F felony with a prior record level IV, V, or VI.
5. A defendant convicted of a Class E felony with a prior record level III, IV, V, or VI.
6. A defendant convicted of a Class A-D felony.

4. Sentence Calculation (N.C. Gen. Stat. § 15A-1444(a2)(3)):

a. Make sure that the sentence reflects the correct part of the sentencing grid for the offense class and prior record level for the defendant.
b. Over the past several years, the General Assembly has repeatedly changed the laws that govern criminal sentences. Be sure to apply the correct sentencing grid for each of your appeals. Sentencing grids are available on the Judicial Branch website.
c. A defendant convicted of attaining habitual felon status must be sentenced four classes higher than the substantive offense and no higher than a Class C felony level. N.C. Gen. Stat. § 14-7.6.
d. If the defendant pled guilty to conspiracy, attempt, or solicitation, make sure the trial court sentenced the defendant in accordance with N.C. Gen. Stat. §§ 14-2.4 (conspiracy), 14-2.5 (attempt), and 14-2.6 (solicitation). These inchoate crimes are generally, but not always, punished at a lower offense class.
e. If the defendant pled guilty based on a theory of acting in concert or aiding or abetting, the defendant is generally punished at the same level as a defendant who personally committed an offense. *State v. Williams*, 299 N.C. 652, 655-56, 263 S.E.2d 774, 777 (1980).
f. A defendant who pleads guilty to accessory before the fact is generally sentenced at the same level as a principal. N.C. Gen. Stat. § 14-5.2. A defendant who pleads guilty to accessory after the fact is generally sentenced two classes lower than the felony unless a different classification is specified by statute. N.C. Gen. Stat. § 14-7.
g. If the defendant pled guilty to trafficking, the sentence is specifically defined under N.C. Gen. Stat. § 90-95(h).
    i. There is no prior record level calculation for trafficking offenses.
    ii. The sentence for conspiracy to engage in trafficking is the same as trafficking. N.C. Gen. Stat. § 90-95(i).
    iii. The class for a conspiracy or attempt to commit a trafficking or non-trafficking drug offense is the same as the underlying drug offense that the defendant conspired or attempted to commit. N.C. Gen. Stat. § 90-98.
    iv. Although conspiracy to traffic is subject to the mandatory sentence for trafficking, attempted trafficking, though the same class as a completed trafficking crime, is subject to sentencing under the Structured Sentencing Act. *State v. Clark*, 137 N.C. App. 90, 97, 527 S.E.2d 319, 323 (2000).
h. If the defendant pled guilty to multiple misdemeanors, the court may not impose consecutive sentences that exceed twice the maximum sentence for the most serious misdemeanor. N.C. Gen. Stat. § 15A-1322(a).

i. **Caution:** If the plea agreement specifies a particular sentence but there are errors in the trial court's calculation of that sentence, think carefully about how to proceed with the appeal.

i. As described in section 2(k) above, a successful challenge to the trial court's calculation could place the client at risk of receiving a higher sentence on remand.

5. Denial of a Properly Preserved Motion to Suppress (N.C. Gen. Stat. § 15A-1444(e)):

a. Make sure that before pleading guilty, the defendant preserved the right to appeal the denial of the motion to suppress. Under N.C. Gen. Stat. § 15A-979(b), the defendant must give notice of his intent to appeal the suppression order to the prosecutor and the court before pleading guilty. *State v. Reynolds*, 298 N.C. 380, 397, 259 S.E.2d 843, 853 (1979). The most common way to comply with *Reynolds* is to include in the written transcript of plea a statement that the defendant reserves the right to appeal the denial of the suppression motion. A sample written plea agreement preserving the right to appeal the denial of a suppression motion is attached to this handout. (A p 3)

i. A stipulation in the record on appeal that the defendant gave proper notice of his intent to appeal the denial of a suppression motion is not sufficient to comply with *Tew* and *Reynolds*. *State v. Brown*, 142 N.C. App. 491, 493, 543 S.E.2d 192, 193 (2001).

ii. For many years, there was some confusion about whether the Court of Appeals could review an unpreserved suppression motion through a writ of certiorari. In 2015, the Court of Appeals held that a defendant could not seek review by writ of certiorari if the defendant failed to give notice of intent to appeal the denial of the suppression motion. *See State v. Harris*, 243 N.C. App. 137, 141, 776 S.E.2d 554, 556 (2015).

iii. However, according to this pleading in *State v. Perez*, No. COA19-273, there are arguments that *Harris* was wrongly decided. For one, *Reynolds* itself stated that if the defendant fails to give notice of intent to appeal, he will waive the "appeal of right" provisions of N.C. Gen. Stat. § 15A-979. *Reynolds* itself did not discuss the right to seek review by writ of certiorari. In addition, in *State v. Walden*, 52 N.C. app. 125, 278 S.E.2d 265 (1981) – which was issued long before *Harris* – the Court of Appeals acknowledged that the defendant failed to give notice of intent to appeal, but treated the appeal as a petition for writ of certiorari and reviewed the merits of the suppression issue. Third, the Court of Appeals has "broad discretion" to issue a writ of certiorari, *State v. Ledbetter*, 371 N.C. 192, 197, 814 S.E.2d 39, 42 (2018), which arguably includes circumstances in which the defendant did not give notice of intent to appeal the denial of a motion to suppress.

b. Make sure that after pleading guilty, the defendant gave notice of appeal from the judgment. If the defendant preserved the suppression issue, but failed to give notice of appeal from the judgment, the appeal will be dismissed. *State v. Miller*, 205 N.C. App. 724, 725, 696 S.E.2d 542, 543 (2010).

i. If the defendant failed to give notice of appeal from the judgment or the notice of appeal is defective, you can file a petition for writ of certiorari on the

ground that the right to prosecute the appeal was lost by failure to take timely action. *State v. Sutton*, 232 N.C. App. 667, 672, 754 S.E.2d 464, 467 (2014).

c. Please note that the type of motion that can be appealed in this context is not just a motion to suppress evidence based on constitutional violations. If the defendant pled guilty, he may also appeal the denial a motion to suppress that is based on violations of the N.C. Rules of Evidence. *State v. Tate*, 300 N.C. 180, 184, 265 S.E.2d 223, 226 (1980); *State v. King*, 214 N.C. App. 114, 119, 713 S.E.2d 772, 776 (2011).

6. Denial of a Motion to Withdraw Guilty Plea (N.C. Gen. Stat. § 15A-1444(e)):

a. If the defendant made the motion to withdraw prior to sentencing, the appellate court must apply the "fair and just reason" standard. *State v. Handy*, 326 N.C. 532, 391 S.E.2d 159 (1990). If the defendant made the motion after sentencing, the appellate court must apply the "manifest injustice" standard. *Id*.

b. The defendant has the right to appeal a motion to withdraw made either before or after sentencing. *State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185 (1980); *State v. Zubiena*, ___ N.C. App. ___, 796 S.E.2d 40 (2016); *State v. Salvetti*, 202 N.C. App. 18, 25, 687 S.E.2d 698, 703 (2010).

c. Additional information on withdrawal motions may be found on the North Carolina Criminal Law Blog.

d. Defendants generally have a difficult time prevailing in appeals involving withdrawal motions. However, there are three cases in which the defendants won. All of these cases involved pre-sentencing withdrawal motions:

i. *State v. Handy*, 326 N.C. 532, 391 S.E.2d 159 (1990): The defendant moved to withdraw his guilty plea to first-degree murder less than twenty-four hours after he pled guilty. In vacating the guilty plea, the Supreme Court noted that the State had made "no argument that it would be substantially prejudiced by" allowing the defendant to withdraw the plea. *Id*. at 542, 391 S.E.2d at 164.

ii. *State v. Deal*, 99 N.C. App. 456, 393 S.E.2d 317 (1990): The Court of Appeals vacated the defendant's guilty plea to armed robbery because the defendant had "low intellectual abilities" and was "laboring under a basic misunderstanding of the guilty plea process" when he pled guilty. *Id*. at 464, 393 S.E.2d at 321.

iii. *State v. Suites*, 109 N.C. App. 373, 427 S.E.2d 318 (1993): The Court of Appeals vacated the defendant's guilty plea to accessory before the fact to second-degree murder because the principal was acquitted of second-degree murder and, under North Carolina precedent, the acquittal of the principal required the acquittal of any individual charged or convicted as an accessory.

7. Sex offender registration and satellite-based monitoring (N.C. Gen. Stat. § 7A-27(b)):

a. If the trial court imposed an order requiring the defendant to register as a sex offender or submit to satellite-based monitoring, you can challenge the order on direct appeal even though the defendant pled guilty. *See State v. Pell*, 211 N.C. App. 376, 377, 712 S.E.2d 189, 190 (2011) (holding that, under N.C. Gen. Stat. § 7A-27, the defendant had a right to appeal an order requiring him to register as a sex offender)

b. If you challenge such an order, make sure the defendant gave written notice of appeal as required in civil cases by Appellate Rule 3. *State v. Brooks*, 204 N.C. App. 193, 195, 693 S.E.2d 204, 206 (2010). If the defendant did not give written notice of appeal, you will need to raise the argument in a petition for writ of certiorari.
c. For information on sex offender registration and satellite-based monitoring, be sure to review the flow chart prepared by Jamie Markham.
d. For information on hearings under *Grady v. North Carolina*, 191 L. Ed. 2d 459 (2015), please review the packet prepared by Andy DeSimone and Jim Grant.

8. Denial of a motion for appropriate relief (N.C. Gen. Stat. § 15A-1422):

    a. A defendant has the right to appeal motions for appropriate relief that are filed in conjunction with guilty pleas. N.C. Gen. Stat. § 15A-1422; *State v. Kittrell*, No. COA08-988, slip op. at 5 (N.C. Ct. App. Jun. 2, 2009) (unpublished). However, the defendant must give notice of appeal not only from the final judgment, but also from the denial of the motion for appropriate relief in order to get merits review on the issues raised in the motion for appropriate relief. *State v. Hagans*, 188 N.C. App. 799, 805-06, 656 S.E.2d 704, 708-09 (2008).

9. Jury trial on some charges, guilty plea to other charges:

    a. The Court of Appeals appears to reach inconsistent results when the defendant goes to trial on some charges, but pleads guilty to other charges. *See State v. Young*, 120 N.C. App. 456, 459, 462 S.E.2d 683, 685 (1995) (reviewing an argument about the substantive offense, but holding that the defendant had no right to appeal a conviction for attaining habitual felon status because he pled guilty to the charge); *but see State v. Glover*, 156 N.C. App. 139, 575 S.E.2d 835 (2003) (reviewing the plea colloquy for one of the defendant's convictions as well as other issues the defendant had the right to appeal); *State v. Bailey*, 157 N.C. App. 80, 577 S.E.2d 683 (2003) (same). Even though the case law is mixed on this point, you can still raise defects in the plea hearing in a petition for writ of certiorari in addition to a brief. *See* #23 on p. 20.

Guilty plea appeals involving DWI convictions: Almost all of the arguments described above involving sentencing do not apply to DWI cases. See below for a discussion of these issues in DWI cases.

10. If you are assigned to a guilty plea appeal involving a DWI conviction, be aware that many of the provisions of N.C. Gen. Stat. § 15A-1444 do not apply to DWI cases.
    a. A defendant who pled guilty to DWI and received an aggravated sentence cannot challenge the evidence supporting the sentence under N.C. Gen. Stat. § 15A-1444(a1) because DWI is a misdemeanor and N.C. Gen. Stat. § 15A-1444(a1) only applies to felonies. *State v. Shaw*, 236 N.C. App. 453, 454, 763 S.E.2d 161, 162 (2014).
    b. A defendant who pled guilty to DWI cannot challenge the trial court's prior record level calculation, sentence disposition, or sentence duration under N.C. Gen. Stat. § 15A-1444(a2) because the statute only applies to defendants sentenced under

Structured Sentencing. *State v. Shaw*, 236 N.C. App. at 454, 763 S.E.2d at 162. Defendants convicted of DWI are sentenced under a different statutory scheme under Chapter 20 of the North Carolina General Statutes. *See id.*; N.C. Gen. Stat. § 20-179.

c. If the State failed to give notice of an aggravating factor or the trial court improperly imposed an aggravated sentence, erroneously calculated the defendant's prior record level, or issued a sentence that was too long, you should raise the arguments in a petition for writ of certiorari. If you file a petition for writ of certiorari, be sure to assert that the Court of Appeals has the authority to issue a writ of certiorari to review the argument under N.C. Gen. Stat. § 15A-1444(e) and *State v. Ledbetter*, 371 N.C. 192, 197, 814 S.E.2d 39, 42 (2018).

Issues that <u>cannot</u> be raised on direct appeal: In general, a defendant who pled guilty cannot raise issues that are not listed in N.C. Gen. Stat. § 15A-1444(a1), (a2), and (e).

11. The following issues are examples of arguments that cannot be raised on direct appeal from a guilty plea.

    a. Whether the defendant's sentence violates double jeopardy. *State v. Rinehart*, 195 N.C. App. 774, 776, 673 S.E.2d 769, 771 (2009).
    b. Whether the defendant's sentence constitutes cruel and unusual punishment. *State v. Jamerson*, 161 N.C. App. 527, 529, 588 S.E.2d 545, 547 (2003).
    c. Whether the trial court improperly granted the State's motion to continue. *State v. Moore*, 156 N.C. App. 693, 695, 577 S.E.2d 354, 355 (2003).
    d. Whether the trial court improperly denied the defendant's motion to dismiss the criminal charge. *State v. Demaio*, 216 N.C. App. 558, 565, 716 S.E.2d 863, 868 (2011); *State v. Smith*, 193 N.C. App. 739, 743, 668 S.E.2d 612, 614 (2008).
    e. Whether the trial court imposed an improper condition of probation. *State v. Sale*, 232 N.C. App. 662, 665, 754 S.E.2d 474, 477 (2014).
    f. Whether the trial court erroneously ordered the defendant to forfeit property. *State v. Royster*, 239 N.C. App. 196, 199, 768 S.E.2d 196, 198 (2015).

12. Although a defendant who pleads guilty may not raise the issues described above on direct appeal, the Court of Appeals has "broad discretion" to review those issues through a writ of certiorari. *State v. Ledbetter*, 371 N.C. 192, 197, 814 S.E.2d 39, 42 (2018). Therefore, if the issue is preserved and has merit, consider raising the issue in both a brief and petition for writ of certiorari.

    a. **Caution:** Some of the arguments described above, such as violations of the protection against double jeopardy or the prohibition against cruel and unusual punishment, could undo the guilty plea if the arguments are successful. If that is the case, be sure to inform the client of the risks of undoing the guilty plea and get the client's written permission if the client still wants you to make the arguments.

Issues that have traditionally been raised through a writ of certiorari: Prior to *Ledbetter*, there were several issues that defendants who pled guilty could raise through a petition for writ of certiorari. See below for examples of these arguments.

13. Subject Matter Jurisdiction:

a. Be sure to review the original charging document and determine whether it is proper:
   i. If the defendant pled guilty based on an indictment, make sure the indictment contained all of the essential elements of the original charge. If the defendant pled guilty on an information, make sure both the defendant and the attorney signed the information as required by N.C. Gen. Stat. §§ 15A-642(c) and 15A-644(b). A copy of an information is attached to this handout. (A pp 4-5)
   ii. Make sure that the client pled guilty to the offense described in the indictment or to any lesser-included offenses. In *State v. Moore*, No. COA04-1107, slip op. (N.C. Ct. App. May 3, 2005) (unpublished), the defendant was originally charged with statutory rape, but pled guilty to indecent liberties. The Court of Appeals vacated the defendant's guilty plea because the indictment did not support his conviction for indecent liberties, which was not a lesser-included offense of rape.
   iii. Two good resources on indictments are: (1) The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment by Jessica Smith at the UNC School of Government and (2) 2017 Update to Arrest Warrant and Indictment Forms prepared by Jeffrey B. Welty at the UNC School of Government.

b. There are different ways to present jurisdictional arguments in guilty plea appeals:
   i. If you make a jurisdictional argument in conjunction with one or more of the arguments listed in N.C. Gen. Stat. § 15A-1444(a1), (a2), and (e), you can present all of the arguments in a brief. *See State v. Absher*, 329 N.C. 264, 265 n.1, 404 S.E.2d 848, 849 n.1 (1991) (stating that a jurisdictional challenge "may be made in the appellate division only if and when the case is properly pending before the appellate division"); *State v. Jamerson*, 161 N.C. App. 527, 529, 588 S.E.2d 545, 547 (2003).
   ii. If the only issue that you raise is a jurisdictional argument, you should consider including the argument in a brief and petition for writ of certiorari.
      1. As grounds for review in the brief, you can cite *State v. Frink*, 177 N.C. App. 144, 147, 627 S.E.2d 472, 474 (2006); and *State v. Brooks*, No. COA07-940, slip op. at 3 (N.C. Ct. App. May 20, 2008) (unpublished).
      2. As grounds for review in the petition for writ of certiorari, you can cite N.C. Gen. Stat. § 15A-1444(e); *State v. Ledbetter*, 371 N.C. 192, 197, 814 S.E.2d 39, 42 (2018).
      3. Be aware that the Court of Appeals dismissed the guilty plea appeal in *State v. Hostetler*, No. COA16-680, slip op. at 4 (N.C. Ct. App. Mar. 7, 2017) (unpublished), because the only issue raised in the appeal involved a defective indictment. However, the indictment was challenged only in a brief. By contrast, the Court reversed the guilty plea in *State v. Culbertson*, ___ N.C. App. ___, 805 S.E.2d 511 (2017)

based on a defective indictment that was challenged both in a brief and a petition for writ of certiorari.

iii. You could also consider raising the issue in an application for writ of habeas corpus. Although this would be an unconventional method of raising a jurisdictional defect, the Supreme Court expressed approval of this approach in *State v. Pennell*, 367 N.C. 466, 472, 758 S.E.2d 383, 387 (2014). If you pursue this option, you can file the application for writ of habeas corpus with "any one of the justices or judges of the appellate division." N.C. Gen. Stat. § 17-6. When a judge has evidence that a person is being illegally restrained, it is the "duty" of the judge to issue a writ of habeas corpus.

14. Knowing, voluntary, and intelligent plea:

a. Be sure to review the trial court's plea colloquy with the defendant. N.C. Gen. Stat. § 15A-1022(a) provides a list of things the trial court must discuss with the defendant before it can accept a guilty plea. If the trial court did not ask the defendant about <u>any</u> of the points listed in N.C. Gen. Stat. § 15A-1022(a), the guilty plea must be vacated. *State v. Glover*, 156 N.C. App. 139, 575 S.E.2d 835 (2003); *State v. Harris*, 14 N.C. App. 268, 270, 188 S.E.2d 1, 3 (1972); *State v. Vanderburg*, 13 N.C. App. 248, 249, 184 S.E.2d 915, 916 (1971).

b. If the trial court omitted some of the warnings from N.C. Gen. Stat. § 15A-1022(a), it will likely be difficult to show that the plea was involuntary. *See State v. Richardson*, 61 N.C. App. 284, 289, 300 S.E.2d 826, 829 (1983) (holding that the trial court's failure to inform the defendant of the mandatory minimum sentence could not have reasonably affected the defendant's decision to plead guilty). Still, be sure to review the information the trial court provided regarding the sentence. The trial court must inform the defendant of the maximum possible sentence, which is "that which could be imposed if the defendant were in the highest criminal history category and the offense were aggravated." *State v. Lucas*, 353 N.C. 568, 596, 548 S.E.2d 712, 730 (2001), *overruled on other grounds by State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005). The defendant's guilty plea was vacated in *State v. Reynolds*, 218 N.C. App. 433, 437, 721 S.E.2d 333, 336 (2012), where the trial court informed the defendant that he could face a maximum sentence of 168 months, but then sentenced him to a maximum sentence of 171 months. By contrast, the defendant's guilty plea was upheld in *State v. Bullocks*, ___ N.C. App. ___, 811 S.E.2d 713 (2018), even though the trial court misinformed the defendant about the maximum sentence for one of his charges because the defendant was properly informed about the maximum and minimum sentences for other, more serious charges that were consolidated with the other charge and the defendant received the sentence he agreed to as part of a plea agreement.

c. Be sure to focus on deficiencies that would violate the Fourteenth Amendment Due Process Clause. In order to satisfy the Due Process Clause, the trial court must inform the defendant about (1) the privilege against self-incrimination; (2) the right to trial by jury; and (3) the right to confront one's accusers. *Boykin v. Alabama*, 395 U.S. 238, 242, 23 L. Ed. 2d 274, 279 (1969); *see also State v. Sinclair*, 301 N.C. 193, 197, 270 S.E.2d 418, 421 (1980) (observing that a guilty plea "involves the waiver of

various fundamental rights such as the privilege against self-incrimination, the right of confrontation and the right to trial by jury").

d. Even if the judge conducts a proper colloquy, you should consider raising a voluntariness claim if there is evidence of coercion in your case. In *State v. Benfield*, 264 N.C. 75, 77, 140 S.E.2d 706, 708 (1965), the court reversed a guilty plea despite the defendant's statement that his guilty plea was freely made where the trial judge advised the defendant the jury would probably return a guilty verdict and that the judge was inclined to give the defendant a long sentence based on a guilty verdict. Similarly, in *State v. Pait*, 81 N.C. App. 286, 288, 343 S.E.2d 573, 575 (1986), the trial judge conducted a thorough colloquy with the defendant. However, the court vacated the defendant's guilty plea because the trial judge was "visibly agitated" when the defendant entered a not guilty plea, directed the defense attorney to enter an "honest plea," and the defendant feared the judge would be hard on him if he did not plead guilty. *Id*.

15. Factual basis for the guilty plea:

a. Be sure the State presented a sufficient factual basis for <u>each</u> element of <u>each</u> charge. "[G]uilty pleas must be substantiated in fact as prescribed by" N.C. Gen. Stat. § 15A-1022(c). *State v. Agnew*, 361 N.C. 333, 335, 643 S.E.2d 581, 583 (2007). "If the evidence contained in the record does not support defendant's guilty plea, then the judgment based thereon must be vacated." *State v. Brooks*, 105 N.C. App. 413, 417, 413 S.E.2d 312, 314 (1992).

b. This issue is arguably preserved for appellate review even if the defendant stipulated to or did not object to the State's factual basis.

   i. In *State v. Canady*, 153 N.C. App. 455, 570 S.E.2d 262 (2002); and *State v. Kimble*, 141 N.C. App. 144, 539 S.E.2d 342 (2000), the Court of Appeals held that the defendants' factual basis arguments were not preserved because the defendants failed to object to the State's factual summaries. However, in *State v. Agnew*, 361 N.C. 333, 337, 643 S.E.2d 581, 584 (2007), the Supreme Court specifically acknowledged that the defendant stipulated to the existence of a factual basis, and, yet, it reversed the defendant's guilty plea based on an insufficient factual basis despite the stipulation. *Agnew* is consistent with case law on stipulations. "Stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate." *State v. Prevette*, 39 N.C. App. 470, 472, 250 S.E.2d 682, 683 (1979). The sufficiency of the factual basis for a plea is arguably a question of law that cannot be the subject of a stipulation.

   ii. Additionally, according to N.C. Gen. Stat. § 15A-1446(d)(16), an error in the entry of a guilty plea may be argued on appeal even if the defendant did not object to any errors during the plea hearing. Although other provisions under N.C. Gen. Stat. § 15A-1446 have been held unconstitutional because they conflicted with Appellate Rule 10, *State v. Bennett*, 308 N.C. 530, 535, 302 S.E.2d 786, 790 (1983), subsection (d)(16) arguably does not conflict with Appellate Rule 10. *See, e.g., State v. Mumford*, 364 N.C. 394, 403 699 S.E.2d 911, 917 (2010) (holding that N.C. Gen. Stat. § 15A-1446(d)(18) was not

unconstitutional because it did not conflict with Appellate Rule 10); *see also State v. Artis*, 174 N.C. App. 668, 622 S.E.2d 204 (2005) (holding that the trial court's failure to engage in a plea colloquy under N.C. Gen. Stat. § 15A-1022 was preserved even without objection based on N.C. Gen. Stat. § 15A-1446(d)(16)).

iii. If the State asserts that a factual basis argument is not preserved, you should respond and argue that the argument is preserved under *Agnew* and N.C. Gen. Stat. § 15A-1446(d)(16).

c. Be sure to consider the following factors in assessing the sufficiency of the factual basis for a guilty plea:

i. Transcript of Plea: A transcript of plea on its own does not provide a factual basis for a guilty plea. *State v. Sinclair*, 301 N.C. 193, 199, 270 S.E.2d 418, 421 (1980).

ii. Stipulation: In *State v. Agnew*, 361 N.C. 333, 337, 643 S.E.2d 581, 584 (2007), the Supreme Court held that a stipulation to a factual basis could not support a guilty plea because it "gave the trial court no additional substantive information about the case . . . ." *Id*.

iii. Indictment: The indictment in *Agnew* was also not sufficient to support the factual basis because it "simply stated the charge and did not provide any further factual description of defendant's particular alleged conduct." *Id*. In *State v. Flint*, 199 N.C. App. 709, 728, 682 S.E.2d 443, 454 (2009), the Court of Appeals rejected an argument that indictments supported the factual basis for a guilty plea because it was "not clear if they were, in fact, before the trial court during defendant's plea."

d. The State might argue that the defendant is not prejudiced by the lack of a sufficient factual basis. For a discussion of why factual basis arguments should not be subject to prejudice arguments, please review the petition for discretionary review in State v. Graves, No. 33P19.

16. Benefit of the bargain:

a. If the defendant cannot get the benefit of the plea agreement, he may challenge the plea agreement through a petition for writ of certiorari.

i. The Court of Appeals will likely vacate the plea agreement if portions of the agreement were unenforceable and the defendant was not aware the agreement was not binding. *See, e.g., State v. Demaio*, 216 N.C. App. 558, 565, 716 S.E.2d 863, 868 (2011) (agreement reserving right to appeal denial of motion to dismiss and motion to limit expert testimony improper); *State v. Smith*, 193 N.C. App. 739, 743, 668 S.E.2d 612, 614 (2008) (defendant could not challenge denial of motion to dismiss habitual felon indictment in guilty plea appeal); *State v. Jones*, 161 N.C. App. 60, 62, 588 S.E.2d 5, 8 (2003) (defendant could not appeal habeas corpus motion after pleading guilty), *rev'd in part on other grounds*, 358 N.C. 473, 598 S.E.2d 125 (2004).

b. If the defendant pled guilty with the understanding that he might not be able to raise some claims on appeal, the plea agreement will likely be considered valid:

i. In *State v. Ross*, 369 N.C. 393, 794 S.E. 2d 289 (2016), the Supreme Court

held that the plea agreement was valid because the defendant understood that he might not be able to seek review of pretrial motions he had filed. Similarly, in *State v. Tinney*, 229 N.C. App. 616, 622, 748 S.E.2d 730, 735 (2013), the Court of Appeals held that the plea agreement was not invalid because the defendant had "ample notice" that a provision in the agreement purporting to preserve the right to appeal a transfer order was unenforceable.

17. Right to counsel:

a. If the trial court allowed the defendant to waive his right to an attorney at the plea hearing without conducting a proper colloquy, be sure to determine whether the trial court complied with N.C. Gen. Stat. § 15A-1242. If the court failed to comply with the statute, the defendant can challenge the waiver of counsel in a petition for writ of certiorari. *See State v. Allen*, No. COA14-152, slip op. (N.C. Ct. App. Oct. 7, 2014) (unpublished).
b. If the defendant was not represented by an attorney during a sentencing hearing that occurred after the defendant pled guilty, the defendant can raise the lack of counsel in a petition for writ of certiorari. *State v. Rouse*, 234 N.C. App. 92, 95, 757 S.E.2d 690, 692 (2014).

18. Competency:

a. If there was a question about the defendant's competency to plead guilty, be sure to determine whether the trial court followed the proper procedures under N.C. Gen. Stat. § 15A-1001, *et. seq*. According to *State v. O'Neal*, 116 N.C. App. 390, 395, 448 S.E.2d 306, 310 (1994), the question of the defendant's competency to plead guilty can be raised in a petition for writ of certiorari.

Other issues: Certiorari review is not limited to issues with a long history of litigation. Other issues, some of which are described below, might warrant review by writ of certiorari.

19. Probation:

a. If the trial court imposed probation, be sure that the sentence was stayed as required by N.C. Gen. Stat. § 15A-1451. If probation was not stayed, you should consider filing a petition for writ of supersedeas early in the appeal to enforce the stay.
b. Be sure to review the limitations on probationary sentences:
    i. A defendant sentenced to community punishment for a felony cannot be placed on probation for not less than 12 nor more than 30 months. N.C. Gen. Stat. § 15A-1343.2(d)(3).
    ii. A defendant sentenced to intermediate punishment for a felony cannot be placed on probation for not less than 18 nor more than 36 months. N.C. Gen. Stat. § 15A-1343.2(d)(4).
    iii. If the court finds that a longer term of probation is necessary, it may impose a longer period up to five years of probation. N.C. Gen. Stat. § 15A-1342(a). A

sample judgment imposing probation is included in the appendix. (A pp 7-10)

c. If the probationary sentence is too long, you should challenge the sentence as part of the guilty plea appeal. If you do not challenge the probationary sentence as part of the defendant's appeal from his guilty plea, the defendant might be barred from challenging the sentence at a later time. *See State v. Rush*, 158 N.C. App. 738, 740, 582 S.E.2d 37, 39 (2003) (rejecting argument about an improper probationary sentence because the defendant failed to file a petition for writ of certiorari when the sentence was imposed).
d. If there are other issues that you can raise on direct appeal, such as an erroneous prior record level calculation, add the argument about the probationary sentence to the brief. *See State v. Branch*, 194 N.C. App. 173, 178, 669 S.E.2d 18, 21 (2008) (reviewing the denial of a motion to suppress and an improper probationary term as part of a direct appeal in a guilty plea case). If there are no other issues that can be raised on direct appeal, you can challenge the probationary sentence in a petition for writ of certiorari.
e. If the trial court imposed special probation, which includes a period of confinement as part of a split sentence, be sure to review the terms of special probation:
    i. Special probation is automatically stayed if the defendant gives notice of appeal. N.C. Gen. Stat. 15A-1451. If you determine from the court file that the defendant received a term of special probation that was not stayed, you should file a petition for writ of supersedeas early in the appeal to enforce the stay. *State v. Stover*, 200 N.C. App. 506, 510, 685 S.E.2d 127, 131 (2009).
    ii. A split sentence imposed as part of special probation cannot be more than one fourth of the maximum sentence. N.C. Gen. Stat. § 15A-1351(a).

20. Transfer from juvenile court to superior court:

a. A juvenile may not challenge a transfer order on direct appeal if the juvenile pled guilty in superior court. *State v. Evans*, 184 N.C. App. 736, 739, 646 S.E.2d 859, 861 (2007). However, the juvenile may nevertheless challenge the transfer order through a petition for writ of certiorari. N.C. Gen. Stat. § 15A-1444(e); *State v. Ledbetter*, 371 N.C. 192, 197, 814 S.E.2d 39, 42 (2018).
b. The superior court is limited to reviewing the district court's transfer decision for abuse of discretion. *In re E.S.*, 191 N.C. App. 568, 573, 663 S.E.2d 475, 478 (2008). This means that the superior court may not re-weigh the evidence or decide which factors are more important. *Id*. Instead, a superior court's ruling on the question of transfer is subject to reversal if the superior court failed to properly apply the abuse of discretion standard of review. *Id.*

21. Restitution:

a. When you review the restitution order, make sure that the State presented some evidence to support the order.
    i. An unsworn statement of the prosecutor, such as a restitution worksheet, is not evidence and "cannot support the amount of restitution recommended." *State v. Buchanan*, 108 N.C. App. 338, 341, 423 S.E.2d 819, 821 (1992).

ii. In *State v. Hillard*, ___ N.C. App. ___, ___, 811 S.E.2d 702, 704-05 (2018), the Court of Appeals held that "written victim impact statements, together with the oral victim impact statements, expense worksheet, and accompanying documentation," constituted "sufficient competent evidence" to support a restitution order. Other unpublished opinions suggest that a victim impact statement may be sufficient to support a restitution order. *See State v. Durham*, No. COA09-78, slip. op. (N.C. Ct. App. Jul. 7, 2009); *State v. Coleman*, No. COA08-136, slip op. (N.C. Ct. App. Dec. 15, 2008); *State v. McGill*, No. COA05-1071, slip op. (N.C. Ct. App. Jun. 6, 2006).

b. An improper restitution order in a guilty plea case may be challenged in a petition for writ of certiorari. *State v. Griffin*, No. COA17-195, slip op. at 3 (N.C. Ct. App. Aug. 15, 2017) (unpublished).

c. **Caution:** Be aware that the new version of the AOC form for written transcripts of plea includes a box in the plea agreement section for defendants to stipulate to restitution. (A p 12) As a result of this change, there is a risk that a successful challenge to the restitution order will undo the plea agreement. However, the Court of Appeals recently held that a stipulation to restitution as part of the plea agreement "is not an express agreement to pay that particular restitution as a condition of the plea agreement." *State v. Murphy*, ___ N.C. App. ___, ___, 819 S.E.2d 604, 609 (2018).

22. Court costs and attorney's fees:

a. Be sure to determine whether the trial court properly calculated court costs and attorney's fees. A schedule for court costs can be found on the Judicial Branch website. There is an appointment fee of $60 when an attorney is appointed to represent an indigent defendant. N.C. Gen. Stat. § 7A-455.1. According to the IDS fee schedule, the rate for Class A through D felonies is $70 per hour. The rate for all other offenses is $60 per hour.

b. Be sure to determine whether the trial court gave the defendant notice and an opportunity to be heard regarding attorney's fees. "Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard." *State v. Friend*, ___ N.C. App. ___, ___, 809 S.E.2d 902, 907 (2018).

How to raise arguments in a petition for writ of certiorari: There are a few different ways to seek certiorari review in a guilty plea appeal.

23. If you have an appeal with one or more arguments that cannot be raised on direct appeal, consider these strategies:

a. If one or more issues can be raised on direct appeal, but others cannot, include all of the arguments in a brief. In addition, file a petition for writ of certiorari with the issues that cannot be raised on direct appeal. Be sure to cite *State v. Ledbetter*, 371 N.C. 192, 814 S.E.2d 39 (2018) as authority for the right to seek certiorari review.

b. If none of the issues that you identify can be raised on direct appeal, you should consider including all the issues in both a brief and a petition for writ of certiorari. This strategy was followed in *State v. Joe*, No. COA15-878, slip op. (N.C. Ct. App. May 10, 2016) (unpublished), and resulted in the defendant's guilty plea being vacated based on the lack of a sufficient factual basis.
c. You could also file an *Anders* brief as part of the direct appeal and then a petition for writ of certiorari for any meritorious issues that cannot be raised on direct appeal.

Strategies for avoiding dismissal: There are two common situations in which the State will move to dismiss guilty plea appeals. See below for possible responses.

24. *Anders* Briefs:

a. If you file an *Anders* brief in a case in which the defendant pled guilty and stipulated to his prior record level, the State might move to dismiss the appeal. The State will likely rely on *State v. Hamby*, 129 N.C. App. 366, 499 S.E.2d 195 (1998). You should consider the following strategies:
    i. When you prepare the record on appeal, consider including a proposed issue on appeal requesting that the Court of Appeals review the case for prejudicial error under *Anders v. California*, 386 U.S. 738, 18 L.Ed.2d 493 (1967).
    ii. File a response to the motion to dismiss. As part of the response, be sure to cite the proposed issue on appeal and assert that the Court of Appeals is required under the *Anders* decision and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), to review the defendant's appeal for prejudicial error. You should also point out that the Court of Appeals rejected similar motions to dismiss in the several unpublished opinions, including *State v. Morrison*, No. COA16-942, slip op. (N.C. Ct. App. Mar. 7, 2017); *State v. Taylor*, No. COA11-1535, slip op. (N.C. Ct. App. Aug. 21, 2012); and *State v. Clemons*, No. COA11-1034, slip op. (N.C. Ct. App. May 15, 2012). Finally, you should assert that even in *Hamby*, the Court of Appeals recognized that it was required to "examine any issue that defendant could have possibly raised." *Hamby*, 129 N.C. App. at 369, 499 S.E.2d at 197.

25. Withdrawal of Guilty Plea:

a. If you file a brief arguing that the trial court improperly denied the defendant's post-sentencing motion to withdraw his guilty plea, the State might file a motion to dismiss on the ground that the defendant has no right to appeal. The logic of the State's argument is that a post-sentencing motion to withdraw is a motion for appropriate relief for which there is no right to appeal.
b. You should file a response asserting that the Supreme Court and the Court of Appeals have held that a defendant has the right to appeal a post-sentencing motion to withdraw. *See State v. Handy*, 326 N.C. 532, 535, 391 S.E.2d 159, 160 (1990) ("Defendant may appeal as of right since the trial judge denied his motion to withdraw his plea of guilty."); *State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185

(1980) (holding that the defendant was entitled to appeal under N.C. Gen. Stat. § 15A-1444(e) after the trial court denied his post-sentencing motion to withdraw his guilty plea); *State v. Zubiena*, 251 N.C. App. 477, 482, 796 S.E.2d 40, 45 (2016) (same); *State v. Salvetti*, 202 N.C. App. 18, 25, 687 S.E.2d 698, 703 (2010) (same).

STATE OF NORTH CAROLINA

File No.

_____ County

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

STATE VERSUS

Name And Address Of Defendant

Social Security No. | *SID No.*

Race | *Sex* | *DOB*

WORKSHEET PRIOR RECORD LEVEL FOR FELONY SENTENCING AND PRIOR CONVICTION LEVEL FOR MISDEMEANOR SENTENCING

(STRUCTURED SENTENCING)

(For Offenses Committed On Or After Dec. 1, 2009)

G.S. 15A-1340.14, 15A-1340.21

I. SCORING PRIOR RECORD/FELONY SENTENCING

NUMBER	TYPE	FACTORS	POINTS
	Prior Felony Class A Conviction	X10	
	Prior Felony Class B1 Conviction	X 9	
	Prior Felony Class B2 or C or D Conviction	X 6	
	Prior Felony Class E or F or G Conviction	X 4	
	Prior Felony Class H or I Conviction	X 2	
	Prior Class A1 or 1 Misdemeanor Conviction *(see note on reverse)*	X 1	
		SUBTOTAL ▶	

Defendant's Current Charge(s):

If all the elements of the present offense are included in any prior offense whether or not the prior offenses were used in determining prior record level.	+ 1	
If the offense was committed while the offender was: ☐ on supervised or unsupervised probation, parole, or post-release supervision; ☐ serving a sentence of imprisonment; or ☐ on escape from a correctional institution. *County* / *File No.* / *State (if other than NC)*	+ 1	
	TOTAL ▶	

II. CLASSIFYING PRIOR RECORD/CONVICTION LEVEL

MISDEMEANOR

NOTE: *If sentencing for a misdemeanor, total the number of prior conviction(s) listed on the reverse and select the corresponding prior conviction level.*

No. Of Prior Convictions	Level
0	I
1 - 4	II
5+	III

PRIOR CONVICTION LEVEL ▶ ☐

☐ The Court has determined the number of prior convictions to be _____ and the level to be as shown above.

☐ In making this determination, the Court has relied upon the State's evidence of the defendant's prior convictions from a computer printout of DCI-CCH.

FELONY

NOTE: *If sentencing for a felony, locate the prior record level which corresponds to the total points determined in Section I above.*

Points	Level
0 - 1	I
2 - 5	II
6 - 9	III
10 - 13	IV
14 - 17	V
18+	VI

PRIOR RECORD LEVEL ▶ ☐

☐ The Court finds the prior convictions, prior record points and the prior record level of the defendant to be as shown herein.

☐ In making this determination, the Court has relied upon the State's evidence of the defendant's prior convictions from a computer printout of DCI-CCH.

☐ In finding a prior record level point under G.S. 15A-1340.14(b)(7), the Court has relied on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue.

☐ The Court finds that all of the elements of the present offense are included in a prior offense.

☐ For each out-of-state conviction listed in Section V on the reverse, the Court finds by a preponderance of the evidence that the offense is substantially similar to a North Carolina offense and that the North Carolina classification assigned to this offense in Section V is correct.

☐ The Court finds that the State and the defendant have stipulated in open court to the prior convictions, points and record level.

Date | *Name Of Presiding Judge (Type Or Print)* | *Signature Of Presiding Judge*

III. STIPULATION

The prosecutor and defense counsel, or the defendant, if not represented by counsel, stipulate to the information set out in Sections I and V of this form, and agree with the defendant's prior record level or prior conviction level as set out in Section II based on the information herein.

Date	*Signature Of Prosecutor*	*Date*	*Signature Of Defense Counsel Or Defendant*

IV. DNA CERTIFICATION (For Offenses Committed On Or After Feb. 1, 2011)

A review of the case record (the form required by G.S. 15A-266.3A(c)) and the records of the State Bureau of Investigation (the DCI-CCH rap sheet) indicates that *(check one):*

☐ 1. The defendant is **NOT** required to provide a DNA sample for this conviction because (i) the offense is not covered by G.S. 15A-266.4 or (ii) a sample of the defendant's DNA has previously been obtained and the defendant's DNA record is currently stored in the State DNA database.

☐ 2. The defendant **IS** required to provide a DNA sample for this conviction because (i) the offense is covered by G.S. 15A-266.4 and (ii) a sample of the defendant's DNA has not previously been obtained and the defendant's DNA record has not previously been stored in the State DNA Database, or if previously obtained and stored, the defendant's DNA sample and record have been expunged.

Date	*Name Of Prosecutor (Type Or Print)*	*Signature Of Prosecutor*

V. PRIOR CONVICTION

NOTE: *Federal law precludes making computer printout of DCI-CCH (rap sheet) part of permanent public court record.*

NOTE: *The only misdemeanor offenses under Chapter 20 that are assigned points for determining prior record level for felony sentencing are misdemeanor death by vehicle [G.S. 20-141.4(a2)] and, for sentencing for felony offenses committed on or after December 1, 1997, impaired driving [G.S. 20-138.1] and commercial impaired driving [G.S. 20-138.2]. First Degree Rape and First Degree Sexual Offense convictions prior to October 1, 1994, are Class B1 convictions.*

Source Code	Offenses	File No.	Date Of Conviction	County *(Name of State if not NC)*	Class

☐ See AOC-CR-600 Continuation for additional prior convictions.

Source Code: **1 - DCI** **2 - NCIC** **3 - AOC/Local** **4 - AOC/Statewide** **5 - ID Bureau** **6 - Other**

Date Prepared: _____

Prepared By: _____

STATE VERSUS

File No. 06 CRS 3406

Name Of Defendant Deborah Dunlap Hatley

15. *(If applicable)* The prosecutor, your lawyer, and you have informed me that the following contains all the terms and conditions of your plea.

The defendant expressly retains the right to appeal the court's previous denial of her motion to suppress in this cause and her plea of guilty is conditioned upon her right to appeal that decision pursuant to GS 15A-979(b)

Prosecutor's Initials: _____ Defense Counsel's Initials: _____ Defendant's Initials: _____

PLEAS

✓	Plea*	File Number	Count No.(s)	Offense(s)	Date Of Offense	G.S. No.	F/M	CL	‡Pun. CL.	Maximum Punishment
	G	06CRS3406	1	Driving While Impaired	3/5/06	20-138.1	M			24 mont

*G = Guilty
NC = No Contest

TOTAL MAXIMUM PUNISHMENT 24 months

MANDATORY MINIMUM FINES & SENTENCES *(if any)*

NOTE TO CLERK: If this column is checked this is an added offense or reduced charge.

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

STATE OF NORTH CAROLINA

_____ County

File No.

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

STATE VERSUS

Name And Address Of Defendant

Race	*Sex*	*Date Of Birth*

INFORMATION

G.S. 15A-644

Offense(s)	Date Of Offense OR Date Range Of Offense	G.S. No.	CL.
I.			
II.			
III.			

I. I, the undersigned prosecutor, upon information and belief allege that on or about the date(s) of offense shown above and in the county indicated above, the defendant named above unlawfully, willfully and feloniously did

II. I, the undersigned prosecutor, upon information and belief allege that on or about the date(s) of offense shown above and in the county indicated above, the defendant named above unlawfully, willfully and feloniously did

(Over)

III. I, the undersigned prosecutor, upon information and belief allege that on or about the date(s) of offense shown above and in the county indicated above, the defendant named above unlawfully, willfully and feloniously did

	Signature Of Prosecutor

WAIVER

I, the undersigned defendant, waive the finding and return of a Bill of Indictment into Court and agree that the case may be tried upon the above information.

Date	*Signature Of Defendant*	*Signature Of Attorney For Defendant*

STATE OF NORTH CAROLINA

File No.

_____County _____ Seat of Court

NOTE: *[This form is to be used for (1) felony offense(s) and (2) misdemeanor offense(s) that are consolidated for judgment with any felony offense(s). Use AOC-CR-310 for DWI offense(s).]*

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

STATE VERSUS

Name Of Defendant

Race | Sex | Date Of Birth

JUDGMENT SUSPENDING SENTENCE - FELONY

PUNISHMENT: ☐ COMMUNITY ☐ INTERMEDIATE
(STRUCTURED SENTENCING)
(For Offenses Committed Before Dec. 1, 2009)
G.S. 15A-1341, -1342, - 1343, -1343.2, -1346

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

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

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

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

The Court ☐ 1. has determined, pursuant to G.S. 15A-1340.14, the prior record points of the defendant to be _____. Any prior record level point under G.S. 15A-1340.14(b)(7) is based on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue.
☐ 2. makes no prior record level finding because none is required.

PRIOR RECORD LEVEL: ☐ I ☐ II ☐ III ☐ IV ☐ V ☐ VI

The Court (**NOTE:** *Block 1 or 2 MUST be checked.*):

☐ 1. makes no written findings because the prison term imposed is within the presumptive range of sentences authorized under G.S. 15A-1340.17(c).
☐ 2. makes the Determination of aggravating and mitigating factors on the attached AOC-CR-605.
☐ 3. makes the Findings of Extraordinary Mitigation set forth on the attached AOC-CR-606.
☐ 4. finds the defendant has provided substantial assistance pursuant to G.S. 90-95(h)(5).
☐ 5. adjudges the defendant to be a habitual felon to be sentenced as a Class C felon.
☐ 6. finds enhancement pursuant to: ☐ G.S. 90-95(e)(3) (drugs), ☐ G.S. 14-3(c) (hate crime), ☐ G.S. 50B-4.1 (domestic violence), ☐ G.S. 14-50.22 (gang). ☐ Other: _____. This finding is based on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission.
☐ 7. finds the above-designated offense(s) is a reportable conviction under G.S. 14-208.6 and therefore imposes the special conditions of probation set forth on the attached AOC-CR-603A, Page Two, Side Two, and makes the additional findings and orders on the attached AOC-CR-615, Side Two.
☐ 8. finds the above-captioned offense(s) involved the *(check all that apply)* ☐ physical or mental ☐ sexual abuse of a minor. ☐ *(if No. 7 not found)* and therefore imposes the special conditions of probation set forth on the attached AOC-CR-603A, Page Two, Side Two.
☐ 9. finds that a ☐ motor vehicle ☐ commercial motor vehicle was used in the commission of the offense and that it shall be reported to DMV.
☐ 10. finds this is an offense involving assault, communicating a threat, or an act defined in G.S. 50B-1(a), and the defendant had a personal relationship as defined by G.S. 50B-1(b) with the victim.
☐ 11. *(offenses committed on or after Dec. 1, 2008, only)* finds the above-designated offense(s) involved criminal street gang activity. G.S. 14-50.25.
☐ 12. finds that the defendant refused to consent to conditional discharge under G.S. 90-96(a).
☐ 13. finds that the defendant used or displayed a firearm while committing the felony. G.S. 15A-1382.2.
☐ 14. *(for judgments entered on or after Dec. 1, 2013, only)* finds that this was an offense involving child abuse or an offense involving assault or any of the acts as defined in G.S. 50B-1(a) committed against a minor. G.S. 15A-1382.1(a1).

The Court, having considered evidence, arguments of counsel and statement of defendant, Orders that the above offenses, if more than one, be consolidated for judgment and the defendant be imprisoned

for a minimum term of _____ months | for a maximum term of _____ months in the custody of the N.C. DAC.

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

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

SUSPENSION OF SENTENCE

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

☐ 1. The Court finds that a ☐ longer ☐ shorter period of probation is necessary than that which is specified in G.S. 15A-1343.2(d).
☐ 2. The Court finds that it is NOT appropriate to delegate to the Section of Community Corrections the authority to impose any of the requirements in G.S. 15A-1343.2(e) for community punishment or G.S. 15A-1343.2(f) for intermediate punishment.
☐ 3. This period of probation shall begin ☐ when the defendant is released from incarceration ☐ at the expiration of the sentence in the case below.

File No.	Offense	County	Court	Date

☐ 4. The defendant shall comply with the conditions set forth in file number _____.
☐ 5. The defendant shall provide a DNA sample pursuant to G.S. 15A-266.4. (AOC-CR-319 required)

MONETARY CONDITIONS

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

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

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

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

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

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

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

NOTE: *Any probationary judgment may be extended pursuant to G.S. 15A-1342.* The defendant shall: (1) Commit no criminal offense in any jurisdiction. (2) Possess no firearm, explosive device, or other deadly weapon listed in G.S. 14-269. (3) Remain gainfully and suitably employed or faithfully pursue a course of study or vocational training, that will equip the defendant for suitable employment, and abide by all rules of the institution. (4) Satisfy child support and family obligations, as required by the Court.
If the defendant is on supervised probation, the defendant shall also: (5) Remain within the jurisdiction of the Court unless granted written permission to leave by the Court or the probation officer. (6) Report as directed by the Court or the probation officer to the officer at reasonable times and places and in a reasonable manner, permit the officer to visit at reasonable times, answer all reasonable inquiries by the officer and obtain prior approval from the officer for, and notify the officer of, any change in address or employment. (7) Notify the probation officer if the defendant fails to obtain or retain satisfactory employment. (8) At a time to be designated by the probation officer, visit with the probation officer a facility maintained by the Section of Prisons.

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

SPECIAL CONDITIONS OF PROBATION - G.S. 15A-1343(b1), 143B-704(c)

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

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

☐ 11. Submit at reasonable times to warrantless searches by a probation officer of the defendant's person, and of the defendant's vehicle and premises while the defendant is present, for the following purposes which are reasonably related to the defendant's probation supervision:
☐ stolen goods ☐ controlled substances ☐ contraband ☐ child pornography ☐ _____.

☐ 12. Not use, possess, or control any illegal drug or controlled substance unless it has been prescribed for the defendant by a licensed physician and is in the original container with the prescription number affixed on it; not knowingly associate with any known or previously convicted users, possessors, or sellers of any illegal drugs or controlled substances; and not knowingly be present at or frequent any place where illegal drugs or controlled substances are sold, kept, or used.

☐ 13. Supply a breath, urine, and/or blood specimen for analysis of the possible presence of a prohibited drug or alcohol, when instructed by the defendant's probation officer.

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

☐ 15. Complete _____ hours of community or reparation service during the first _____ days of the period of probation, as directed by the judicial services coordinator and pay the fee prescribed by G.S. 143B-708. ☐ pursuant to the schedule set out under Monetary Conditions on the reverse. ☐ within _____ days of this Judgment and before beginning service.

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

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

☐ 18. Other:

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

ORDER OF COMMITMENT/APPEAL ENTRIES

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

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

SIGNATURE OF JUDGE

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

CERTIFICATION

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

☐ 1. Appellate Entries (AOC-CR-350)
☐ 2. Judgment Suspending Sentence (AOC-CR-603C, Page Two) (additional conditions of probation)
☐ 3. Felony Judgment Findings Of Aggravating And Mitigating Factors (AOC-CR-605)
☐ 4. Extraordinary Mitigation Findings (AOC-CR-606)
☐ 5. Restitution Worksheet, Notice And Order (Initial Sentencing) (AOC-CR-611)
☐ 6. Judicial Findings As To Required DNA Sample (AOC-CR-319)
☐ 7. Judicial Findings And Order For Sex Offenders - Suspended Sentence (AOC-CR-615, Side Two)
☐ 8. Additional File No.(s) And Offense(s) (AOC-CR-626)
☐ 9. Other: _____.

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

Material opposite unmarked squares is to be disregarded as surplusage.

STATE VERSUS | File No.

Name Of Defendant

INTERMEDIATE PUNISHMENTS

NOTE: Use this page with **AOC-CR-310A**, "Impaired Driving - Judgment Suspending Sentence"; **AOC-CR-603A**, "Judgment Suspending Sentence - Felony"; **AOC-CR-604A**, "Judgment Suspending Sentence - Misdemeanor"; **AOC-CR-619A**, "Conditional Discharge Under G.S. 90-96(a)"; **AOC-CR-621A**, "Conditional Discharge Under G.S. 14-50.29"; **AOC-CR-627A**, "Conditional Discharge Under G.S. 90-96(a1)"; **AOC-CR-632A**, "Conditional Discharge Under G.S. 15A-1341(a4)"; or **AOC-CR-633A**, "Conditional Discharge Under G.S. 15A-1341(a5)"; **for offenses committed before Dec. 1, 2009**.

In addition to complying with the regular and any special conditions of probation set forth in the "Judgment Suspending Sentence" entered in the above case(s), the defendant shall also comply with the following special conditions of probation and conditions of special probation, which are defined as intermediate punishments by G.S. 15A-1340.11(6).

☐ **1. Special Probation - G.S. 15A-1351**

For the defendant's active sentence as a condition of special probation, the defendant shall comply with these additional regular conditions of probation: (1) Obey the rules and regulations of the Division of Adult Correction governing the conduct of inmates while imprisoned. (2) Report to a probation officer in the State of North Carolina within seventy-two (72) hours of the defendant's discharge from the active term of imprisonment.

☐ A. Serve an active term of _____ ☐ days ☐ months ☐ hours in the custody of the ☐ N.C. DAC. ☐ Sheriff of this County. ☐ Other: _____.

(**NOTE:** *Noncontinuous periods of special probation may not be served in DAC. Also, special probation imposed in misdemeanor sentences on or after Oct. 1, 2014, and in sentences under G.S. 20-179 on or after Jan. 1, 2015, may not be served in DAC.*)

☐ B. The defendant shall report in a sober condition to begin serving his/her term on:

Day	*Date*	*Hour* ☐ AM ☐ PM

and shall remain in custody until:

Day	*Date*	*Hour* ☐ AM ☐ PM

☐ C. The defendant shall again report in a sober condition to continue serving this term on the same day of the week for the next _____ consecutive weeks, and shall remain in custody during the same hours each week until completion of the active sentence ordered.

☐ D. This sentence shall be served at the direction of the probation officer within _____ ☐ days ☐ months of this judgment.

☐ E. Pay jail fees. ☐ F. Work release is recommended. ☐ G. Substance abuse treatment is recommended.

☐ H. Other:

☐ **2. Residential Program - G.S. 15A-1340.11(8); 15A-1343(b1)(2)**

Attend or reside in _____ *(name program)* residential program for a period of _____ ☐ days, ☐ months, and abide by all rules and after care regulations of that program.

Other:

☐ **3. House Arrest With Electronic Monitoring - G.S. 15A-1340.11(4a); 15A-1343(b1)(3c)**

Be assigned to house arrest with electronic monitoring for a period of _____ ☐ days, ☐ months, and submit to electronic monitoring and abide by all rules, regulations, and directions of the probation officer, regarding electronic monitoring, and pay the fees prescribed under G.S. 15A-1343(c2) pursuant to the schedule set out under Monetary Conditions.

Other:

☐ **4. Intensive Supervision Program - G.S. 15A-1340.11(5); 15A-1343(b1)(3b); 143B-704(c)**

Submit to supervision by officers assigned to the Intensive Probation Program established pursuant to G.S. 143B-704(c), for a period of _____ months *(6 to 9 months recommended by the Section of Community Corrections)*, and comply with the rules adopted by that program.

Other:

☐ **5. Day Reporting Center - G.S. 15A-1340.11(3); 15A-1343(b1)(10); 15A-1340.11(6)**

Report as directed by the probation officer to the Day Reporting Center for a period of _____ ☐ days, ☐ months, and abide by all rules and regulations of that program.

Other:

☐ **6. Drug Treatment Court - G.S. 15A-1340.11(3a); 15A-1340.11(6)**

Comply with the rules adopted for the program as provided for in Article 62 of Chapter 7A of the General Statutes and report on a regular basis for a specified time to participate in court supervision, drug screening or testing, and drug or alcohol treatment programs.

Other:

Material opposite unmarked squares is to be disregarded as surplusage.

(Over)

MANDATORY SPECIAL CONDITIONS FOR SEX OFFENDERS AND PERSONS CONVICTED OF OFFENSES INVOLVING PHYSICAL, MENTAL, OR SEXUAL ABUSE OF A MINOR - G.S. 15A-1343(b2)

NOTE: *The following are not defined as intermediate punishments under G.S. 15A-1340.11(6).*
NOTE: *Select **only one** of the three sets of conditions below.*

☐ **1. Special Conditions For Reportable Convictions - G.S. 15A-1343(b2)**

NOTE: *Impose only for a reportable conviction under G.S. 14-208.6.*
The defendant has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4) and must
a. Register as a sex offender and enroll in satellite-based monitoring if required on the attached AOC-CR-615, Side Two.
b. Participate in such evaluation and treatment as is necessary to complete a prescribed course of psychiatric, psychological, or other rehabilitative treatment as ordered by the court.
c. Not communicate with, be in the presence of, or found in or on the premises of the victim of the offense.
☐ d. *(if the Court finds physical, mental, or sexual abuse of a minor)* Not reside in a household with
☐ (1) *(for sexual abuse)* any minor child.
☐ (2) *(for physical or mental abuse)* any minor child ☐ other than the child(ren) named below, for whom the court expressly finds that it is unlikely that the defendant's harmful or abusive conduct will recur and that it would be in the best interest of the child(ren) named below to reside in the same household with the probationer. *(Name minor child(ren) with whom the probationer may reside in the same household)*: _____.
e. Submit at reasonable times to warrantless searches by a probation officer of the defendant's person, of the defendant's vehicle and premises, and of the defendant's computer or other electronic mechanism which may contain electronic data, while the defendant is present, for the following purposes which are reasonably related to the defendant's probation supervision: ☐ child pornography
☐ _____.
f. Other:

☐ **2. Special Conditions For Offenses Involving The Sexual Abuse Of A Minor - G.S. 15A-1343(b2)**

NOTE: *Impose if offense involved sexual abuse of a minor but is **not** a reportable conviction.*
The defendant has been convicted of an offense involving the sexual abuse of a minor and must
a. Participate in such evaluation and treatment as is necessary to complete a prescribed course of psychiatric, psychological, or other rehabilitative treatment as ordered by the court.
b. Not communicate with, be in the presence of, or found in or on the premises of the victim of the offense.
c. Not reside in a household with any minor child. (G.S. 15A-1343(b2)(4))
d. Submit at reasonable times to warrantless searches by a probation officer of the defendant's person, of the defendant's vehicle and premises, and of the defendant's computer or other electronic mechanism which may contain electronic data, while the defendant is present, for the following purposes which are reasonably related to the defendant's probation supervision: ☐ child pornography
☐ _____.
e. Other:

☐ **3. Special Conditions For Offenses Involving The Physical Or Mental Abuse Of A Minor - G.S. 15A-1343(b2)**

NOTE: *Impose if offense involved physical or mental abuse of a minor but is **not** a reportable conviction and did **not** involve sexual abuse.*
The defendant has been convicted of an offense involving the physical or mental abuse of a minor and must
a. Participate in such evaluation and treatment as is necessary to complete a prescribed course of psychiatric, psychological, or other rehabilitative treatment as ordered by the court.
b. Not communicate with, be in the presence of, or found in or on the premises of the victim of the offense.
c. Not reside in a household with
☐ (1) any minor child.
☐ (2) any minor child other than the child(ren) named below, for whom the court expressly finds that it is unlikely that the defendant's harmful or abusive conduct will recur and that it would be in the best interest of the child(ren) named below to reside in the same household with the probationer. *(Name minor child(ren) with whom the probationer may reside in the same household)*:
_____.
d. Submit at reasonable times to warrantless searches by a probation officer of the defendant's person, of the defendant's vehicle and premises, and of the defendant's computer or other electronic mechanism which may contain electronic data, while the defendant is present, for the following purposes which are reasonably related to the defendant's probation supervision: ☐ child pornography
☐ _____.
e. Other:

ADDITIONAL CONDITIONS FOR DOMESTIC VIOLENCE

☐ 1. Pursuant to its finding that the defendant is responsible for acts of domestic violence, the Court further finds that:
☐ a. there is an abuser treatment program, approved by the Domestic Violence Commission, reasonably available to the defendant, who shall:
☐ (1) *(for supervised probation)* attend and complete *(check one)* ☐ *(program name)* _____
☐ a program to be identified by the probation officer, and abide by the program's rules. The probation officer shall send a copy of this judgment to the program, which shall notify the officer if the defendant fails to participate or is discharged for violating any of its rules.
☐ (2) *(for unsupervised probation)* attend and complete *(check one)* ☐ *(program name)* _____
☐ a program chosen by the defendant, who shall notify the program and the district attorney of that choice within ten (10) days of the entry of this judgment, and abide by the program's rules. The district attorney shall send a copy of this judgment to the program, which shall notify the district attorney if the defendant fails to participate or is discharged for failure to comply with the program or its rules.
☐ b. there is no approved abuser treatment program reasonably available. ☐ c. it would not be in the best interests of justice to order the defendant to complete an abuser treatment program because _____.
☐ 2. As additional Special Conditions of Probation, the defendant shall:
☐ a. not come within _____ feet of _____ at any time.
☐ b. comply fully with any G.S. Chapter 50B Domestic Violence Protective Order in effect.

The above conditions are incorporated in the "Judgment Suspending Sentence" in the above case(s) and made a part thereof.

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

Material opposite unmarked squares is to be disregarded as surplusage.

STATE OF NORTH CAROLINA

File No.

_____ County

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

STATE VERSUS		
Name Of Defendant		
DOB	*Age*	*Highest Level Of Education Completed*

TRANSCRIPT OF PLEA

G.S. 15A-1022, 15A-1022.1

NOTE: *Use this section **ONLY** when the Court is rejecting the plea arrangement.*

☐ The plea arrangement set forth within this transcript is hereby rejected and the clerk shall place this form in the case file. *(Applies to plea arrangements disclosed on or after December 1, 2009.)*

Date	*Name Of Presiding Judge (Type Or Print)*	*Signature Of Presiding Judge*

The undersigned judge, having addressed the defendant personally in open court, finds that the defendant (1) was duly sworn or affirmed, (2) entered a plea of ☐ guilty ☐ guilty pursuant to *Alford* decision ☐ no contest, and (3) offered the following answers to the questions set out below:

Answers

1. Are you able to hear and understand me? (1) _____
2. Do you understand that you have the right to remain silent and that any statement you make may be used against you? (2) _____
3. At what grade level can you read and write? (3) _____
4. (a). Are you now under the influence of alcohol, drugs, narcotics, medicines, pills, or any other substances? (4a) _____
   (b). When was the last time you used or consumed any such substance? (4b) _____
5. Have the charges been explained to you by your lawyer, and do you understand the nature of the charges, and do you understand every element of each charge? (5) _____
6. (a). Have you and your lawyer discussed the possible defenses, if any, to the charges? (6a) _____
   (b). Are you satisfied with your lawyer's legal services? (6b) _____
7. (a). Do you understand that you have the right to plead not guilty and be tried by a jury? (7a) _____
   (b). Do you understand that at such trial you have the right to confront and to cross examine witnesses against you? (7b) _____
   (c). Do you understand that at a jury trial you have the right to have a jury determine the existence of any aggravating factors that may apply to your case *(and, if applicable, additional sentencing points not related to prior convictions)* beyond a reasonable doubt? (7c) _____
   (d). Do you understand that by your plea(s) you give up these and other valuable constitutional rights to a jury trial *(and, if applicable, rights related to sentencing)*? (7d) _____
8. Do you understand that, if you are not a citizen of the United States of America, your plea(s) of guilty or no contest may result in your deportation from this country, your exclusion from admission to this country, or the denial of your naturalization under federal law? (8) _____

☐ 9. Do you understand that upon conviction of a felony you may forfeit any State licensing privileges you have in the event that you refuse probation or that your probation is revoked? (9) _____

10. Do you understand that following a plea of guilty or no contest there are limitations on your right to appeal? (10) _____
11. Do you understand that your plea of guilty may impact how long biological evidence related to your case (for example, blood, hair, skin tissue) will be preserved? (11) _____

(Over)

12. Do you understand that you are pleading ☐ guilty ☐ no contest to the charges shown below? (12) _____
(Describe charges, total maximum punishments, and applicable mandatory minimums for those charges.)

PLEAS

✓	Plea*	File Number	Count No.(s)	Offense(s)	Date Of Offense	G.S. No.	F/M	CL.	‡Pun. CL.	Maximum Punishment

☐ See attached AOC-CR-300A, for additional charges.

*G = Guilty GA = *Alford* plea
NC = No Contest

TOTAL MAXIMUM PUNISHMENT

MANDATORY MINIMUM FINES & SENTENCES *(if any)*

✓ **NOTE TO CLERK:** If this column is checked this is an added offense or reduced charge.

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

13. Do you now personally plead ☐ guilty ☐ no contest to the charges I just described? (13) _____

14. ☐ (a) Are you in fact guilty? (14a) _____
☐ (b) *(no contest plea)* Do you understand that, upon your plea of no contest, you will be treated as being guilty whether or not you admit that you are in fact guilty? (14b) _____
☐ (c) *(*Alford *guilty plea)*
(1) Do you now consider it to be in your best interest to plead guilty to the charges I just described? (14c1) _____
(2) Do you understand that, upon your "*Alford* guilty plea," you will be treated as being guilty whether or not you admit that you are in fact guilty? (14c2) _____

☐ 15. *(Use if aggravating factors are listed below)* Have you admitted the existence of the aggravating factors shown below, have you agreed that there is evidence to support these factors beyond a reasonable doubt, have you agreed that the Court may accept your admission to these factors, and do you ☐ understand that you are waiving any notice requirement that the State may have with regard to these aggravating factors ☐ agree that the State has provided you with appropriate notice about these aggravating factors? *(If so, review the aggravating factors with the defendant.)* (15) _____

☐ 16. *(Use if sentencing points are listed below)* Have you admitted the existence of the sentencing points not related to prior convictions shown below, have you agreed that there is evidence to support these points beyond a reasonable doubt, have you agreed that the Court may accept your admission to these points, and do you ☐ understand that you are waiving any notice requirement that the State may have with regard to these sentencing points ☐ agree that the State has provided you with appropriate notice about these sentencing points? *(If so, review the sentencing points with the defendant.)* (16) _____

17. Do you understand that you also have the right during a sentencing hearing to prove to the Court the existence of any mitigating factors that may apply to your case? (17) _____

18. Do you understand that the courts have approved the practice of plea arrangements and you can discuss your plea arrangement with me without fearing my disapproval? (18) _____

STATE VERSUS	File No.
Name Of Defendant	

19. Have you agreed to plead ☐ guilty ☐ no contest as part of a plea arrangement? *(If so, review the terms of the plea arrangement as listed in No. 20 below with the defendant.)* (19) _____
20. The prosecutor, your lawyer and you have informed the Court that these are all the terms and conditions of your plea:

PLEA ARRANGEMENT

☐ The State dismisses the charge(s) set out on Page Two, Side Two, of this transcript.

☐ The defendant stipulates to restitution to the party(ies) in the amounts set out on "Restitution Worksheet, Notice And Order (Initial Sentencing)" (AOC-CR-611).

21. Is the plea arrangement as set forth within this transcript and as I have just described it to you correct as being your full plea arrangement? (21) _____
22. Do you now personally accept this arrangement? (22) _____
23. *(Other than the plea arrangement between you and the prosecutor)* has anyone promised you anything or threatened you in any way to cause you to enter this plea against your wishes? (23) _____
24. Do you enter this plea of your own free will, fully understanding what you are doing? (24) _____
25. Do you agree that there are facts to support your plea ☐ and admission to aggravating factors ☐ and sentencing points not related to prior convictions, and do you consent to the Court hearing a summary of the evidence? (25) _____
26. Do you have any questions about what has just been said to you or about anything else connected to your case? (26) _____

ACKNOWLEDGEMENT BY DEFENDANT

I have read or have heard all of these questions and understand them. The answers shown are the ones I gave in open court and they are true and accurate. No one has told me to give false answers in order to have the Court accept my plea in this case. The terms and conditions of the plea as stated within this transcript, if any, are accurate.

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME		Date
Date	Signature	Signature Of Defendant
☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court		Name Of Defendant (Type Or Print)

CERTIFICATION BY LAWYER FOR DEFENDANT

I hereby certify that the terms and conditions stated within this transcript, if any, upon which the defendant's plea was entered are correct and they are agreed to by the defendant and myself. I further certify that I have fully explained to the defendant the nature and elements of the charges to which the defendant is pleading, and the aggravating and mitigating factors and prior record points for sentencing, if any.

Date	Name Of Lawyer For Defendant (Type Or Print)	Signature Of Lawyer For Defendant

CERTIFICATION BY PROSECUTOR

As prosecutor for this Prosecutorial District, I hereby certify that the conditions stated within this transcript, if any, are the terms and conditions agreed to by the defendant and his/her lawyer and myself for the entry of the plea by the defendant to the charges in this case.

Date	Name Of Prosecutor (Type Or Print)	Signature Of Prosecutor

PLEA ADJUDICATION

Upon consideration of the record proper, evidence or factual presentation offered, answers of the defendant, statements of the lawyer for the defendant, and statements of the prosecutor, the undersigned finds that:

1. There is a factual basis for the entry of the plea *(and for the admission as to aggravating factors and/or sentencing points)*;
2. The defendant is satisfied with his/her lawyer's legal services;
3. The defendant is competent to stand trial;
4. ☐ The State has provided the defendant with appropriate notice as to the aggravating factors and/or points; ☐ The defendant has waived notice as to the aggravating factors and/or points; and
5. The plea *(and admission)* is the informed choice of the defendant and is made freely, voluntarily and understandingly.

The defendant's plea *(and admission)* is hereby accepted by the Court and is ordered recorded.

Date	*Name Of Presiding Judge (Type Or Print)*	*Signature Of Presiding Judge*

SUPERIOR COURT DISMISSALS PURSUANT TO PLEA ARRANGEMENT

File No.	Count No.(s)	Offense(s)

DISTRICT COURT DISMISSALS PURSUANT TO PLEA ARRANGEMENT

File No.	Count No.(s)	Offense(s)

CERTIFICATION BY PROSECUTOR

The undersigned prosecutor enters a dismissal to the above charges pursuant to a plea arrangement shown on this Transcript Of Plea.

Date	*Name Of Prosecutor (Type Or Print)*	*Signature Of Prosecutor*

RAISING INEFFECTIVE ASSISTANCE OF COUNSEL (IAC) CLAIMS AND FILING MOTIONS FOR APPROPRIATE RELIEF (MARs) AND PETITIONS FOR WRIT OF HABEAS CORPUS ON DIRECT APPEAL

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Revised, October 2020

I. GENERAL OVERVIEW – WHAT IS THE POINT OF RAISING THESE CLAIMS?

Raising a claim of ineffective assistance of counsel in your appellate brief and filing an MAR directly in the Court of Appeals during the pendency of an appeal share the common purpose of obtaining appellate review of issues that were not otherwise preserved for appellate review at trial. Typically, you will argue ineffective assistance of counsel in your brief when trial counsel failed to object, file a motion, or take some other action necessary to preserve an otherwise winning issue for appellate review, where the otherwise winning issue is clear from the trial record and where there cannot have been any reasonable tactical reason for counsel not to raise the issue properly. Typically you will file an MAR directly in the Court of Appeals where some non-record item of evidence establishes a winning claim for relief that was not raised on the record during the trial.

Petitions for a Writ of Habeas Corpus have a much more limited function in connection with the direct appeal process. The purpose of filing a habeas petition is to obtain the client's release faster than the appellate process would usually allow when there is no valid jurisdictional basis for the client's imprisonment. There are a very limited number of potential grounds to file a habeas petition during the pendency of an appeal. The most common of these will be discussed below. When you have one of these situations, you should always consider filing a habeas petition, and should consult with the Appellate Defender about whether it is appropriate to do so in your case.

II. RAISING CLAIMS OF IAC IN YOUR APPELLATE BRIEF

Claims of IAC are governed by the US Supreme Court opinion in *Strickland v. Washington*, 466 U.S. 668 (1984). In *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985) the North Carolina Supreme Court expressly adopted Strickland as the test for IAC under the state constitution. Typically, you will raise an IAC claim when the trial record unequivocally establishes that trial counsel failed to preserve an otherwise winning claim AND that there either was not, or could not have been a valid tactical reason for doing so. In particular, raising a claim of IAC may be necessary when the issue that trial counsel failed to preserve is not reviewable under the plain error standard, *i.e.*, all issues except evidentiary and instructional issues. An IAC claim suitable for inclusion in an appellate brief may also arise when trial counsel opens the door to otherwise inadmissible testimony or where trial counsel promises a defense in opening statement but then fails to present the defense.

There are several reasons why IAC claims are usually unsuitable for inclusion in a

direct appeal brief. First, under *Strickland* there is a strong presumption that trial counsel's decisions are based on reasonable trial strategy. It is extremely difficult to overcome this presumption on a cold record. Even in cases where trial counsel would willingly concede that he did not act out of strategic concerns, but simply missed an issue (see above), the cold record will not include counsel's affidavit to that effect. Even when the trial lawyer's performance is so bad it seems obvious to you that counsel could not have been following a reasonable trial strategy, the Court of Appeals will rarely, and I mean extremely rarely – as in virtually never – find that the presumption of reasonable trial strategy has been overcome based on the cold record.

Second, in addition to showing performance so deficient that it will overcome the presumption of reasonable trial strategy on the record, you will have the burden to establish prejudice. It will be the rare case where the prejudicial impact of trial counsel's deficient performance (assuming you can establish this prong of the test on the record to begin with) will be clear on the record.

Strickland very clearly says that the level of prejudice for a successful IAC claim is a reasonable probability of a different outcome, and need not rise to the level of more probable than not to have affected the outcome. Nevertheless, our Court of Appeals has recently and repeatedly held that the level of prejudice for IAC is the same as needed for plain error, *i.e.*, probably affected the outcome. The practical significance of the Court of Appeals' position is that there is no real point in alleging IAC for counsel's failure to preserve state law evidentiary and/or instructional issues that are reviewable under plain error. If you cannot establish plain error prejudice, our Court of Appeals also will not find IAC prejudice.

On the other hand, in the rare case where both prongs of the IAC test can be established on the cold record, there is a risk that if you do not raise the claim on direct appeal, it will be procedurally defaulted when raised in an MAR. See, N.C. Gen. Stat. §15A-1419(a)(3). Thus, if you encounter a case where it genuinely appears that the cold record establishes both deficient performance and prejudice, you must raise the claim.

These concerns are addressed in the North Carolina Supreme Court's opinion in *State v. Fair*, 354 N.C. 131, 166-67 (2001):

> Defendant next alleges he was denied his right to the effective assistance of counsel. He argues that any claim of ineffective assistance of counsel (IAC) should properly be litigated in a motion for appropriate relief (MAR).
>
> IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. Compare *Blakeney*, 352 N.C. at 308-09, 531 S.E.2d at 814-15 (concluding that IAC claim alleging counsel's ineffectiveness in failing to interpose an objection was appropriately resolved on direct appeal), with *State v. House*, 340 N.C. 187, 196-97, 456 S.E.2d 292, 297 (1995) (determining that whether defendant consented to argument of his counsel regarding defendant's guilt was appropriately deferred for consideration in MAR). This rule is

> consistent with the general principle that, on direct appeal, the reviewing court ordinarily limits its review to material included in "the record on appeal and the verbatim transcript of proceedings, if one is designated." N.C. R. App. P. 9(a).
>
> We agree with the reasoning in *McCarver v. Lee*, 221 F.3d 583, 589 (4th Cir. 2000), cert. denied, 531 U.S. 1089, 148 L. Ed. 2d 694, 121 S. Ct. 809 (2001): " N.C.G.S. § 15A-1419 is not a general rule that any claim not brought on direct appeal is forfeited on state collateral review. Instead, the rule requires North Carolina courts to determine whether the particular claim at issue could have been brought on direct review.
>
> Accordingly, should the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent MAR proceeding. See *State v. Kinch*, 314 N.C. 99, 106, 331 S.E.2d 665, 669 (1985) ("We cannot properly determine this issue on this direct appeal because an evidentiary hearing on this question has not been held. Our decision on this appeal is without prejudice to defendant's right to file a [MAR] in the superior court based upon an allegation of [IAC]."). It is not the intention of this Court to deprive criminal defendants of their right to have IAC claims fully considered. Indeed, because of the nature of IAC claims, defendants likely will not be in a position to adequately develop many IAC claims on direct appeal. Nonetheless, to avoid procedural default under N.C.G.S. § 15A-1419(a)(3), defendants should necessarily raise those IAC claims on direct appeal that are apparent from the record. See *McCarver*, 221 F.3d at 589-90. When an IAC claim is raised on direct appeal, defendants are not required to file a separate MAR in the appellate court during the pendency of that appeal.

When in doubt, call OAD to consult.

SOME CASE LAW ON WHEN THE RECORD WILL SUPPORT AN IAC CLAIM:

Our appellate courts tend to be very hostile to the idea that IAC can be shown on a cold record. Here are a few examples to illustrate the point:

***State v. Todd*, 369 N.C. 707 (2017)**. *Todd* involves a claim that the defendant's appellate counsel provided ineffective assistance of counsel in the direct appeal by failing to raise a winning appellate issue that the evidence was insufficient to support the defendant's conviction for armed robbery. The trial court summarily denied the defendant's MAR. Over a dissent, the Court of Appeals summarily reversed that denial and remanded with instructions to allow the MAR and vacate the conviction. The dissent would have held that appellate counsel's performance was not deficient because it is expected that

appellate counsel will make strategic decisions about which issues to raise in an appeal and that counsel's doing so was not deficient performance. The North Carolina Supreme Court held that the trial court, the Court of Appeals majority, and the Court of Appeals dissent were all incorrect. The Supreme Court held that the question of whether appellate counsel had made a strategic decision to omit the sufficiency issue was a factual question that could not be resolved without an evidentiary hearing that delved into counsel's actual decision-making process.

***State v. Gonzalez*, COA20-120 (unpublished, 20 October 2020)**. In *Gonzalez* the defendant went to trial and was convicted of indecent liberties. In both a pretrial capacity hearing and at trial, the defense introduced apparently uncontroverted evidence that defendant was intellectually disabled. Although the trial court found the defendant capable of proceeding, she noted that he had "a limited ability to understand" the proceedings. After trial, at sentencing, defense counsel did not argue in favor of a mitigating factor based on the defendant's intellectual disability and did not ask for a mitigated range sentence. On appeal, appellate counsel argued that trial counsel was ineffective for not pursuing the mitigating factor of limited mental capacity and not advocating for a mitigated sentence, arguing there could be no valid tactical reason not to do so.

The Court of Appeals held that "the record on appeal is too minimal for us to determine the extent, if any, to which counsel's decision to ask for a sentence in the low presumptive range instead of asserting any mitigating factors had any grounding in appropriate strategic or tactical considerations. We therefore dismiss this claim without prejudice."

PRACTICAL EXAMPLES:

1. The State wholly fails to prove one of the elements of the conviction offense. For example, the defendant is charged with felony possession of stolen goods valued at over $1000 and the State presents no evidence that the goods alleged in the indictment were actually worth more than $1000. Trial counsel, however, fails to move to dismiss at the close of the evidence (or counsel moves to dismiss but specifically limits the motion to a different element, *e.g.*, insufficient evidence that defendant knew or should have known the goods were stolen). RESULT: you should, and probably must, allege IAC in your appellate brief. There is no tactical reason not to move to dismiss, and prejudice of readily apparent from the fact of conviction in the absence of sufficient evidence. **See Practice Tip #6 below for more on this scenario.**

2. The client is charged with and convicted of both sale of a schedule II controlled substance and sale of a schedule II controlled substance within 1000 feet of a public park based on the same transaction, and receives consecutive sentences. (See, *State v. Gentry*, unpublished opinion 6/4/2013). Trial counsel fails to argue in any way that the defendant is being punished twice for the same crime, either on double jeopardy grounds or on the grounds that the statute, 90-95(e)(10) clearly establishes a sentencing enhancement for the underlying sale and not a separate offense. RESULT: you should allege IAC in the appellate brief. There can be no viable strategic reason to allow the defendant to be convicted and punished for two crimes when he committed a single crime. Both deficient

performance and prejudice appear on the record.

3. The client is convicted of armed robbery of a convenience store. When the judge asks if he has anything to say before the judge pronounces sentence, the client says "Your honor, I did not commit this crime. I have three alibi witnesses who would testify that I was with them. My lawyer never even talked to them." The judge asks the lawyer to respond and he says "Well, I meant to talk to them but just never got around to it." The judge then proceeds to impose judgment and sentence the defendant to prison. RESULT: you are not in a position to argue IAC on direct appeal. Although deficient performance might be established on your cold record, you cannot begin to establish the necessary prejudice showing. The record does not establish what the witnesses would actually have said if called upon to testify – the defendant's brief description that they would give him an alibi is woefully insufficient for this purpose.

PRACTICE TIPS

1. In the event you have decided to write an IAC issue, make sure to explain each of the following three things: (1) Why counsel's performance was deficient, (2) how and why the cold record is sufficient to overcome the presumption that trial counsel's decisions constituted reasonable trial strategy; and (3) how the cold record sufficiently establishes prejudice.

2. One way to overcome the presumption of reasonable trial strategy is where counsel obviously attempted to preserve an issue for appellate review but failed to properly perform the necessary procedural steps to effectively do so. The attempt shows that trial counsel was not intentionally waiving an issue as a matter of trial strategy.

3. Sometimes it may be clear that trial counsel is attempting to preserve some issue for appellate review, but less clear that trial counsel has successfully jumped through the necessary hoops to do so. When this happens, you can combine the underlying issue with a conditional claim of IAC. To do this, you: (1) argue the underlying issue on the merits, (2) argue that the underlying issue was preserved for appellate review based on trial counsel's actions, and (3) argue, in the alternative, that counsel was ineffective for failing to successfully preserve the issue for appellate review.

4. In the event that you are faced with a case where you think it might be necessary to raise IAC in the brief in order to avoid a procedural default in a future MAR, but you really think the issue would be more suitable to be raised in a future MAR w/ extra-record factual materials (e.g., affidavit from trial counsel) you might need to conditionally argue IAC, but explain why you think the issue will be more appropriate for a post-appeal MAR in Superior Court and you will then ask the appellate court to dismiss the IAC claim without prejudice in the event the court determines that the record is insufficient to address the claim in the direct appeal. See, e.g., *State v. Allen*, 360 N.C. 297, 315-16 (2006). If you ever find yourself in this situation, contact OAD for further guidance.

5. Sometimes, it might make sense to include an IAC claim in the appellate brief

and also file an MAR directly in the Court of Appeals, such as a situation where reasonable observers might differ about whether it is obvious from the cold record that trial counsel just missed an issue rather than making a strategic decision to waive the issue, but you know that the lawyer will give you an affidavit admitting to missing the issue. In such a situation, you should discuss with the appellate defender whether or not you should file an MAR as well as raise the issue in the brief. When in doubt, call OAD to consult.

6. **ONE SPECIAL CIRCUMSTANCE –** There is one specific situation involving IAC that seems to arise all too often. This occurs when the evidence in insufficient to support the conviction but the trial lawyer has failed to properly preserve the issue by making a valid motion to dismiss for insufficient evidence at the close of the evidence. When this happens, you should BOTH: (1) invoke Rule 2, and (2) argue IAC for failing to properly preserve the issue. Why do it this way when either Rule 2 or an IAC claim alone should do the trick? Because the COA has issued opinions telling us to do it this way. *See, e,g*., *State v. Marion*, 233 N.C.App. 195. 202-03 (2014), (quoting *State v. Gayton-Barbosa*, 197 N.C.App. 129, 140 (2009) ("However, because Defendant also brings forward an ineffective assistance of counsel claim based on her counsel's failure to make the motion to dismiss, we elect to review Defendant's sufficiency of the evidence argument pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure. *See State v. Gayton-Barbosa*, 197 N.C. App. 129, 140, 676 S.E.2d 586, 593 (2009) ('[P]ursuant to N.C.R. App. P.2, we will hear the merits of defendant's claim despite the rule violation because defendant also argues ineffective assistance of counsel based on counsel's failure to make the proper motion to dismiss.'")).

7. TALK TO THE TRIAL LAWYER BEFORE FILING A BRIEF CONTAINING AN IAC CLAIM.

This is a little bit less important than when you are filing an MAR with an IAC claim, as you are working off the cold record, but it is still a reasonable professional courtesy, and you can be sure that if you don't contact the trial lawyer, the AG will do so, and if the trial lawyer has some remotely plausible explanation of why (s)he did or did not do whatever forms the basis for the claim, the AG will find a way to let the Court of Appeals know about it.

III. MOTIONS FOR APPROPRIATE RELIEF FILED DIRECTLY IN THE COURT OF APPEALS

The statute governing MARs in the Court of Appeals is N.C. Gen. Stat. §15A-1418. The statute provides in pertinent part: "When a case is in the appellate division for review, a motion for appropriate relief based upon the grounds set out in G.S. 15A-1415 must be made in the appellate division."

The official IDS policy regarding MARs in the Court of Appeals appears on the IDS website and says as follows:

IDS Policy:
Before filing and litigating a motion for appropriate relief during the pendency of the direct appeal, appointed appellate counsel must consult with and obtain the approval of the Appellate Defender. If prior approval is not obtained, appellate counsel will not be compensated for his or her work on the motion for appropriate relief.

IDS Rule 3.2(g) and policy effective November 15, 2002.

Authority:
G.S. 7A-452(a), 7A-498.3(c), 7A-498.8(b)(1), 15A-1418; IDS Rule 3.2(g).

http://www.ncids.org/Rules%20&%20Procedures/Policies%20By%20Case%20Type/Non-Cap-Non-CriminalAppeals/MARPendingAppeal.pdf

A. Considerations for Appellate Defender approval to file an MAR during the pendency of an appeal

The Appellate Defender has discretion to grant or withhold approval to file an MAR while an appeal is pending. There is no single factor or set of factors that will automatically result in approval or denial of his approval. There are, however, particular circumstances and factors he routinely takes into consideration. A non-exhaustive list of these considerations includes:

1. Factors favoring approval:

a. The proposed MAR raises what is essentially a purely legal issue, and some necessary factual predicate exists but was not made part of the trial record.

b. The factual predicate for the proposed MAR is uncontrovertable or uncontested, and is readily available for inclusion in the proposed MAR.

c. The issue to be raised in the proposed MAR is complementary to an issue that will be raised in the brief -- *i.e.*, the record is marginally sufficient to raise an issue directly in the appellate brief but will be substantially stronger with the addition of extra-record factual material.

d. The proposed MAR is a dead-bang winner.

e. If the proposed MAR is not filed while the appeal is pending the client will have no other practical recourse – it is unlikely that the client will be able to file a post-appeal MAR in Superior Court. E.g., the client received a probationary sentence or a short active sentence that will expire before the appeal is over and therefore will not be eligible for representation by PLS.

2. Factors weighing against approval:

a. The proposed MAR raises a complex fact-intensive issue.

b. The factual predicate for the proposed MAR is likely to be contested.

c. The issue to be raised in the proposed MAR will require extensive (or any) on-the-ground factual investigation in order to be properly presented.

d. The issue to be raised in the proposed MAR is wholly unrelated to issues to be raised in the appellate brief.

e. The client's position will not be substantially prejudiced if the issue is reserved for a post-appeal MAR to be filed in Superior Court if the appeal is not successful.

Examples:

(1) The client was convicted in Durham County of felony possession of stolen goods and sentenced as an habitual felon. He appeals and you are appointed. Client writes you and says: "I already pled guilty to larceny of the same goods in Wake County and got 10-12 months. I told my lawyer, but he did not do anything about it." Client encloses copies of the Wake indictment and judgment; the Wake larceny indictment clearly identifies the same goods as the Durham PSG indictment. However, the Wake indictment and judgment are not included anywhere in the Durham case file or discussed anywhere in the trial record. You propose to file an MAR claiming that the Durham conviction was obtained in violation of the client's constitutional rights related to double jeopardy and that the Durham lawyer rendered IAC by failing to move to dismiss the Durham PSG charge. Likely result: Approval to file the MAR.

(2) The client writes and says "my lawyer stipulated to the prior record level worksheet and told me to sign it. I took a careful look at it once I got to prison. One of the charges listed is an armed robbery. I was charged with armed robbery, but pled out to misdemeanor larceny and have never been convicted of armed robbery in my life. If my lawyer had gone over the worksheet with me before my sentencing hearing, I would have told him this." You check the file for the charge in the clerk's office and it confirms the client's version, but nothing in the file for the charge currently on appeal documents the client's version. The difference in the points for armed robbery instead of misd. larceny resulted in the client being sentenced at a higher prior record level. You propose to file an MAR to argue that the client was sentenced unlawfully and that the lawyer committed IAC by stipulating to the worksheet. Likely result – approval to file the MAR

(3) The client is convicted of armed robbery of a convenience store and appeals. He writes and says: "I told my lawyer I had three witnesses who would say I was with them when that store was robbed. We went to a restaurant and I paid with my credit card – I didn't save the receipt, but I'm sure there will be records to prove it. I also made

some calls on my cell phone – I know the cell phone company records will show that those calls were made from 20 miles away from that store. But my lawyer didn't investigate any of that. He never even talked to my witnesses and didn't subpoena them for the trial. When I testified that it wasn't me I had nothing to back me up, and the DA just laughed." You propose to file an MAR alleging IAC based on trial counsel's failure to properly investigate and prepare the case. Likely result – MAR will NOT be approved for filing; this type of claim should be filed in a post-appeal MAR in Superior Court.

B. Practice Tips

The grounds that may be raised in an MAR in the Court of Appeals are listed in 15A-1415(b). MAR procedure is governed by 15A-1419 and 15A-1420. Generally speaking, the same procedural rules apply for MARs in the Court of Appeals as for MARs in Superior Court (although you will almost never need to worry about the rules for successive MARs or the procedural bar rules when filing in the Court of Appeals). Read these provisions very carefully! They are complex and failure to follow them may result in summary denial of your MAR.

1. Attach all necessary documentation.

If you are filing an MAR in the Court of Appeals, it means you are relying at least in part on extra-record factual materials. You must attach all necessary documentation to your motion. See 15A-1420(b)(1). Although the statute speaks to "affidavit or other documentary evidence … which are not ascertainable from the records and any transcript of the case," you should attach copies of all documents necessary to understand the MAR issue(s), even documents that are already included in the record on appeal. In addition, you should include at least one affidavit, typically your own affidavit explaining the significance of any attached documentation or other evidence. In addition, if trial counsel has anything helpful to say (more on this below), you will likely want to attach an affidavit from trial counsel.

2. Clearly spell out all grounds for the relief you are requesting in the MAR

Even if they are factually related, each distinct claim should be presented independently, typically under its own subheading.

3. Remember to explain how the client was prejudiced, as well as why legal error occurred.

N.C. Gen. Stat. §15A-1420(c)(6) provides that "Relief must be denied unless prejudice appears, in accordance with G.S. 15A-1443."

4. Make your MAR work in conjunction with your brief.

Remember, your MAR will typically be decided by the panel assigned to decide your appeal. While this may not always be true, you should operate under the assumption

that it will be true. Your MAR should be as concise as reasonably possible, just as your brief should be. But if there is something you want the panel deciding your appeal to know, and you cannot say it in the brief because the necessary factual predicate is absent from the record, make sure to tell them in the MAR.

5. Always talk to trial counsel before filing your MAR.

There are several very important reasons to do this. First, if your MAR includes a claim of IAC, this is a matter of basic professional courtesy. Second, and far more importantly, trial counsel is usually in a position to be very helpful. Even if you are planning to raise a claim of IAC, do not assume trial counsel will be hostile. If you can show them that they missed an issue, most trial attorneys will be willing to give you an affidavit explaining that they missed it, as opposed to considering it but rejecting it for tactical reasons (which usually defeats an IAC claim). Third, whether or not your MAR involves an IAC claim, trial counsel can be incredibly helpful in giving you background information that does not appear in the record. Fourth, and this is critically important, if trial counsel considered your issue and had a legitimate reason for not pursuing the issue, you need to know this as soon as possible. Finally, if trial counsel is going to be hostile, you want to find this out as soon as possible.

IV. PETITIONS FOR WRIT OF HABEAS CORPUS

In North Carolina, petitions for a Writ of Habeas Corpus are governed by Chapter 17 of the General Statutes. Generally speaking, in cases where a defendant is imprisoned by virtue of a judgment imposed in a criminal case, habeas is ONLY available as a remedy if there is some jurisdictional defect that renders the judgment void *ab initio*, not merely erroneous or voidable. Thus, the situations in which you can file a habeas petition in conjunction with an appeal ere extremely limited. But in the appropriate circumstances, habeas can prove to be a much quicker way of obtaining relief for an imprisoned client than raising the same issue in the appellate brief.

A. Some important statutes:

N.C.G.S. §17-4:

Application to prosecute the writ shall be denied in the following cases:

. . .

(2) Where persons are committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree.

. . .

(4) Where no probable ground for relief is shown in the application.

NOTES: Subsection (2) is what limits habeas relief in post-judgment criminal cases to

jurisdictional issues (or cases in which the defendant has fully served the sentence and is no longer being detained *by virtue of* the judgment. Subsection (4) simply means that the application has to allege a real jurisdictional problem with the judgment or it will be summarily denied.

N.C.G.S. §17-6:

Application for the writ shall be made in writing, signed by the applicant –

(1) To any one of the justices or judges of the appellate division.
(2) To any one of the superior court judges, either during a session or in vacation.

NOTES: This section allows a habeas applicant to judge shop. But be aware this may backfire. We are reliably informed that if a habeas petition if filed with a single judge of the Court of Appeals, it will be referred to the current petitions panel. And even in Superior Court, which is where many (most?) applications will get filed, Superior Court judges are very sensitive about stepping on each other's toes.

N.C.G.S. §17-7:

The application must state, in substance, as follows:

(1) That the party, in whose behalf the writ is applied for, is imprisoned or restrained of his liberty, the place where, and the officer or person by whom he is imprisoned or restrained, naming both parties, if their names are known, or describing them if they are not known.
(2) The cause or pretense of such imprisonment or restraint, according to the knowledge or belief of the applicant.
(3) If the imprisonment is by virtue of any warrant or other process, a copy thereof shall be annexed, or it shall be made to appear that a copy thereof has been demanded and refused, or that for some sufficient reason a demand for such copy could not be made.
(4) If the imprisonment or restraint is alleged to be illegal, the application must state in what the alleged illegality consists; and that the legality of the imprisonment or restraint has not been already adjudged, upon a prior writ of habeas corpus, to the knowledge or belief of the applicant.
(5) The facts set forth in the application must be verified by the oath of the applicant, or by that of some other credible witness, which oath may be administered by any person authorized by law to take affidavits.

NOTES: This statute provides a roadmap for your application. Treat it as a checklist. The first clause of subsection (4) requires that you explain *why* the imprisonment is unlawful. This needs to be a complete (but hopefully consice) explanation. A conclusory allegation such as "the trial court lacked jurisdiction to impose the judgment" will not suffice. But "the trial court lacked jurisdiction to impose the judgment for felony larceny because the indictment did not allege the property was worth more than $1000" should suffice.

B. What are the usual situations where filing a habeas application on appeal will be appropriate:

So what are the common situations where filing a habeas will be appropriate? There are mainly three, one of which is a special case:

The first is when the indictment for the only charge(s) holding the defendant in prison is facially defective and fails to properly charge any crime. If a defendant is being held on multiple convictions, every indictment must be flawed before you will have a viable habeas claim. A recent example of this is in a case that led to the sample petition attached to this paper. The defendant had been convicted of being a sex offender unlawfully on the premises of a school. He was sentenced to a lengthy prison term as an habitual felon. The indictment failed to allege the defendant had the right kind of prior conviction to trigger the premises restrictions. There was a prior case directly on point saying an indictment worded in the same manner as the defendant's indictment was facially defective.

The second commonly occurring situation is when the defendant has their probation revoked and suspended sentence activated in a hearing taking place after the expiration of the probationary period and the trial court fails to make the necessary findings under N.C.G.S. §15A-1344(f) to support a subsequent revocation.

The third situation is when a defendant has been ordered to serve a split sentence as a condition of probation and the defendant is being made to serve the split sentence while the appeal is pending despite the automatic stay provided for in 15A-141(a)(4). See, generally, *State v. Stover*, 200 N.C.App. 506, 516-17 (2009) (Steelman, J., concurring). Unlike the first two of these situations, this one is about the timing of when a defendant can be imprisoned, rather than whether the defendant can be imprisoned at all. In this situation, an immediate habeas should be considered as a supplement to the appellate briefing on any merits issues regarding the underlying judgment, rather than constituting an attempt to bypass the appeals process entirely by getting permanent substantive relief from the imprisonment, as in the first two situations.

C. Practice Tips:

1. It is important to catch these issues early on in a case, so the defendant can get the maximum and quickest possible relief When you first get a new file, look at the indictment to determine if it is facially invalid. If the only indictment(s) resulting in a sentence of imprisonment is facially invalid, you should immediately consider a habeas without waiting for the transcript. If your case is a probation revocation case, look at the original probationary judgment and check the length of the probationary period. Check the dates of the violation report and the revocation hearing. If the violation report was filed before the expiration of the probationary period but hearing was conducted after the expiration of the original probationary period, you might have this issue. Because the necessary findings may be made in open court, it might be necessary to get the transcript to determine if the trial court made the necessary findings. But if your hearing was conducted after the period expired, you can check with trial counsel to get an initial assessment of whether you have an issue here. If the violation report itself was not filed

until after the expiration of the period, you almost certainly have an issue.

2. As soon as you determine that you might have an issue that should be raised in a habeas application, CALL OAD. There are several reasons to do this. First, we can provide helpful feedback on the viability of your potential habeas application. Second, we can likely provide sample pleadings that are reasonably appropriate to your factual situation. Third, and most importantly for roster attorneys, if you want to get paid for doing the work, filing a habeas on behalf of an indigent appellant requires pre-approval from the Appellate Defender.

3. One of the first questions you will have to decide is whether you plan to file the habeas in superior Court of in the Court of Appeals. Unlike MARs, over which Superior Court lacks jurisdiction while the appeal is pending, a Superior Court judge always has habeas jurisdiction. The choice largely depends on which route will get the client out most quickly, and a lot of factors can affect this determination, not the least of which is the level of cooperation you are getting from trial counsel.

Two recent examples illustrate this point: In one case, the illegality of the imprisonment was because the indictment for the conviction offense was facially defective and charged no crime. There was a prior Court of Appeals decision that was directly on point. The county of conviction was distant from appellate counsel and trial counsel, who had missed the issue when the case was in Superior Court, was not being especially helpful. The decision was made to file the Habeas application directly with the Court of Appeals judge who wrote the prior on-point decision. Result: habeas was allowed, the State was ordered to file a written return (ie a response to the petition admitting or denying the allegations), and the Court of Appeals ordered the client's conviction vacated the same day the State responded to the petition.

In the second case, the defendant had her probation revoked after her probationary period had expired, based on an alleged absconding violation. The client only had two consecutive 45 day sentences activated. The day after the hearing, trial counsel called OAD and alerted the office that the client had given notice of appeal, that the judge (who was relatively new to the bench) had not made the necessary findings, and that the finding of an absconding violation was, in trial counsel's opinion, dubious. One concern, though, was that without a transcript the Court of Appeals would have no way to know the trial court had not made the necessary findings. After consultation, we devised a plan in which trial counsel would present a habeas, drafted with substantial assistance from OAD, with the Senior Resident Superior Court Judge who trial counsel believed to be both knowledgeable and fair. This way counsel could bring in the DA and establish the factual predicate for the petition by agreement, with the possibility of bringing in the Court Reporter if the State disputed the facts. Result: Relief granted. The client was released within a day or two of the petition being filed.

June 2014
TIPS!
Emily Davis, Assistant Appellate Defender

In reviewing briefs submitted to briefbank, the briefbank committee frequently sees arguments raised as IAC for issues that should not be raised as IAC on direct appeal.

To provide some helpful guidelines for this thrilling legal topic, this month's tips are (1) situations in which IAC should be raised on direct appeal, (2) when to raise an issue as plain error instead of IAC, and (3) examples of IAC arguments.

TRICK ONE: THERE ARE LIMITED SITUATIONS IN WHICH IAC SHOULD BE RAISED ON DIRECT APPEAL.

Issues that should be raised as IAC on direct appeal:

(i) No MTD and GENUINE SUFFICIENCY issue. *Couple with request for Rule 2 review*. [2020 update: This remains correct]

(ii) MTD was limited to element X and GENUINE SUFFICIENCY issue as to element Y. *Couple with request for Rule 2 review*. [2020 update: The North Carolina Supreme Court held in 2020 in *State v. Smith* and *State v. Golder* that any motion to dismiss tests the sufficiency of every element of the State's burden of proof. As a result, this category, which probably used to be most common category of IAC to raise on direct appeal, should no longer be necessary].

(iii) MTD did not allege "variance." *Couple with request for Rule 2 review*. [2020 update: State v. Golder also seems to make this category no longer necessary, but it is a little vague, so the status of this category is up in the air].

(iv) No OBJ to evidence that D was previously convicted of offense for which he is being tried and that conviction was reversed on

appeal or evidence involving an offense for which D was acquitted

(v) No OBJ when civil pleading or judgment admitted against D to establish truth of allegations contained therein [2020 update: This advice was apparently based on the Court of Appeals decision in *State v. Young*, 233 N.C.App. 207 (2014). That decision was subsequently reversed by the N.C. Supreme Court in *State v. Young*, 368 N.C. 188 (2015). Mr. Young's MAR alleging IAC for counsel's failure to object to the evidence was ultimately denied on the prejudice prong, after an evidentiary hearing. Now, there is no reason to treat this category differently than any other failure to object to inadmissible evidence].

(vi) *Harbison* error [2020 update: This is still correct, if the client's lack of consent to the admission appears from the record]

(vii) Failure to deliver on promises made in opening statement [2020 update: This is still correct].

(viii) When the record establishes there was no strategic reason for defense counsel's allegedly deficient action or inaction AND the issue is significant to the case [2020 update: Still correct, but the case law has further limited the situations in which "the record establishes" the lack of valid strategic reasons]

TRICK TWO: IN SOME SITUATIONS, IT IS BETTER TO PRESENT THE ISSUE AS PLAIN ERROR INSTEAD OF IAC. WHEN ARGUING AN ISSUE AS PLAIN ERROR, TRY TO AVOID COUPLING THE PLAIN ERROR ARGUMENT WITH AN IAC ARGUMENT. GO STRAIGHT TO PLAIN ERROR.

Examples of issues that should be raised as plain error instead of IAC:

(i) Failure to OBJ to a question/line of questioning: Raise the issue as plain error instead of IAC. THE TRIAL COURT COMMITTED PLAIN ERROR BY PERMITTING MS. DAVIS TO TESTIFY ABOUT CRACK SMOKING BECAUSE THE TESTIMONY WAS IRRELEVANT TO ANY ISSUE.

(ii) Failure to OBJ to an instruction: Raise the issue as plain error instead of IAC. THE TRIAL COURT COMMITTED PLAIN ERROR BY INSTRUCTING ON MURDER WHEN MS. DAVIS WAS CHARGED WITH SOLICITATION.

(iii) Failure to request an instruction: Raise the issue as plain error instead of IAC. THE TRIAL COURT'S FAILURE TO INSTRUCT ON ANY OFFENSE CONSTITUTED PLAIN ERROR.

When raising the issue as plain error, avoid coupling the plain error argument with an IAC argument because:

(i) While IAC and plain error prejudice tests are technically different, our courts equate them. Here is what happens: the Court determines the plain error argument first. After determining there is no plain error, the Court summarily denies the IAC claim. When your plain error challenge loses and your IAC claim is summarily denied, nothing is gained for your client except the enmity of the Court for raising the IAC claim.

(ii) Some members of the Court believe IAC claims should only be raised in an MAR, not on direct appeal.

(iii) The Court does not want to find IAC when defense counsel is not given the chance to explain herself.

[2020 update: This entire section remains correct. Although a few Court of Appeals judges have acknowledged the distinction between the two prejudice standards, as an institution, the Court of Appeals still conflates the two standards regularly, to the point that this problem is baked into the case law and likely will remain so until the NC Supreme Court steps in to correct the problem.]

TRICK THREE: EXAMPLES OF IAC ARGUMENTS

Here are 3 examples of IAC arguments properly raised on direct appeal.

STANDARD OF REVIEW FOR IAC: ALWAYS *DE NOVO*

Whether the defendant was denied effective assistance of counsel is reviewed *de novo* by this Court. *State v. Campbell*, 359 N.C. 644, 617 S.E.2d 1 (2005). Under a *de novo* standard, the Court considers the matter anew and freely substitutes its own judgment for that of the lower court. *N.C. Dep't of Envtl. & Natural Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004).

EXAMPLE 1:

YOU MADE ME PROMISES, PROMISES. KNOWING I'D BELIEVE.

FAILURE TO DELIVER ON OPENING STATEMENT PROMISES

I. MR. CAMPBELL WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S PROMISES IN GUILT PHASE OPENING THAT THE JURY WOULD RECEIVE EVIDENCE AND INSTRUCTIONS ON SELF-DEFENSE AND INTOXICATION WHICH, DUE TO COUNSEL'S FAILURE TO PRESENT ANY SUPPORTING SUBSTANTIVE EVIDENCE, THE JURY DID NOT RECEIVE.

A criminal defendant is deprived of the effective assistance of counsel when counsel fail to deliver on promises made to the jury in opening statement that it will receive evidence of named defenses. *State v. Moorman*, 320 N.C. 387, 358 S.E.2d 502 (1987). When the failure to present promised defenses is due not to unexpected or unforeseeable developments in the prosecution's case, but to counsel's unreasonable miscalculations and misapprehensions of law, such constitutes deficient performance falling below an objective standard of reasonableness. *Ouber v. Guarino*, 293 F.3d 19, 30 (1st Cir. 2002). Where, as here, a reasonable probability exists that the guilt and penalty phase determinations would have been different had counsel produced the promised evidence, the verdicts must be reversed. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985); United States Constitution, Amends. VI, VIII, XIV; North Carolina Constitution, Article I, §§18, 19, 23, 27, and 35. Alternatively, relief must be accorded under the federal and state constitutions due to counsel's wholesale failure to subject the State's case to adversarial testing, such that Mr. Campbell was effectively denied his right to counsel. *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984); *State v. Rogers*, 352 N.C. 119, 529 S.E.2d 671 (2000).

Prior to trial, the prosecution led both defense counsel and the trial court to believe that it would introduce Mr. Campbell's post-arrest statement. (PT p. 6-9, 55, 74; Vol. I p. 70, 101-102, 158, 162-163, 169, 170) For example, before *voir dire* the

prosecutor xeroxed copies of the statement for each juror (Vol. I p. 93) and advised the court which items of evidence he thought would be relevant once the statement was admitted. (Vol. I p. 170-171)

On February 26, 2002, however, the prosecution, in clear and unambiguous language, advised the defense and trial court that it might not introduce Mr. Campbell's confession. During a discussion about the extent to which matters such as self-defense and homosexuality could be discussed by the defense in the upcoming *voir dire*, the following exchange occurred:

> CT: Based upon the fact you're going to offer his statement into evidence, we can agree that that is going to be an area where the jury is going to hear, correct?
>
> DA: Well, no. That remains to be seen what, exactly, we're going to introduce. We remain open to that possibility, but we haven't said we're definitely going to do that yet.
>
> CT: All I can do is, I can't micromanage this. You ask the question, I'll rule on it.
>
> D: All right, sir. I've been led all along to believe that the 13-page confession was going to be the part of the state's case. Now I'm told it might not be, so--I think it will come in, one way or the other.
>
> DA: I agree with that.
>
> D: Whether the state introduces it or not, I think it's going to come in; I'll inform the court of that. So, I mean, I think it is an issue. Certainly, that's something that our expert, Dr. Corvin, has relied on in formulating his opinions. (Vol. II p. 230)

The prosecution did not mention a confession or self-defense in its *voir dire* of the first panel of jurors. (Vol. III p. 330-654; Vol. IV p. 658-796; Vol. IX p. 2787) On February 28, 2002, the prosecution passed the first panel to the defense. Based on the prosecution's pre-trial statement and its conduct in *voir dire*, no reasonable basis existed for defense counsel to believe that the State would introduce the confession. Defense counsel nevertheless advised every prospective juror that the case was not a "whodunit" as Mr. Campbell had confessed to killing Mr. Hall. Counsel told the venires that the question in the case was whether Mr. Campbell bore any legal culpability for the killing. (Vol. IV p. 807-808, 809-810; VI p. 1297-1301; VII p. 1637; VIII p. 1775-1776, 1783, 1896-1897; IX p. 2143, 2281-2282) Counsel explained that acting in self-defense to a perceived homosexual assault or acting in an intoxicated state were matters which

negated or reduced culpability. Counsel obtained promises from jurors that he or she could consider evidence of self-defense and intoxication as it related to the guilt and penalty phases of this case. (Vol. IV p. 833, 834, 840, 847; VI p. 1308-1309, 1312, 1322; VII p. 1644-1645, 1647-1650; VIII p. 1783-1786, 1786-1794, 1798-1799, 1800-1801, 1831, 1899-1900, 1901; IX p. 2147-2148, 2152-2153, 2285-2286, 2288)

In the midst of *voir dire*, the court prohibited the defense from continuing to ask jurors whether their verdict would be affected if Mr. Campbell chose not to testify in light of the fact that he had already confessed. (Vol. VI p. 1359) The court cautioned the defense that it was

> asking them to assume things that we're not sure are going to happen. I don't know what the evidence is going to be. I don't know what the strategy of the state may be. (Vol. VI p. 1359)

The court was troubled by the fact that the defense questions assumed that the prosecution would introduce Defendant's post-arrest statement, and that while

> [w]e had a motion which would tend to indicate that's the route they're taking but, right now, we don't know that. There may be another route they choose to take in an effort to gain conviction. (Vol. VI p. 1359-1360) [1]

The prosecution did not then advise the defense that it planned to introduce the confession. With no assurances forthcoming from the State regarding the confession, the defense persisted in both advising potential jurors that Mr. Campbell had made admissions and questioning jurors about self-defense, intoxication, and the burdens of proof applicable to those defenses.

The State did not refer to Mr. Campbell's confession in its opening statement. It did not suggest that self-defense or intoxication would be issues in the case. (Vol. X p. 2334-2342) Defense counsel nonetheless began their opening statement by advising the jury that

> on February the 2nd, 2000, Terence Campbell found himself in an unthinkable situation, having to defend himself from a homosexual assault, an assault committed by Buddy Hall. As a result of what happened that night, Buddy Hall is dead and Terence Campbell is on trial for his life. (Vol. X p. 2342-2343)

Counsel exhaustively related the details of Mr. Campbell's February 4, 2000 confession. (Vol. X p. 2343-2347; Appendix 1) Counsel coupled the self-defense and intoxication defenses in telling the jury that it would hear that

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1 The court was likely referring to the motion to suppress. The motion was resolved in the State's favor (Rp. 43-47), thus paving the way for the State's introduction of the confession in its case-in-chief.

> Mr. Hall sexually assaulted Terence and tried to engage him in homosexual acts. When that happened, Terence lost it. The evidence will show that the combination of the alcohol, the fatigue and fear left Terence unable to think clearly. (Vol. X p. 2345)

Counsel advised the jury that

> the State also bears the burden of proving to you, beyond a reasonable doubt, that Terence Campbell was not acting in self-defense. The evidence will show that Terence was put in fear of that homosexual assault, and the law provides that a person who is put in fear of that homosexual assault is put in fear of great bodily harm and has the right to use deadly force to repel that attack. It is the state's burden to prove to you, beyond a reasonable doubt, that he was not acting in self-defense. (Vol. X p. 2348)

Counsel told the jury that "there's a lot of information that you'll have to sift through," but, once having done so, it would not be convinced beyond a reasonable doubt that Mr. Campbell formed the specific intent to kill or that Mr. Campbell killed in the course of an armed robbery. (Vol. X p. 2348) The defense told the jury that its duty would be to return not guilty verdicts. (Vol. X p. 2348-2349)

During the direct examination of Detective Kemp, who interrogated Mr. Campbell after his arrest (Vol. I p. 110-111), the prosecutor announced outside the presence of the jury that he would not offer Mr. Campbell's confession into evidence in his case-in-chief. (Vol. XI p. 2784) The confession was not admitted as substantive evidence in either the guilt or penalty phases. The jury was instructed that the statements attributed to Mr. Campbell were not offered as substantive evidence of what occurred on February 2, 2000, and that the only purposes for which it could use the statements were in weighing Dr. Corvin's credibility and determining the weight to be his testimony. (Vol. XIV p. 3260-3261) The trial court did not instruct the jury on either self-defense or intoxication. (Rp. 111-131)

In determining whether counsel's performance in opening statement was deficient, the Court "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *State v. Zimmerman*, 823 S.W.2d 220, 225 (Tenn. 1991) (counsel ineffective for failing, as promised in opening statement, to present the defendant and experts to testify regarding battered wife syndrome). To that end, counsel is constitutionally bound to fashion a trial strategy cognizant of the interrelationship between the rules of evidence and admission of statements by a defendant, the quantum of proof necessary to establish defenses of intoxication and self-defense, the function of an opening statement, and the prejudice that flows to a defendant from the broken promises of counsel. Counsel herein clearly failed to meet this constitutional standard,

which prejudiced Mr. Campbell in the guilt and penalty phases of the case to the extent that the verdicts reached are unreliable.

First, counsel bear a duty to be knowledgeable about the law. "*If counsel's failure to undertake such careful inquiries and investigations of the facts or law results in withdrawing a crucial defense from the case, the defendant has not had the assistance to which he is entitled* (citations omitted)." *People v. Corona*, 80 Cal.App.3d 684, 705, 145 Cal. Rptr. 894, 905 (1978) (emphasis in original) (pre-*Strickland* ineffective assistance reversal), cited with approval in *State v. Moorman*, *supra,* 320 N.C. at 402, 358 S.E.2d at 511). It is a well-established rule of law that a defendant cannot introduce his own confession into evidence. As an out-of-court statement, a confession is inadmissible unless offered against its maker. N.C.G.S. §8C-1, Rule 801(d)(A). Further, while the Rules of Evidence do not bar otherwise inadmissible evidence from coming before the jury as a basis for an expert's opinion, such does not transform the inadmissible evidence into substantive evidence. *State v. Wade*, 296 N.C. 454, 251 S.E.2d 407 (1978); §8C-1, Rule 703.

When the State advised the defense prior to trial that it might not introduce the confession, competent counsel would have realized the necessity of reassessing their approach, as the Rules of Evidence then operated against the defense being able to admit the confession as substantive evidence. Instead, defense counsel boasted that the confession would be admitted "[w]hether the state introduces it or not…." (Vol. II p. 230)

The first test of counsel's fluency with the Rules of Evidence came when the State announced during the direct examination of Detective Kemp that it would not introduce the confession. The defense suggested that the confession could be admitted as substantive evidence under Rule 806 to impeach Mr. Campbell's pre-arrest statements (Vol. XII p. 2807), which had been admitted through Aiken police officers Tracy Saxton and John Gregory. (Vol. X p. 2380-2382, 2389, 2402, 2406, 2408, 2414, 2421) The defense cited *State v. Lovin*, 339 N.C. 695, 454 S.E.2d 229 (1995) in support of its argument. (Vol. XII p. 2807) Rule 806 governs the impeachment of hearsay declarants. Assuming *arguendo* that Rule 806 supported the admission of the confession to impeach Mr. Campbell's statements to the South Carolina police, Rule 806 does not authorize the admission of impeachment hearsay as substantive evidence, as *Lovin* holds. *State v. Lovin*, *supra*, 339 N.C. at 710, 454 S.E.2d at 238. Counsel's citation to a case that explicitly rejected the position they had taken, and counsel getting sidetracked into a discussion of whether Rule 806 requires corroborative hearsay statements (Vol. XII p. 2810-2812), indicate that counsel did not understand the parameters of Rule 806.

Counsel also suggested that the confession was admissible through Detective Kemp to correct the erroneous impression jurors received from the pre-arrest statements that Mr. Campbell did not know who owned the car he was driving or how Mr. Hall's effects ended up in that car. (Vol. XII p. 2809) Counsel was apparently arguing some sort of "rule of completeness" doctrine, which was also doomed to fail. The law is clear that when the State introduces a defendant's statement, the defense is entitled to introduce only those statements "made during the same 'verbal transaction'" as the statement admitted. *State v. Fowler*, 353 N.C. 599, 621, 548 S.E.2d 684, 699 (2001), *cert. denied*,

535 U.S. 939, 122 S. Ct. 1322, 152 L. Ed. 2d 230 (2002). In any event, counsel's efforts thereafter to cross-examine State witnesses based on the contents of the confession were shut down on State objections. (*See* Vol. XII p. 2855, 2858, 2871)

When the State rested its case-in-chief without having introduced the confession, competent counsel would again have reassessed the viability of their defense theories. No evidentiary avenue existed for admission of the confession, as counsel and Mr. Campbell had decided prior to trial that Mr. Campbell would not testify to avoid admitting prior convictions which would lessen the State's burden of proof at the violent habitual felon phase. (Vol. XV p. 3240, 3499) These attorneys, however, told the court that their defenses remained the same. (Vol. XIII p. 3043)

The evidentiary quandary came to an immediate head when the State argued that the defense could not put on evidence of a homosexual assault committed by Mr. Hall against someone other than Mr. Campbell without first either establishing self-defense or Mr. Campbell's prior knowledge of the incident. (Vol. XIII p. 3043) The defense responded that the confession would be admitted through Dr. Corvin and, when coupled with other-crimes evidence relating to Mr. Hall, would be sufficient to raise self-defense. (Vol. XIII p. 3044-3045) When the defense was forced to concede that it could not offer the confession as substantive evidence through Dr. Corvin, the court advised counsel that it would not admit reputation evidence without substantive evidence of self-defense having first been admitted. (Vol. XIII p. 3045-3046) Defense counsel responded, "Let me think about it over the break and maybe over the lunch hour, if we need to." (Vol. XIII p. 3046)

After the next witness, the court advised defense counsel of its concerns over the defense witness list, as the court was reluctant to permit witnesses to testify to peripheral matters before substantive evidence of self-defense was admitted. The court asked counsel to explain how they planned to present self-defense. (Vol. XIII p. 3062-3063) Defense counsel again argued that if reputation and other-crimes evidence was admitted under Rule 404(a)(2) as pertinent character evidence of the victim, such would establish that Mr. Hall was a sexual aggressor, which would then corroborate Dr. Corvin's opinions. (Vol. XIII p. 3063) The State responded that evidence regarding other victims could not establish that Mr. Campbell acted in self-defense on this occasion. (Vol. XIII p. 3065-3066) The defense persisted in arguing that evidence of an alleged rape attempt by Mr. Hall against someone other than Mr. Campbell entitled Mr. Campbell to self-defense instructions. (Vol. XIII p. 3068) The following exchange then occurred:

> D: If we could take - - if we could take a break and let me pull some case law, Judge, and go through this. I mean, I've got - -
>
> CT: We knew this was going to be an issue from the minute I walked into the courtroom, and we've all had an opportunity to look at it, but I'll assist you in any way I can. (Vol. XIII p. 3070)

The prosecutor complained that the defense was "filibustering" and didn't "want to confront…the reality of what they've already promised as a trial strategy…." (Vol. XIII p. 3071)

When the matter was discussed again, defense counsel claimed that their contention "all along" had been that Mr. Campbell's statements would not technically be substantive evidence if admitted through Dr. Corvin, but that reputation and other-crimes evidence formed the basis of their self-defense claim and supported the giving of instructions. (Vol. XIII p. 3098) Counsel explained that any evidence establishing that Mr. Hall was a first aggressor towards other people proved that he was the first aggressor against Mr. Campbell. (Vol. XIII p. 3100) The court again ruled that substantive evidence of self-defense had to be presented before corroborating evidence would be admitted. (Vol. XIII p. 3101)

The court asked counsel if they actually understood the issue. (Vol. XIII p. 3101) Counsel responded, "Yes, sir. I just ask for a lunch break to try to clear my head and see where we can go with it." (Vol. XIII p. 3102) The court recessed the jury for the day and advised counsel that it had "tried to put the puzzle together without all the puzzle pieces" and "tried to establish what I thought would be necessary before we get to the self-defense issue. If I'm wrong, then I'll need some cases to support what you're saying." (Vol. XIII p. 3106) Counsel asked for "an opportunity to review some law…." (Vol. XIII p. 3110)

Following a three hour recess (Vol. XIII p. 3114), counsel stated that they would leave it "to the court's discretion on whether we're entitled to" self-defense instructions. (Vol. XIII p. 3122) Counsel then launched a new theory and argued that Mr. Campbell was entitled to self-defense instructions if Dr. Corvin testified that Mr. Campbell's state of mind was such that he had been placed in fear of a homosexual assault. (Vol. XIII p. 3123-3124)[2] Counsel suggested that Dr. Corvin could testify that Mr. Campbell overreacted to a situation and that his overreaction constituted self-defense. (Vol. XIII p. 3125) The defense said that their position "all along" had been that self-defense would be established if they corroborated any portion of the confession, thus making it more likely that the confession as a whole was truthful. (Vol. XIII p. 3125) Counsel could not provide any case law supporting this argument (Vol. XIII p. 3126) and admitted that they had no "independent evidence as to the actual confrontation…." (Vol. XIII p. 3128) Ultimately, the defense was forced to concede that it had no substantive evidence to establish self-defense (Vol. XIV p. 3242) and abandoned both self-defense and intoxication. (Vol. XIV p. 3244)

The evidentiary conundrum counsel placed themselves in is strikingly similar to *People v. Lewis*, 240 Ill.App.3d 463, 609 N.E.2d 673 (1992), where counsel was found

2 The full, rather garbled, explanation by counsel of this theory was that "in terms of his mental state at the time, the fact that he was suffering from diminished capacity, and the fact that what was going on, on that evening could have caused him to be placed in fear of a homosexual assault, or the fact that he was more [sic] than fear, he was the victim of one, could place him in a situation where he could be entitled – and just the expert's opinion that he could be placed in that mental state is some evidence from which the judge could technically get that instruction that there would be some evidence, by way of an expert's opinion, that the defendant's mental state was such that he was--" (Vol. XIII p. 3123)

ineffective to failing to make out the defenses promised in opening statement. In *Lewis*, counsel told the jury in opening statement that the defendant had made a statement denying having stabbed one murder victim, admitting having stabbed the second murder victim, and claiming that someone else inflicted the fatal wounds upon the second victim. The prosecution did not offer the defendant's statement into evidence. The defense was unable to get the statement admitted, since it was inadmissible hearsay. Defendant's murder convictions were reversed for ineffective assistance of counsel on the grounds that it was incompetent for the defense to have promised to produce an inadmissible statement, that the promise concerned production of "significant exonerating evidence," and that the "failure to fulfill such promise is highly prejudicial." *Id.* at 467-468, 609 N.E.2d at 677.

Similarly, in *People v. Ortiz*, 224 Ill.App.3d 1065, 586 N.E.2d 1384 (1992), counsel was found ineffective for having advised the jury in opening statement that the evidence would establish that the victim had a relationship with a man named Joe Robbins, that Robbins possessed two knives when stopped by police, and that Robbins perpetrated the charged assault. On cross-examination, counsel asked the victim if she had ever spoken to Joe Robbins. The victim denied that she had. Counsel then asked if she had ever met Joe Robbins. At that point, the trial court sustained the State's objection on the grounds that the examination was irrelevant and outside the scope of the direct. Counsel failed to introduce any evidence regarding Joe Robbins. It was clear to the appellate court that counsel's performance was deficient, as, due to lack of familiarity with the rules of evidence, counsel promised a defense which he was unable to deliver. The failure to produce evidence promised in opening statement provided the prejudice requiring reversal. *Id.* at 1072-1073, 586 N.E.2d at 1389.

It is clear from the colloquies with the court in this case that defense counsel were making things up as they went along. They requested recesses to conduct legal research or to "clear their heads" before devising legal arguments containing unsupportable evidentiary propositions. As the trial court noted, it was clear from day one that the $64,000 question in the case was how the defense would prove its defenses. (Vol. XIII p. 3070) Competent counsel have answered that question before promising defenses to a jury, for when counsel

> fails to do the requisite legal research to learn the applicable law, his failure to raise a defense or defenses which could have been established by making the aforesaid efforts cannot be justified by reference to trial strategy or tactics (citations omitted).

People v. Corona, *supra*, 80 Cal.App.3d at 706, 145 Cal. Rptr. at 906.

Second, as argued in Issue II *infra*, competent counsel could not reasonably have concluded that the February 4, 2000 confession established either perfect self-defense or intoxication. Additional evidence would have been needed to make out either defense. As in *People v. Lewis*, *supra*, 240 Ill.App.3d at 469, 609 N.E.2d at 678, counsel was

ineffective for promising to make out defenses solely from a confession, as such promises surely could not have been fulfilled.

Third, prevailing professional norms recognize that overstatement or misstatement in an opening statement "may have adverse effects:

> 'The trial attorney should only inform the jury of the evidence that he is sure he can prove….His failure to keep [a] promise [to the jury] impairs his personal credibility. The jury may view unsupported claims as an outright attempt at misrepresentation.'

McCloskey, *Criminal Law Desk Book,* §1506(3)(O) (Matthew Bender, 1990)." *State v. Zimmerman*, *supra*, 823 S.W.2d at 225. When a reasonable basis exists for the defense to suspect that the State's evidence will not play out as it hopes, "it is an abecedarian principle that the lawyer must exercise some degree of circumspection." *Ouber v. Guarino*, *supra*, 293 F.3d at 28. That reasonable basis existed on this record, since the prosecutor announced prior to trial that he might not introduce the confession (Vol. II p. 230) and never referred to it during *voir dire* or opening statement. The trial court certainly understood what the prosecutor meant and warned defense counsel of the precariousness of their assumptions. (Vol. VI p. 1359-1360) Counsel's performance was deficient for failing to take the prosecutor's statement at face value, and opting instead to plow full speed ahead in opening statement to promise what they had no hope of delivering.

Fourth, the prejudice that flows to a defendant from the broken promises of defense counsel is a breakdown of the adversary system. "A cardinal tenet of successful advocacy is that the advocate be unquestionably credible. If the fact finder loses confidence in the credibility of the advocate, it loses confidence in the credibility of the advocate's cause." *State v. Moorman*, *supra*, 320 N.C. at 400, 358 S.E.2d at 510. Counsel expended considerable effort in *voir dire* and opening statement to advise the jury that it would have to find that the State disproved self-defense and intoxication beyond a reasonable doubt in order to find Mr. Campbell guilty. Counsel then failed to present any evidence of self-defense or intoxication. "A broken promise of this magnitude taints both the lawyer who vouchsafed it and the client on whose behalf it was made." *Ouber v. Guarino*, *supra*, 293 F.3d at 28. The jury has no reason to trust that other defense efforts were credible. *State v. Moorman*, *supra*, 320 N.C. at 402, 358 S.E.2d at 511. *Also see Montez v. State*, 824 S.W.2d 308, 311 (Tex. Crim. App. 1992) (counsel ineffective for, *inter alia*, making "extravagant promises" in opening statement "about what would be shown to the jury" and failing to fulfill such promises).

Counsel's failure to deliver opened "the gate to legitimate, devastating comments on the part of the prosecution." *People v. Corona*, *supra*, 80 Cal.App.3d at 725, 145 Cal. Rptr. at 919. A prosecutor is entitled to comment on the absence of defense evidence. *E.g. State v. Ward*, 354 N.C. 231, 262, 555 S.E.2d 251, 271 (2001). Prejudice sufficient to require reversal exists when the defense failure to produce evidence is a centerpiece of

the State's closing arguments. *See, e.g., State v. Zimmerman*, *supra*, 823 S.W.2d at 225-226; *State v. Moorman*, *supra*, 320 N.C. at 401, 358 S.E.2d at 511; *Dames v. State*, 807 So.2d 756, 758 (Fla. App. 2002); *People v. Ortiz*, *supra*.

The prosecution herein waived its initial closing argument in the guilt phase. (Vol. XVI p. 3662) The jury thus heard first from the defense. As in *Moorman*, 320 N.C. at 401, 358 S.E.2d at 511, these attorneys exacerbated the "effect of the unfulfilled promise of a defense" by continuing to exhort the jury to find intoxication and self-defense on the basis of the confession. The defense contended that a "lot of evidence" had been presented to support and corroborate the "more plausible explanation" of what happened that night and that the State had "done a pretty poor job of supporting their contention, other than just conjecture, hunches and circumstantial evidence." (Vol. XVI p. 3669-3670) The defense twice argued that the fact that the videotape depicting the dildo scene that Mr. Campbell described was not the videotape in the videocassette recorder when police searched the premises did not detract from the credibility of the confession, as counsel attributed that discrepancy to Mr. Campbell's overconsumption of alcohol. (Vol. XVI p. 3687, 3708) The defense complained that the State spent its efforts gathering evidence to establish Mr. Campbell's guilt and expended "little or no effort…to corroborate anything in Mr. Campbell's statement." (Vol. XVI p. 3693) The defense claimed that the State's allocation of resources was unfair since Mr. Campbell's "version of events matches up. Virtually everything he says can be corroborated." (Vol. XVI p. 3707) The defense went on at length in a "quick summarization of our theory of what happened" by reciting the contents of the confession. (Vol. XVI p. 3706-3709) The defense claimed that the State's failure to fingerprint the boom box proved that Mr. Hall had indeed "baited" Mr. Campbell with the item and put it in the car himself (Vol. XVI p. 3707), which again proved that Mr. Campbell's confession was truthful. In reliance on the confession, the defense said,

> To get right down to it, it's not pleasant to say but, to some extent, Mr. Hall set some of these wheels into motion, when it comes right down to it. All these matters constitute facts that the state has failed to present, let alone prove. (Vol. XVI p. 3713)

In its closing, the prosecution took full advantage of its right to remind the jury what evidence it could consider in rendering verdicts and what it could not. The prosecutor hammered home that he was the advocate who had never misled the jury, had kept his promises, and had produced actual evidence for the jury to consider. The prosecutor repeatedly advised the jury that the Defendant's confession was not evidence and that the jury could not base verdicts on the defense conjecture and speculation. (Rp. 59-110; Vol. XVI p. 3720-3771)

The prosecutor told the jury he was going to focus on the law (Vol. XVI p. 3722), and that

> while we're on the subject of what might be appropriate to

talk about, how about let's talk about the evidence, because you didn't hear it, you didn't hear it for the last two hours.

We kept talking about this defendant's statement at an early stage. Do you realize this isn't even evidence? Evidence comes from the witness stand, ladies and gentleman. It's when people are under oath and are subject to cross-examination. [Objection overruled.] Are you listening to me? Evidence comes from right here. (Indicating) Isn't that what we talked about, under oath, subject to cross-examination. This is self-serving hearsay, and it can't even be considered as substantive evidence. Now, I'm not going to be a law professor to you. What does that mean? It means that it doesn't even raise the issue of self-defense.

Remember Mr. Heckart and Mr. Harrell when they were first talking to y'all, said, do you understand that the law in North Carolina is that someone who is in fear of a same sex sexual attack can use deadly force? That's absolutely the law. That's not abnormal or unusual. That's absolutely the law. You know what, folks? You're about to hear all the jury instructions that his honor is going to give you in this case, and you're going to have a copy. I want you to follow very closely and get to the point that Mr. Heckart and Mr. Harrell were talking about where you have any instruction on self-defense.
Remember, I turned around and said, folks, you understand that we might talk to you about NAFTA or child molestation or bank robbery, but until his honor gives it, it's not the law in this case? The law arises out of the evidence, and there's been absolutely no evidence that he was in fear of death or great bodily injury or sexual attack in this case. That's why his honor is not even instructing on it.

And they also asked you about voluntarily [sic] intoxication. Don't some of y'all have problems in your family with that? In fact, you even had you [sic] fill out a questionnaire about that. Do you understand that that might be some evidence in this case? No, it wasn't. In fact, again, voluntarily [sic] intoxication, absolutely a defense to murder, because you can't form the specific intent to kill if you're so overcome with alcohol that you can't think straight, it's kind of like a temporary insanity, then you can't form the specific intent to kill. They also read you that instruction. His honor is not going to. Again,

> focus on the law that you're going to be given in this case. That's not going to be an instruction either. (Vol. XVI p. 3722-3724)

The prosecutor reminded the jury that he told them in his

> opening statement to you -- when I say something, I like to try and back it up. I said you would hear about that law, I'm backing it up. They said you were going to hear about the law on self-defense, they haven't. They said you were going to hear about the law on voluntary intoxication; you're not going to hear about it. I said you're going to hear about two types of murder, felony murder and premeditated murder, and his honor is going to instruct on both. (Vol. XVI p. 3725-3726)

The prosecutor explained why he decided not to introduce Mr. Campbell's confession:

> If this was such a traumatic incident and he couldn't believe he found himself the victim of a sexual attack, who did he call first, the police or the sheriff? How about the hospital? He had just had to fend off this savage attacker, this little man who is eight inches shorter and 50 pounds lighter than him. Did he call the hospital, EMS, to get medical treatment? No, no, he decided to go around the house and rob the man blind and then leave. That is totally inconsistent with his story.
>
> And they said, well, why didn't Mr. David put in the story? Because I put before you credible evidence, that's why. Because Mr. Heckart is absolutely right, the highest aim of every legal contest is the search for the truth, not a search for reasonable doubt. Ours is a solemn obligation to seek the truth. Do you believe this? (Indicating the defendant's statement.) (Vol. XVI p. 3727-3728)

The prosecutor reviewed the elements of the charged crimes to "show you how that evidence fits into the law. Now, there's a novel concept. Let's talk about the law." (Vol. XVI p. 3742) He urged the jury to pore through the instructions, as "We don't run from the law, we embrace it. They're the ones who are talking to you about law that's not even instructed on." (Vol. XVI p. 3744) The prosecutor said that he had to prove six elements to establish premeditated murder, "and, again, I'm taking these straight out of the pattern jury instructions that his honor is going to be reading to you in a moment. We're trying to follow the law in this courtroom, and the facts support the law." (Vol. XVI p. 3745-3746) As to the sixth element of first degree murder set forth in the

instructions, the prosecutor stated:

> Defendant did not act in self-defense. Huh-uh, nope. Not even an instruct – the evidence doesn't even raise that as an issue in this case. (Vol. XVI p. 3756)

The prosecutor debunked Dr. Corvin's testimony regarding Mr. Campbell's degree of intoxication (Vol. XVI p. 3759-3760) and reminded the jury, "That's so not evidence that they're that [sic] not even getting an instruction on voluntary intoxication." (Vol. XVI p. 3760)

The prosecutor's theme that he was the only trustworthy advocate continued into his penalty phase closing argument. The prosecutor told the jury, "You know, I'm the only attorney up here that's been talking about the law, because the law fully supports what I'm asking for." (Vol. IXX p. 4274) He stated that he welcomed having the burden of proof, as the State "make[s] our burdens through the use of evidence, not speculation, gossip or conjecture." (Vol. IXX p. 4283) The prosecutor reminded the jury that the defense "didn't even get a voluntary intoxication instruction from his honor during the guilt/innocence phase." (Vol. IXX p. 4288)

"The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland v. Washington*, *supra*, 466 U.S. at 685, 104 S.Ct. at 2065, 80 L.Ed.2d at 694, *quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 240, 87 L.Ed. 268, 273 (1942). The prosecution's case is not met when defense attorneys "promise even a condensed recital of such powerful evidence, and then not produce it…." *Anderson v. Butler*, 858 F.2d 16, 19 (1st Cir. 1988). Such cannot be regarded as harmless, but is "prejudicial as a matter of law," *id.*, and establishes a *Strickland* violation.

As the First Circuit held in *Anderson*, there does come a point when representation is so deficient that engaging in the *Strickland* prejudice analysis provides no benefit to the legal system.

> The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. As Judge Wyzanski has written: 'While a criminal trial is not a game in which the participants are expected to enter the ring with a near

> match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.'

United States v. Cronic, *supra*, 466 U.S. at 656-657, 104 S. Ct. at 2045-2046, 80 L. Ed. 2d at 666-667, *quoting United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir.), *cert. denied sub nom. Sielaff v. Williams*, 423 U.S. 876, 96 S. Ct. 148, 46 L. Ed. 2d 109 (1975). When counsel "fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.* at 659, 104 S.Ct. at 2046, 80 L.Ed.2d at 668.

The essence of constitutional protections in capital proceedings is heightened reliability of fact-finding. *Beck v. Alabama*, 447 U.S. 625, 638, 100 S. Ct. 2382, 2390, 65 L. Ed. 2d 392, 403 (1980); *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000). A jury deciding guilt of first degree murder and death-worthiness should hear two sides of a story when two sides exist. Competent counsel deliver what they promise, for "`[t]ruth,' Lord Eldon said, 'is best discovered by powerful statements on both sides of the question.'" *United States v. Cronic*, *supra*, 466 U.S. at 655, 104 S. Ct. at 2044-2045, 80 L. Ed. 2d at 665. Counsel's promises of self-defense and intoxication in the guilt phase opening, and the subsequent failure to deliver, so affected the truth-seeking function of this trial that the convictions and sentence must be reversed.

****

EXAMPLE 2:

HERE'S YOUR TICKET, PACK YOUR BAGS, TIME FOR JUMPING OVERBOARD.

COUNSEL SAID ON THE RECORD HIS ACTIONS RESULTED FROM A MISUNDERSTANDING OF LAW, NOT STRATEGY.

II. MR. BAKER WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY FAILED TO UNDERSTAND THE SCOPE OF EVIDENCE RULE 609 AND DIMINISHED MR. BAKER'S CREDIBILITY BY LIMITING HIS EXAMINATION OF MR. BAKER TO HIS FELONY CONVICTIONS.

When Mr. Baker took the witness stand, his defense attorney almost immediately questioned him about his prior convictions. Evidence Rule 609 permits the introduction for impeachment purposes of evidence of felony and Class A1, 1, and 2 misdemeanor convictions in the preceding ten years. N.C. Gen. Stat. § 8C-1, Rule 609 (2013). Mr. Baker was asked about three prior felony convictions, but his attorney did not ask him

about his misdemeanor convictions. On cross examination, the prosecutor suggested that Mr. Baker had not been fully honest about his record and questioned him about the misdemeanors. (Tpp 516-517)

The defense attorney attempted to rehabilitate his client by accepting blame for the failure to ask about the misdemeanors, (Tpp 518-519), and conceded to the court that he had misunderstood the scope of Rule 609. The defense attorney provided ineffective assistance of counsel when he failed to understand the governing evidentiary rule, and Mr. Baker's credibility was seriously damaged as a result.

The State acknowledged that its case rested on the jury's assessment of Mr. Baker's credibility. It urged jurors to "pay very close attention" to the police interview and the explanations Mr. Baker gave "for the Chevy Malibu and for the credit card[.]" (Tp 197) In that recorded interview on January 11, 2012, his initial statement to police on December 26, 2011, and his trial testimony on November 7, 2013, Mr. Baker gave essentially the same account of his meeting with T.J. and the agreement to pay Taylor's electric bill. Mr. Baker also acknowledged that he drove the Malibu briefly three days after the Salinas-Rodriguez robbery. (Ex 9, 9:23; Tpp 357-358, 391) The robbery victims could not identify him at trial, and their pre-trial identifications were tainted by procedural violations in the lineups. (Tpp 454-456) The State was correct. The case hinged on whether the jury believed Mr. Baker's story. The defense attorney's error deprived Mr. Baker of his right to effective representation under the United States Constitution, Amends. VI, VIII, XIV, and the North Carolina Constitution, Article I, §§ 19, 23. Mr. Baker must be granted a new trial.

Argument

A criminal defendant's right to the effective assistance of counsel is violated when counsel provides deficient representation which prejudices the defendant. *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674 (1984); U.S. Const. amends. VI, XIV; N.C. Const., art. I, §§ 19 & 23. To establish that ineffective assistance was provided by counsel, a defendant must show that (1) counsel's performance falls below an objective standard of professional reasonableness, and (2) but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington,* 466 U.S. 668, 80 L.Ed.2d 674 (1984); *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland, supra*, 466 U.S. at 694, 80 L.Ed.2d at 698). The quantum of proof required is less than a preponderance of the evidence. "[A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case." *Id*. 466 U.S. at 693, 80 L.Ed.2d at 697.

Mr. Baker's trial counsel acknowledged that he misunderstood the scope of Evidence Rule 609 and consequently did not adequately address Mr. Baker's prior convictions on direct examination. (Tp 520) When the prosecutor confronted Mr. Baker with the Class 2 misdemeanor convictions for resisting an officer that defense counsel omitted, it appeared that he had consciously tried to hide the convictions from the jury.

(Tpp 516-518) As a result, Mr. Baker's credibility before the jury was diminished.

"Knowledge of governing legal principles central to a case is a prerequisite to effective representation." *Patton v. State*, 537 N.E.2d 513, 518 (Ind. Ct. App. 1989). A number of courts have found that making a tactical decision based on a misunderstanding of the law constitutes deficient performance. *See State v. Hopkins*, 576 N.W.2D 374, 379-80 (Iowa 1998) (holding that the defense attorney's performance during the charge conference fell outside the "normal range of competency" because he was not familiar with the current state of the law on the charge against the defendant); *Aldrich v. State*, 296 S.W.3d 225 (Tex. App. Fort Worth 2009) (holding that defense counsel's misunderstanding of discovery law fell below an "objective standard of reasonableness as a matter of law"); *Ex parte Chandler*, 182 S.W.3d 350, 258 (Tex. Crim. App. 2005) ("Ignorance of well-defined general laws, statutes and legal propositions is not excusable and such ignorance may lead to a finding of constitutionally deficient assistance of counsel.").

In Mr. Baker's case, his attorney's misunderstanding of the law damaged his client's credibility in a case that hinged on the jury's acceptance of "the explanations he g[ave] for the Chevy Malibu and for the credit card[.]" (Tp 197) If an attorney does not understand, or is not familiar with the relevant law, he cannot fulfill his professional duty to his client. The "failure to become informed of the law affecting a client" cannot be considered a tactical decision. *Luchenberg v. Smith*, 79 F.3d 388 (4th Cir. 1996).

Mr. Baker's attorney's statements to the court make clear that he did not understand the scope of Rule 609. At the beginning of his testimony, defense counsel asked Mr. Baker about his 2008 convictions for breaking or entering and larceny after breaking or entering and his 2004 conviction for breaking or entering a motor vehicle, and then asked, "Are those your prior convictions?" Mr. Baker said yes. (Tpp 496-97) On cross-examination, the State asked:

> [PROSECUTOR]: Now, you were honest earlier about some of the convictions that you had previously?
>
> [MR. BAKER]: Yes, ma'am.
>
> [PROSECUTOR]: But you've had more than that, haven't you.
>
> [MR. BAKER]: Yes, ma'am. I have a few more.
>
> [PROSECUTOR]: Which one?
>
> [DEFENSE COUNSEL]: Objection, your Honor.
>
> [PROSECUTOR]: Mr. Baker, as I was saying earlier, your counsel asked you what you'd been convicted of previously, and you were honest about some of those things, right?

[MR. BAKER]: Correct.

[PROSECUTOR]: But you've had more convictions than that in the past ten years than ones you just admitted to, haven't you?

[MR. BAKER]: Yes, ma'am.

[PROSECUTOR]: And you didn't volunteer that to the jury?

[MR. BAKER]: My lawyer never asked me, but I don't have a problem telling you.

[PROSECUTOR]: Huh?
[MR. BAKER]: I said my lawyer never asked me those questions, but I don't have a problem telling you.

[PROSECUTOR]: Okay. Well, let me ask you about them.

[MR. BAKER]: Yes, ma'am.

[PROSECUTOR]: February 12, 2004, you were convicted of resisting an officer, weren't you?
[MR. BAKER]: Yes, ma'am, I was.

[DEFENSE COUNSEL]: Objection, your Honor.

[COURT]: Overruled. That's a Class 2.

[DEFENSE COUNSEL]: Class 2 is not allowed, your Honor.

[PROSECUTOR]: Yes, it is, your Honor.

[COURT]: Yes, it is.

(Tpp 516-517) The State then asked about, and Mr. Baker admitted, two more convictions for resisting an officer a week apart in December 2006 and another resisting an officer conviction on 10 October 2008. Outside the presence of the jury, defense counsel argued, "[Y]our Honor, again, I could be wrong. I'm looking for the -- I think it's Rule 609 that define --" before the court cut him off to explain that Class 2 misdemeanors are included under Rule 609. (Tp 520) In response, defense counsel stated, "Oh, okay. All right. Then for some reason I thought it was A1 and 1. I didn't know it was 2." (Tp 520) When he failed to educate himself about the rules of evidence, the attorney violated his duty to Mr. Baker and deprived him of his constitutional right to effective assistance of counsel.

The second prong of the *Strickland* test is a showing that the defendant was

prejudiced by defense counsel's error. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693. *See Braswell*, 312 N.C. at 562, 324 S.E.2d at 248. Mr. Baker was prejudiced by defense counsel's error in this case. The State argued in closing,

> Now, this is an all or nothing case. It really is. Not every case is like that. But this is an all or nothing case. If you think, if you find that the defendant was the driver of that Malibu on December 19th, 2011, that he was one of the two robbers, you're going to find him guilty of all the crimes. If you find that he wasn't, then you're going to find him not guilty of all the crimes. I submit to you there's no middle, it's just an all or nothing thing.

(Tp 552) The State also argued, "You are allowed to consider his convictions in determining the credibility of his testimony, and I'll leave it at that[,]" (Tp 573), before concluding

> Ladies and gentlemen, I told you in opening statement that this case is going to come down to whether or not you believe the defendant. If you believe that all of these things happening . . . and that the defendant has a legitimate explanation for all these things and you believe him – and you have to believe him, really – then find him not guilty of everything. If you believe him, if you believe all of his explanations, find him not guilty.

(Tp 574) But for defense counsel's error, the result of the proceeding against Mr. Baker would have been different. The State made this a case about credibility, and defense counsel damaged Mr. Baker's credibility by making it appear that he was hiding prior convictions. This was not a trial strategy. The attorney simply, and detrimentally, misunderstood the governing evidentiary rule. His misunderstanding of the law deprived Mr. Baker of effective representation at a critical point in the trial proceeding. Mr. Baker must be granted a new trial. *Strickland*, 466 U.S. at 693-94, 80 L.Ed.2d at 697-98.

If, despite the strong evidence that it was unreasonable for Mr. Baker's attorney not to know the scope of Rule 609, and that Mr. Baker was seriously prejudiced by this, this Court concludes that the record is not fully developed on the issue of ineffective assistance of counsel, Mr. Baker requests that it defer consideration of the merits without prejudice and allow him to develop a proper record in post-conviction proceedings.

****

EXAMPLE 3:

III. WHEN NO PARENT, GUARDIAN, CUSTODIAN, OR ATTORNEY WAS PRESENT DURING THE CUSTODIAL INTERROGATION OF 13-YEAR-OLD JUAN BENITEZ AND DEFENSE COUNSEL'S STRATEGY WAS TO SUPPRESS THE STATEMENT, COUNSEL'S FAILURE TO ARGUE THE STATEMENT WAS INADMISSIBLE UNDER N.C. GEN. STAT. § 7B-2101 AND *STATE V. OGLESBY* -- THE MERITORIOUS SUPPRESSION ARGUMENT -- CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

Failure to preserve this issue was ineffective assistance of counsel. Counsel is ineffective where his deficient performance prejudices the defense. *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674 (1984); *see* U.S. Const. amends VI, XIV; N.C. Const. art. I, §§19, 23.

Here, counsel's performance was deficient. *Oglesby*, the governing decision on this issue, was decided in 2007, while the suppression motions were filed – and the suppression hearing took place – in 2012. "At minimum, an attorney should be familiar with the facts and law relevant to his client's case." *Rios-Delgado v. United States*, 117 F. Supp.2d 581, 589 (W.D. Tex. 2000). *See Hinton v. Alabama*, ___ U.S. ___, ___, 188 L.Ed.2d 1, 9 (2014) (citations omitted) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.").

Further, there can be no strategic reason for failing to raise this ground for suppression. There can be no doubt that counsel's strategy -- as evidenced by his multiple suppression motions, vigorous cross-examination of State's witnesses, presentation of evidence of Juan Benitez's intellectual limitations and inability to understand the juvenile warnings, and lengthy argument at the suppression hearing -- was to suppress Juan's statements. *Oglesby*'s holding that a guardian relationship must be established by legal process is clear-cut and unequivocal, rendering the statement at the LCSD inadmissible. There can be no strategic reason for counsel's failure to advance a winning argument to achieve his objective of suppressing the statement. *See Kimmelman v. Morrison*, 477 U.S. 365, 385, 91 L.Ed.2d 305, 326 (1986) (finding failure to conduct pretrial discovery "was not based on 'strategy,' but on counsel's mistaken belie[f] that the State was obliged to take the initiative and turn over all of its inculpatory evidence to the defense"); *Northrop v. Trippett*, 265 F.3d 372, 384-85 (6th Cir. 2001) (finding there could be no strategic reason for failure to raise meritorious suppression claim).

Counsel's deficient performance was prejudicial because had counsel advanced the *Oglesby* argument, the trial court would have suppressed the statement at the LCSD. *See Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698 (requiring "reasonable probability" of

different result).

No. COA20-719 THREE-B DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Carteret County
	)	18 CRS 999
JERRY LEE FAIRCLOTH	)	18 CRS 53701
Defendant-Appellant	)	

JERRY LEE FAIRCLOTH	)	
	)	
Petitioner	)	
	)	
v.	)	
	)	
ERIK A. HOOKS, Secretary Department of Public Safety,	)	Original Habeas Application in the Court of Appeals
	)	
SHANTICIA TAYLOR, Warden of Warren Correctional Institution,	)	In Re: The Unlawful Restraint of Jerry Lee Faircloth's Liberty
	)	
JOSH STEIN, Attorney General State of North Carolina	)	
	)	
Respondents	)	

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APPLICATION FOR WRIT OF HABEAS CORPUS

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	)	
JOSH STEIN, Attorney General State of North Carolina	)	
	)	
Respondents	)	

****

APPLICATION FOR WRIT OF *HABEAS CORPUS*

****

TO THE HONORABLE JUDGE DONNA STROUD OF THE NORTH CAROLINA COURT OF APPEALS:

NOW COMES applicant Jerry Lee Faircloth, by and through counsel, and respectfully applies under Article I, § 21 of the North Carolina Constitution and N.C.G.S. § 17-1 *et seq*. for a writ of *habeas corpus* discharging him from Warren Correctional Institution and the custody of the North Carolina Division of Adult Correction. Mr. Faircloth applies for the writ on the grounds that the indictment charging him with being a sex offender on premises was fatally flawed under *State v. Harris*, 219 N.C. App. 590, 724 S.E.2d 633 (2012) and *State v. Herman*, 221 N.C. App. 204, 726 S.E.2d 863 (2012), depriving the trial court of subject matter jurisdiction and rendering the judgments entered against him void *ab initio*. In support of his application, Mr. Faircloth shows the following:

FACTUAL AND PROCEDURAL HISTORY

On 13 November 2018, the Carteret County Grand Jury indicted Jerry Lee Faircloth for being a sex offender on school premises and for having attained habitual felon status. (App. 1-11). The matter came on for trial at the 13 January 2020, Criminal Session of Carteret County Superior Court before the Honorable Joshua W. Willey. The jury found Mr. Faircloth guilty of being a sex offender on school premises on 15 January 2020. Mr. Faircloth pled guilty to habitual felon status that same day. He was sentenced to a term of 84 to 113 months of imprisonment and appealed. (App. 12-17). On 23 September 2020, he filed the settled record on appeal. *See State v. Faircloth*, No. COA20-719. As

of the date of this application's filing, this Court has not yet calendared Mr. Faircloth's appeal for a hearing. *See State v. Faircloth*, No. COA20-719.

Mr. Faircloth began his sentence on 15 January 2020 and was admitted to the custody of the Division of Adult Correction on 19 February 2020. (App. 18-23). Mr. Faircloth is not currently incarcerated for any other convictions. The legality of Mr. Faircloth's incarceration has not been the subject of a prior application for a writ of *habeas corpus*.

GROUNDS FOR ISSUANCE OF THE WRIT OF *HABEAS CORPUS*

Like all indictments, an indictment for an offense under N.C.G.S. § 14-208.18(a) must allege every essential element of the offense charged. The indictment in the present case fails to allege the essential element that Mr. Faircloth was required to register for having committed an offense under Article 7B of Chapter 14 of the General Statutes or for having committed an offense involving a victim under the age of 18 years old. The omission of this element rendered the indictment fatally defective and failed to vest the trial court with subject matter jurisdiction to try Mr. Faircloth. Consequently, his continued incarceration is unlawful. Mr. Faircloth therefore asks this Court to issue a writ of *habeas corpus* and order his immediate release from Warren Correctional Institution and the unlawful custody of the Division of Adult Correction.

A. Issuance of a writ of *habeas corpus* is appropriate in this case.

"Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the restraint if unlawful, and that remedy shall not be denied or delayed." N.C. Const. Art I, § 21. A defendant who is imprisoned in North Carolina for any criminal matter may challenge the lawfulness of his custody by applying for a writ of *habeas corpus*. N.C.G.S. § 17-3. The purpose of the writ "is to give a person restrained of his liberty an immediate hearing so that the legality of his detention may be inquired into and determined." *State v. Lewis*, 274 N.C. 438, 441, 164 S.E.2d 177, 179 (1968). A verified application for the writ shall be made to any one of the justices or judges of the appellate division or to any superior court judge, N.C.G.S. § 17-6, and must detail the location, pretense, and alleged illegality of the detention at issue. N.C.G.S. § 17-7.

Habeas corpus is not a substitute for an appeal or a motion for appropriate relief. *In re Palmer*, 265 N.C. 485, 144 S.E.2d 413 (1965); *State v. Hamrick*, 2 N.C. App. 227, 162 S.E.2d 567 (1968). "The only questions open to inquiry [in a *habeas corpus* proceeding] are whether on the record the court which imposed the sentence had jurisdiction of the matter or had exceeded its powers." *In re Burton*, 257 N.C. 534, 540, 126 S.E.2d 581, 586 (1962) (emphasis added). Because Mr. Faircloth is incarcerated solely by a judgment entered by

a court without subject matter jurisdiction, *habeas corpus* is an appropriate remedy in this case.

B. Under this Court's precedent, an indictment for a violation of N.C.G.S. § 14-208.18(a) must allege more than just a defendant's obligation to register as a sex offender under Article 27A.

It is well-established that "'[a] valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony[.]'" *State v. Corey*, 373 N.C. 225, 233, 835 S.E.2d 830, 836 (2019) (quoting *State v. Rankin*, 371 N.C. 885, 886, 821 S.E.2d 787, 790 (2018)) (additional citations omitted). "As a prerequisite to its validity, an indictment must allege every essential element of the criminal offense it purports to charge[.]" *State v. Harris*, 219 N.C. App. 590, 592, 724 S.E.2d 633, 636 (2012) (cleaned up). "An arrest of judgment is proper when the indictment . . . fails to state some essential and necessary element of the offense of which the defendant is found guilty." *Id*. at 593, 724 S.E.2d at 636 (internal citation and quotation marks omitted). "[T]here can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity." *Id*. (citation omitted).

In 2012, this Court recognized that an indictment for an offense under N.C.G.S. § 14-208.18(a) *must* allege either that the defendant had previously

been convicted of an offense enumerated in Article 7A of Chapter 14 of the North Carolina General Statutes or an offense involving a victim who was under 16 years of age at the time of the offense. *See id.* at 594, 724 S.E.2d 637. Though N.C.G.S. § 14-208.18(a) has been amended since this Court's decision in *Harris*, the holding of *Harris* is unaffected and compels the same result in this case.[1]

In *Harris*, the indictment alleged only that:

> on or about the 14th day of January, 2010, in Mecklenburg County, Charles Fitzgerald Harris 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*.

Harris, 219 N.C. App. at 593, 724 S.E.2d at 636 (emphasis added).

This Court first held that the essential elements of a N.C.G.S. § 14-208.18(a) offense are "the defendant was (1) knowingly on the premises of any

---

[1] N.C.G.S. § 14-208.18 was amended in 2015, along with various other sexual offenses by 2015 N.C. HB 383 as a part of a reorganization, renaming, and renumbering of various sexual offenses. In this amendment, the reference to "Article 7A" was changed to "Article 7B" to reflect the reorganization of prior Article 7A offenses under the newly-created Article 7B along with new names and statute numbers. The statute was amended again in 2015 by 2015 N.C. HB 1021 to raise the age of the prior victim from "under 16" to "under 18" years old. Neither of these amendments abrogates this Court's precedent.

place intended primarily for the use, care, or supervision of minors and (2) at a time when he or she was required by North Carolina law to register as a sex offender based upon a conviction for *committing an offense enumerated in Article 7A of Chapter 14 of the North Carolina General Statutes or an offense involving a victim who was under the age of 16 at the time of the offense*." *Id.* at 594, 724 S.E.2d 637 (emphasis added).

This Court noted that "[t]he indictment in which the grand jury attempted to charge Defendant with violating N.C. Gen. Stat. § 14-208.18 simply alleged that Defendant was a 'registered sex offender.'" *Id.* at 597, 724 S.E.2d at 638. Because a person may be required to register as a sex offender for offenses other than those listed in Article 7A of Chapter 14, or those involving a victim under the age of sixteen, this Court held that "an allegation that Defendant was a 'registered sex offender' does not suffice to allege all of the elements of the criminal offense enumerated in N.C. Gen. Stat. § 14-208.18." *Id.* at 597-598, 724 S.E.2d at 638-639.

C. The indictment in this case is defective.

The indictment in this case is indistinguishable from the fatally defective one in *Harris*. Here, the indictment alleges the following:

> The jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did *as a person required by Article 27A of Chapter 14 of the North Carolina*

> *General Statutes to register*, enter, remain, and loiter on the premises of Newport Middle School, 500 East Chatham Street, Newport North Carolina.

(App. 1) (emphasis added).

Thus, the indictment alleges only that Mr. Faircloth was "a person required to by Article 27A of Chapter 14 of the North Carolina General Statutes to register[.]" (App. 1). However, the current version of N.C.G.S. § 14-208.18(a) applies only to registered sex offenders who were convicted of "[a]ny offense in Article 7B of this Chapter[,]" or "[a]ny offense where the victim of the offense was under the age of 18 years at the time of the offense." N.C.G.S. § 14-208.18(c)(1).[2] This discrepancy between the statute and the indictment creates the same problem recognized in *Harris*: a person may be required to register as a sex offender by Article 27A of Chapter 14 but not have been convicted of an offense listed under Article 7B of Chapter 14 or one involving a victim under the age of eighteen.

As was the case at the time *Harris* was decided, Article 27A of Chapter 14 of the General Statutes requires a person convicted of a "reportable conviction" to register as a sex offender. N.C.G.S. § 14-208.7. "Reportable conviction" is defined by Article 27A as "any of the following:"

---

[2] *See* note 1, *supra*

> a. A final conviction for an offense against a minor, a sexually violent offense, or an attempt to commit any of those offenses unless the conviction is for aiding and abetting. A final conviction for aiding and abetting is a reportable conviction only if the court sentencing the individual finds that the registration of that individual under this Article furthers the purposes of this Article as stated in G.S. 14-208.5.
>
> b. A final conviction in another state of an offense, which if committed in this State, is substantially similar to an offense against a minor or a sexually violent offense as defined by this section, or a final conviction in another state of an offense that requires registration under the sex offender registration statutes of that state.
>
> c. A final conviction in a federal jurisdiction (including a court martial) of an offense, which is substantially similar to an offense against a minor or a sexually violent offense as defined by this section.
>
> d. A final conviction for a violation of G.S. 14-202(d), (e), (f), (g), or (h), or a second or subsequent conviction for a violation of G.S. 14-202(a), (a1), or (c), only if the court sentencing the individual issues an order pursuant to G.S. 14-202(l) requiring the individual to register.
>
> e. A final conviction for a violation of G.S. 14-43.14, only if the court sentencing the individual issues an order pursuant to G.S. 14-43.14(e) requiring the individual to register.

N.C.G.S. § 14-208.6(4).

Thus, "a number of convictions that result in the imposition of a registration requirement pursuant to N.C. Gen. Stat. 14-208.7 . . . do not constitute offenses which are listed in Article 7[B] of Chapter 14 of the North

Carolina General Statutes or involve a victim under the age of 1[8]." *Harris*, 219 N.C. App. at 597, 724 S.E.2d at 638 (modifications to reflect current version of the statute). For example, certain forms of secret peeping under N.C.G.S. §§ 14-202(d)-(h) would require registration under Article 27A of Chapter 14, but are not Article 7B offenses and do not necessarily involve a victim under the age of 18. Likewise, the following are all "sexually violent offenses" under N.C.G.S. § 14-208.6(4), and therefore require registration under Article 27A: human trafficking offenses against adults under N.C.G.S. § 14-43.11; subjecting or maintaining a person for sexual servitude under N.C.G.S. § 14-43.13; taking indecent liberties with a student over the age of eighteen under N.C.G.S. § 14-202.4(a); promoting or patronizing the prostitution of a person with a mental disability under N.C.G.S. § 14-205.2(c) and N.C.G.S. § 14-205.3(b); and incest with adults under N.C.G.S. § 14-178. While each of the foregoing offenses requires registration under Article 27A, Chapter 14, *not one of them* is listed within Article 7B of Chapter 14, nor do they involve a person under the age of 18.

As was the case in *Harris*, the simple fact that "a person required by Article 27A of Chapter 14 of the North Carolina General Statutes to register" enters the premises of any place intended primarily for the use, care, or supervision of minors "does not inevitably mean that a violation of N.C.G.S. § 14-208.18 has occurred." *See Harris* 219 N.C. App. at 597, 724 S.E.2d at 638.

An indictment for an offense under N.C.G.S. § 14-208.18 which alleges only that a defendant was "required by Article 27A of Chapter 14 to register" fails to allege all the essential elements of N.C.G.S. § 14-208.18 and is fatally defective.

The reasoning of *Harris* has been repeatedly followed by this Court. In *State v. Herman*, this Court recognized a deficient indictment *sua sponte*, even where "neither party . . . has raised an issue on appeal regarding the validity of the indictment and the presence or absence of subject matter jurisdiction." *State v. Herman*, 221 N.C. App. 204, 209, 726 S.E.2d 863, 866 (2012) (vacating judgment based on identically flawed indictment). The State has even conceded this issue in two unpublished decisions. *See State v. Easter*, 2016 N.C. App. LEXIS 7 (N.C. Ct. App. 2016) (unpublished) and *State v. Randall*, 2013 N.C. App. LEXIS 700 (N.C. Ct. App. 2013) (unpublished). The reasoning of *Harris* is thus well-established law, the deficiency in the indictment is clear, and there can be no credible argument otherwise.

D. Because judgment on the underlying felony must be vacated, so must the judgment sentencing Mr. Faircloth as an habitual felon.

Mr. Faircloth was also indicted for having attained the status of an habitual felon. Because the underlying felony conviction must be vacated, this Court must "also vacate [D]efendant's judgment sentencing [D]efendant as a[n] habitual felon." *Harris*, 219 N.C. App. at 597-598, 724 S.E.2d at 639. *See*

also State v. Fox, 216 N.C. App. 144, 152, 721 S.E.2d 673, 678 (2011) ("Because we vacate defendant's underlying felony conviction, we also vacate defendant's judgment sentencing defendant as a habitual felon.").

E. Conclusion:

As a matter of well-established law, the indictment in this case was fatally defective and the trial court lacked subject matter jurisdiction. Mr. Faircloth remains incarcerated solely on the basis of his conviction under N.C.G.S. § 14-208.18 and his attendant sentencing as an habitual felon. Accordingly, he is unlawfully in the custody of the Division of Adult Correction, and therefore respectfully requests that this Court issue the writ of *habeas corpus* and order his immediate release from Warren Correctional Institution.

PRAYER FOR RELIEF

For the foregoing reasons, Mr. Faircloth respectfully asks this Court to issue a writ of *habeas corpus* and order his immediate release from Warren Correctional Institution and the Custody of the Division of Adult Correction.

Respectfully submitted this, the 24th day of September, 2020.

Electronically Submitted
Sterling Rozear
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North Carolina State Bar No. 40043
sterling.p.rozear@nccourts.org

Glenn Gerding
Appellate Defender
North Carolina State Bar No. 23124

Office of the Appellate Defender
123 West Main Street, Suite 500
Durham, North Carolina 27701
919.354.7210

Attorneys for Applicant

CERTIFICATE OF SERVICE

I hereby certify that the original Application for a Writ of *Habeas Corpus* has been duly filed, pursuant to Rule 26, by electronic means with the Clerk of the North Carolina Court of Appeals.

I further certify that a copy of the foregoing Application has been served upon the following by sending it electronically to the following current email addresses:

Erik A. Hooks, Secretary
Department of Public Safety
erik.hooks@ncdps.gov

Shanticia Taylor,
Warden of Warren
Correctional Institution
shanticia.hawkins@ncdps.gov

Daniel P. O'Brien,
Special Deputy Attorney General
State of North Carolina
dobrien@ncdoj.gov

Irene C. Finney,
Assistant District Attorney
Carteret County
Irene.c.finney@nccourts.org

This, the 24th day of September 2020.

Electronically Submitted
Sterling Rozear
Assistant Appellate Defender

AFFIRMATION

Pursuant to Emergency Directive 5 of the Chief Justice's 30 May 2020 order, extended by the Chief Justice's 15 September 2020 order, counsel affirms, under the penalties for perjury, the representations in the foregoing application are true to counsel's knowledge except as to matters represented upon information and belief, and as to those matters, counsel believes them to be true.

/s/ Sterling Rozear
Sterling Rozear
Assistant Appellate Defender

No. COA20-719 THREE-B DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	
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	)	
JOSH STEIN, Attorney General State of North Carolina	)	
	)	
Respondents	)	

****

APPENDIX TO
APPLICATION FOR WRIT OF *HABEAS CORPUS*

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1217

STATE OF NORTH CAROLINA

CARTERET County

File No. 18CRS053701

In The General Court Of Justice
Superior Court Division

STATE VERSUS

Name And Address Of Defendant
JERRY LEE FAIRCLOTH
137 NEAL DR

ATLANTIC NC 28511

Race	Sex	Date Of Birth
W	M	10/05/1967

INDICTMENT

☐ This is a superseding indictment.

Offense(s)	Date Of Offense OR Date Range Of Offense	G.S. No.	CL.
I. SEX OFFENDER/CHILD PREMISES	09/17/2018	14-208.18(A)	H
II.			

I. The jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did

as a person required by Article 27A of Chapter 14 of the North Carolina General Statues to register, enter, remain, and loiter on the premises of Newport Middle School, 500 East Chatham Street, Newport, North Carolina.

II. And the jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did

Signature Of Prosecutor

WITNESSES

☑ H. Pehrfeldgrass CCSO	☐
☐	☐
☐	☐
☐	☐

The Witnesses marked "X" were sworn by the undersigned Foreperson of the Grand Jury and, after hearing testimony, this Bill was found to be:

☑ A TRUE BILL by twelve or more grand jurors, and I the undersigned Foreperson of the Grand Jury, attest the concurrence of twelve or more grand jurors in this Bill of Indictment.

☐ NOT A TRUE BILL.

Date 11-13-18

Signature Of Grand Jury Foreperson

AOC-CR-122, Rev. 1/13

STATE OF NORTH CAROLINA In the General Court of Justice Superior Court Division Carteret County	File No. 18CRS 0999 Film No.
STATE VERSUS DEFENDANT JERRY LEE FAIRCLOTH	INDICTMENT HABITUAL FELON
DATE OF OFFENSE ON OR ABOUT 9/17/2018	OFFENSE IN VIOLATION OF G.S. Section : 14-7.1

The jurors for the State upon their oath present that the above-named defendant, whose date of birth is October 5, 1967 and who committed the act of Sex Offender on a Child Premise in violation of Chapter 14, (and any lesser included charges the court may instruct) is a Habitual Felon under Article 2A of Chapter 14 of the North Carolina General Statutes in that he has previously been convicted of the felonies set out below on the dates set out below in the court set out below with the date of occurrence of said felonies as set out below. The name of the state or other sovereign against whom said felony offense was committed is as set out below. At least two of these felonies were committed by said defendant after attaining the age of eighteen years.

I. UNDERLYING FELONY NUMBER 1:

1. Felony Offense: First Degree Burglary
2. Conviction date: April 9, 1997
3. Court: Carteret County Superior Court
   File number: 96CRS012836
   The contents of which are hereby incorporated by reference.
4. Date of occurrence of offense: November 11, 1996
5. State against whom this offense was committed: North Carolina

(A copy of the judgment and commitment in the above-numbered case is attached to this indictment.)

II. UNDERLYING FELONY NUMBER 2:

1. Felony Offense: Crimes Against Nature
2. Conviction date: April 10, 2008
3. Court: Carteret County Superior Court
   File number: 06CRS056346
   The contents of which are hereby incorporated by reference.
4. Date of occurrence of offense: October 1, 2006
5. State against whom this offense was committed: North Carolina

(A copy of the judgment and commitment in the above-numbered case is attached to this indictment.)

III. UNDERLYING FELONY NUMBER 3:

1. Felony Offense: Breaking and Entering
2. Conviction Date: May 3, 2017
3. Court: Carteret County Superior Court
   File number: 16CRS054477
   The contents of which are hereby incorporated by reference.
4. Date of occurrence of offense: September 20 2016
5. State against whom this offense was committed: North Carolina

(A copy of the judgment and commitment in the above-numbered case is attached to this indictment.)

Signature of Prosecutor

WITNESSES

☑ H. PENDERGRASS, CCSO	☐

The witnesses marked "X" were sworn by the undersigned Foreman of the Grand Jury and, after hearing testimony, this bill was found to be:

☑ A TRUE BILL by twelve or more grand jurors, and I the under-signed Foreman of the Grand Jury, attest the concurrence of twelve or more grand jurors in this Bill of indictment.

☐ NOT A TRUE BILL

Date 11-13-18	Signature of Grand Jury Foreman

STATE OF NORTH CAROLINA

File no. 96CRS12836

CARTERET County BEAUFORT Seat of Court

In The General Court Of Justice
Superior Court Division

NOTE: [This form is to be used for (1) felony offense(s), and (2) misdemeanor offense(s), which are consolidated for judgment with any felony offense(s). Use AOC-CR-301 on DWI offense(s).]

STATE VERSUS

Defendant: JERRY LEE FAIRCLOTH JR

Race	Sex	DOB
AMERICAN INDIAN	MALE	10-05-1967

JUDGMENT AND COMMITMENT
ACTIVE PUNISHMENT
FELONY
(STRUCTURED SENTENCING)
G.S. 15A-1301, 15A-1340.13

Attorney For State: JAMES LUPTON ☐ Def. Found Not Indigent ☐ Def. Waived Attorney

Attorney For Defendant: HENRY BOSHAMER ☒ Appointed ☐ Retained

The defendant ☒ pled guilty to: ☐ was found guilty by a jury of: ☐ pled no contest to:

File No.(s)	Off	Offense Description	Offense Date	G.S. No.	F/M	CL.
96CRS12836		FIRST DEGREE BURGLARY	11-11-1996	14-51	F	D

The Court:
☒ 1. has determined, pursuant to G.S. 15A-1340.14, the prior record points of the defendant to be 4, RECORD LEVEL: ☒ II ☐ III ☐ IV ☐ V ☐ VI
☐ 2. makes no prior record level finding because none is required for Class A felony, enhanced firearm penalty, violent habitual felon, or drug trafficking offenses.

PRIOR ☐ I ☐ II

The Court:
☐ 1. makes no written findings because the prison term imposed is: ☐ (a) within the presumptive range of sentences authorized under G.S. 15A-1340.17(c). ☐ (b) for a Class A felony. ☐ (c) for enhanced firearm penalty (G.S. 15A-1340.16A). ☐ VI for an adjudication as a violent habitual felon, G.S. 14-7.12. ☐ (e) for drug trafficking offenses.
☒ 2. makes the Findings of Aggravating and Mitigating Factors set forth on the attached AOC-CR-605.
☐ 3. imposes the prison term pursuant to a plea arrangement as to sentence under Article 58 of G.S. Chapter 15A.
☐ 4. finds the defendant has provided substantial assistance pursuant to G.S. 90-95(h)(5).
☐ 5. adjudges the defendant to be an habitual felon pursuant to Article 2A of G.S. Chapter 14.
☐ 6. finds enhanced punishment from a Class 1 misdemeanor to a Class I felony. ☐ G.S. 90-95(e)(3) (drugs); ☐ G.S. 14-3(c) (race).
☐ 7. finds no Extraordinary Mitigation.

The Court, having considered evidence, arguments of counsel and statement of defendant, finds that the defendant's plea was freely, voluntarily, and understandingly entered; and Orders the above offenses be consolidated for judgment and the defendant be imprisoned

for a minimum term of:	for a maximum term of:	in the custody of:
048 months	067 months	☒ N.C. DOC. ☐ Sheriff pursuant to G.S. 15A-1352(b). ☐ Other

☒ Class A Felony: ☐ Life Imprisonment Without Parole ☐ Death (see attached Death Warrant and
☐ Class B1 Felony: Life Imprisonment Without Parole
☐ Violent Habitual Felon: Life Imprisonment Without Parole

The defendant shall be given credit for 150 days spent in confinement prior to the date of this Judgment as a result of this charge(s).

☐ The sentence imposed above shall begin at the expiration of all sentences which the defendant is presently obligated to serve.
☒ The sentence imposed above shall begin at the expiration of the sentence imposed in the case referenced below:
(NOTE: List the case number, date, county and court in which prior sentence imposed.)

STATE'S EXHIBIT S4

(check all that apply)

☐ 1. The defendant shall pay the costs. ☐ 2. The defendant shall pay a fine of $ _____.

The Court recommends:

☒ 3. Substance Abuse Treatment Unit pursuant to G.S. 15A-1351(h). ☐ 4. Psychiatric and/or psychological

☐ 5. Work Release.

☐ 6. Payment as a condition of post release supervision, if applicable, or from work release earnings, if applicable, of the items and amounts set out below.

Fine	Costs	Restitution*	Reimbursement For Attorney Fee & Other Expenses	Total Amount Due

*Name(s), address(es), amount(s) & social security number(s) of aggrieved party(ies) to receive restitution:

The Court further recommends:

DART PROGRAM OR ANY OTHER SUBSTANCE ABUSE TREATMENT PROGRAM AS MAY BE AVAILABLE.

The Court does not recommend:

☐ 1. Restitution as a condition of post release supervision or work release. ☐ 2. Work release.

AWARD OF FEE TO COUNSEL FOR DEFENDANT

☐ A hearing was held in open court in the presence of the defendant at which time a fee, including expenses, was awarded the defendant's appointed counsel or assigned public defender.

ORDER OF COMMITMENT/APPEAL ENTRIES

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

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

SIGNATURE OF JUDGE

Date	Name Of Presiding Judge (Type Or Print)	Signature Of Presiding Judge
04-09-1997	JAMES E RAGAN	

ORDER OF COMMITMENT AFTER APPEAL

Date Appeal Dismissed	Date Withdrawal Of Appeal Filed	Date Appellate Opinion Certified

It is ORDERED that this Judgment be executed. It is FURTHER ORDERED that the sheriff arrest the defendant, if necessary, and recommit the defendant to the custody of the official named in this Judgment and furnish that official two certified copies of this Judgment and Commitment as authority for the commitment and detention of the defendant.

Date	Signature Of Clerk	☐ Deputy CSC ☐ Assistant CSC ☐ Clerk of Superior Court

CERTIFICATION

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

☐ Appeal Entries (AOC-CR-350)
☐ Felony Judgment Findings Of Aggravating And Mitigating Factors (AOC-CR-605)
☐ Judicial Findings As To Forfeiture Of Licensing Privileges (AOC-CR-317)
☐ Commitment Information Statement (DC-600)

A TRUE COPY
CLERK OF SUPERIOR COURT
CARTERET COUNTY
BY _____
Assistant Deputy Clerk of Superior Court

Date	Signature And Seal

Date Certified Copies Delivered To Sheriff	☐ Deputy CSC ☐ Assistant CSC ☐ Superior Clerk of Court

Material opposite unmarked squares is to be disregarded as surplusage.

STATE OF NORTH CAROLINA

File No. 96CRS12836

CARTERET County

In The General Court Of Justice
Superior Court Division

STATE VERSUS	FELONY JUDGMENT FINDINGS OF AGGRAVATING AND MITIGATING FACTORS (STRUCTURED SENTENCING)
Name Of Defendant: JERRY LEE FAIRCLOTH JR	
Offense: 1ST DEGREE BURGLARY	G.S. 15A-1340.16

NOTE: *When consolidating offenses for judgment, findings of aggravating factors and mitigating factors should be made only for the most serious offense. Separate findings of aggravating factors and mitigating factors should be made for each offense that is not consolidated.*

AGGRAVATING FACTORS

☐ 1. The Defendant:
- ☐ a. induced others to participate in the commission of the offense.
- ☐ b. occupied a position of leadership or dominance of other participants in the commission of the offense.

☐ 2. The defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy.

☐ 3. The offense was committed for the purpose of:
- ☐ a. avoiding or preventing a lawful arrest.
- ☐ b. effecting an escape from custody.

☐ 4. The defendant was:
- ☐ a. hired to commit the offense.
- ☐ b. paid to commit the offense.

☐ 5. The offense was committed to:
- ☐ a. disrupt the lawful exercise of a governmental function or the enforcement of laws.
- ☐ b. hinder the lawful exercise of a governmental function or the enforcement of laws.

☐ 6. The offense was committed against a present or former: law enforcement officer, employee of the Department of Correction, jailer, fireman, emergency medical technician, ambulance attendant, justice or judge, clerk or assistant or deputy clerk of court, magistrate, prosecutor, juror, or witness against the defendant, while engaged in the performance of that person's official duties or because of the exercise of that person's official duties. (NOTE: *Strike words that are not applicable.*)

☐ 7. The offense was especially heinous, atrocious or cruel.

☐ 8. The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

☐ 9. The defendant held public office at the time of the offense and the offense related to the conduct of the office.

☐ 10. The defendant:
- ☐ a. was armed with a deadly weapon at the time of the crime.
- ☐ b. used a deadly weapon at the time of the crime.

☐ 11. The victim was:
- ☐ a. very young.
- ☐ b. very old.
- ☐ c. mentally infirm.
- ☐ d. physically infirm.
- ☒ e. handicapped.

☐ 12. The defendant committed the offense while on pretrial release on another charge.

☐ 13. The defendant involved a person under the age of 16 in the commission of the crime.

☐ 14. The offense involved:
- ☐ a. an attempted taking of property of great monetary value.
- ☐ b. the actual taking of property of great monetary value.
- ☐ c. damage causing great monetary loss.
- ☐ d. an unusually large quantity of contraband.

☐ 15. The defendant took advantage of a position of trust or confidence to commit the offense.

☐ 16. The offense involved the sale or delivery of a controlled substance to a minor.

☐ 17. The offense was committed against a victim because of the victim's race, color, religion, nationality, or country of origin.

☐ 18. The defendant does not support the defendant's family.

☐ 18.a. The defendant has previously been adjudicated delinquent for an offense that would be a Class A, B, C, D or E felony if committed by an adult.

☐ 19. The victim of this offense suffered serious injury that is permanent and debilitating.

☒ The Court makes no findings of any aggravating factors.

MITIGATING FACTORS

☐ 1. The defendant committed the offense under:
- ☐ a. duress which was insufficient to constitute a defense but significantly reduced the defendant's culpability.
- ☐ b. coercion which was insufficient to constitute a defense but significantly reduced the defendant's culpability.
- ☐ c. threat which was insufficient to constitute a defense but significantly reduced the defendant's culpability.
- ☐ d. compulsion which was insufficient to constitute a defense but significantly reduced the defendant's culpability.

☐ 2. The defendant:
- ☐ a. was a passive participant in the commission of the offense.
- ☐ b. played a minor role in the commission of the offense.

☐ 3. The defendant was suffering from a:
- ☐ a. mental condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense.
- ☐ b. physical condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense.

☐ 4. The defendant's:
- ☐ a. age, or immaturity, at the time of the commission of the offense significantly reduced the defendant's culpability for the offense.
- ☐ b. limited mental capacity at the time of the commission of the offense significantly reduced the defendant's culpability for the offense.

☐ 5. The defendant has made:
- ☐ a. substantial restitution to the victim.
- ☐ b. full restitution to the victim.

☐ 6. The victim was more than 16 years of age and:
- ☐ a. was a voluntary participant in the defendant's conduct.
- ☐ b. consented to the defendant's conduct.

☐ 7. The defendant:
- ☐ a. aided in the apprehension of another felon.
- ☐ b. testified truthfully on behalf of the state in another prosecution of a felony.

☐ 8. ☐ a. The defendant acted under strong provocation.
- ☐ b. The relationship between the defendant and the victim was otherwise extenuating.

☐ 9. The defendant:
- ☐ a. could not reasonably foresee that the defendant's conduct would cause or threaten serious bodily harm or fear.
- ☐ b. exercised caution to avoid serious bodily harm or fear to other persons.

☐ 10. The defendant reasonably believed that the defendant's conduct was legal.

☒ 11. The defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer:
- ☒ a. at an early stage of the criminal process.
- ☐ b. prior to arrest.

☐ 12. The defendant has been a person of good character or has had a good reputation in the community in which the defendant lives.

☐ 13. The defendant is a minor and has reliable supervision available.

☐ 14. The defendant has been honorably discharged from the United States Armed Services.

☐ 15. The defendant has accepted responsibility for the defendant's criminal conduct.

☐ 16. The defendant has entered and is currently involved in or has successfully completed a drug treatment program or an alcohol treatment program subsequent to arrest and prior to trial.

☐ 17. The defendant supports the defendant's family.

☐ 18. The defendant has a support system in the community.

☐ 19. The defendant has a positive employment history or is gainfully employed.

☐ 20. The defendant has a good treatment prognosis and a workable treatment plan is available.

☐ 21. Additional written findings of factors in mitigation:

A TRUE COPY
CLERK OF SUPERIOR COURT
CARTERET COUNTY
BY _____
Assistant Deputy Clerk of Superior Court

☐ The Court makes no findings of any mitigating factors.

DETERMINATION (NOTE: *Check only one*)

The Court, after considering the evidence and arguments presented at the trial and sentencing hearing, finds that the aggravating and mitigating factors marked, if any, were proven by a preponderance of the evidence and that the

☐ factors in aggravation outweigh the factors in mitigation and that an aggravated sentence is justified.

☒ factors in mitigation outweigh the factors in aggravation and that a mitigated sentence is justified.

Date	Name Of Presiding Judge (Type Or Print)	Signature Of Presiding Judge
04-09-1997	JAMES E RAGAN	

Material opposite unmarked squares is to be disregarded as surplusage.

STATE OF NORTH CAROLINA

File No. 06CRS056346 52

CARTERET County BEAUFORT Seat of Court

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

NOTE: *(This form is to be used for (1) felony offense(s), and (2) misdemeanor offense(s), which are consolidated for judgment with any felony offense(s). Use AOC-CR-342 for DWI offense(s).)*

STATE VERSUS

Name Of Defendant: FAIRCLOTH, JERRY, LEE

Race	Sex	DOB
I	M	10/5/1967

JUDGMENT AND COMMITMENT ACTIVE PUNISHMENT FELONY (STRUCTURED SENTENCING)

G.S. 15A-1301, 15A-1340.13

Attorney For State: FINNEY, IRENE ☐ Def. Found Not Indigent ☐ Def. Waived Attorney

Attorney For Defendant: WALLACE, JAMES Q ☒ Appointed ☐ Retained

The defendant ☒ pled guilty to ☐ was found guilty by a jury of ☐ pled no contest to

File No.(s)	Off.	Offense Description	Offense Date	G.S. No.	F/M	CL.	Pun. CL
06CRS056346	52	CRIME AGAINST NATURE	10/1/2006	14-177	F	I	

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

PRIOR RECORD LEVEL: ☐ I ☐ II ☒ III ☐ IV ☐ V ☐ VI

The Court: (NOTE: *Block 1 or 2 MUST be checked.*):

☒ 1. has determined, pursuant to G.S. 15A-1340.14, the prior record points of the defendant to be 13. Any prior record level point under G.S. 15A-1340.14(b)(7) is based on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue.

☐ 2. makes no prior record level finding because none is required for Class A felony, violent habitual felon, or drug trafficking offenses.

The Court: (NOTE: *Block 1 or 2 MUST be checked.*):

☒ 1. makes no written findings because the prison term imposed is: ☒ (a) within the presumptive range of sentences authorized under G.S. 15A-1340.17(c). ☐ (b) for a Class A felony. ☐ (c) for an adjudication as a violent habitual felon. G.S. 14-7.12. ☐ (d) for drug trafficking offenses.

☐ 2. makes the aggravating and mitigating factors Determination as set forth on the attached AOC-CR-605.

☐ 3. imposes the prison term pursuant to a plea arrangement as to sentence under Article 58 of G.S. Chapter 15A.

☐ 4. finds the defendant has provided substantial assistance pursuant to G.S. 90-95(h)(5).

☐ 5. adjudges the defendant to be an habitual felon to be sentenced as a Class C felon pursuant to Article 2A of G.S. Chapter 14.

☐ 6. finds enhanced punishment pursuant to: ☐ G.S. 90-95(e)(3) (drugs). ☐ G.S. 14-3(c) (hate crime). ☐ G.S. 50B-4.1 (domestic violence). ☐ Other: _____. This finding is based on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue.

☐ 7. finds that the defendant used, displayed, or attempted to use or display a firearm at the time of the felony and, pursuant to G.S. 15A-1340.16A, has increased the minimum term of imprisonment to which the defendant would otherwise be sentenced by sixty (60) months. This finding is based on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue.

☐ 8. finds the above named offense(s) is a reportable conviction. G.S. 14-208.6.
- ☐ a. and finds the defendant ☐ has ☐ has not been classified as a sexually violent predator. G.S. 14-208.20.
- ☐ b. and finds the defendant ☐ has ☐ has not a recidivist. G.S. 14-208.6.
- ☐ c. and finds the above designated offense(s) ☐ is ☐ is not an aggravated offense. G.S. 14-208.6.
- ☐ d. and finds the above designated offense(s) ☐ is ☐ is not an offense against a minor. G.S. 14-208.6.

NOTE: *See No. 3, regarding satellite-based monitoring, on Side Two.*

☐ 9. finds that a ☐ motor vehicle ☐ commercial motor vehicle was used in the commission of the offense and this conviction shall be reported to DMV.

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

The Court, having considered evidence, arguments of counsel and statement of defendant, Orders that the above offenses, if more than one, be consolidated for judgment and the defendant be imprisoned

for a minimum term of:	for a maximum term of:	in the custody of:
8 months	10 months	☒ N.C. DOC
☐ Class A Felony: ☐ *Life Imprisonment Without Parole* ☐ *Death (see attached Death Warrant and Certificates)*		☐ Sheriff pursuant to G.S. 15A-1352(b)
☐ Class B1 Felony: *Life Imprisonment Without Parole*		☐ Other _____
☐ Violent Habitual Felon: *Life Imprisonment Without Parole*		

The defendant shall be given credit for 341 days spent in confinement prior to the date of this Judgment as a result of this

☐ The sentence imposed above shall begin at the expiration of all sentences which the defendant is presently obligated to serve.

☐ The sentence imposed above shall begin at the expiration of the sentence imposed in the case referenced below:

File Number	Offense	County	Court	Date

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

(check all that apply)

☐ 1. The defendant shall pay the costs. ☐ 2. The defendant shall pay a fine of $ _____.

☐ 3. The defendant ☐ is not required to submit to satellite-based monitoring. ☐ shall submit to satellite-based monitoring as indicated on the attached AOC-CR-615.

The Court recommends:

☐ 4. Assignment to a substance abuse treatment unit. G.S. 15A-1351(h) *(applies only to offenses committed before December 1, 2003).*

☐ 5. Psychiatric and/or psychological counseling.

☐ 6. Work Release.

☐ 7. Payment as a condition of post release supervision, if applicable, or from work release earnings, if applicable, of the items an amounts set out below.

Fine	Court Costs	Restitution*	Attorney's Fee	GPS Fee	Total Amount Due
$	$	$	$	$	$

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

The Court further recommends:

ATTORNEY FEES 900.00 AND 50.00 APT FEE AS A CIVIL JUDGMENT

The Court does not recommend:

☐ 1. Restitution as a condition of post release supervision or work release. ☐ 2. Work release.

AWARD OF FEE TO COUNSEL FOR DEFENDANT

☐ A hearing was held in open court in the presence of the defendant at which time a fee, including expenses, was awarded the defendant's appointed counsel or assigned public defender.

ORDER OF COMMITMENT/APPEAL ENTRIES

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

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

SIGNATURE OF JUDGE

Date	Name Of Presiding Judge (Type Or Print)	Signature Of Presiding Judge
4/10/2008	BENJAMIN G. ALFORD	

ORDER OF COMMITMENT AFTER APPEAL

Date Appeal Dismissed	Date Withdrawal Of Appeal Filed	Date Appellate Opinion Certified

It is ORDERED that this Judgment be executed. It is FURTHER ORDERED that the sheriff arrest the defendant, if necessary, and recommit the defendant to the custody of the agency named in this Judgment on the reverse and furnish that agency two certified copies of this Judgment and Commitment as authority for the commitment and detention of the defendant.

Date	Signature	☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court

CERTIFICATION

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

☐ Appeal Entries (AOC-CR-350)

☐ Felony Judgment Findings Of Aggravating And Mitigating Factors (AOC-CR-605)

☐ Judicial Findings As To Forfeiture Of Licensing Privileges (AOC-CR-317)

☐ Victim Notification Tracking Form

☐ Restitution Worksheet, Notice And Order (Initial Sentencing) (AOC-CR-611)

☐ Judicial Findings And Order As To Satellite-Based Monitoring For Sex Offenders - Lifetime Monitoring, Judicial Findings And Order As To Satellite-Based Monitoring For Sex Offenders - Court-Determined Monitoring Period (AOC-CR-615)

A TRUE COPY
CLERK OF SUPERIOR COURT
CARTERET COUNTY
BY _____
Assistant Deputy Clerk of Superior Court

Date	Signature	SEAL
4/10/2008		

Date Certified Copies Delivered To Sheriff	☐ Deputy CSC ☒ Assistant CSC ☐ Clerk Of Superior Court
4/10/2008	

Material opposite unmarked squares is to be disregarded as surplusage.

STATE OF NORTH CARO[illegible]IA

CARTERET County BEAUFORT Seat of Court

File 16CRS054477 51

NOTE: *[Use AOC-CR-342 for DWI offense(s).]*

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

STATE VERSUS			JUDGMENT AND COMMITMENT ACTIVE PUNISHMENT - FELONY (STRUCTURED SENTENCING) (For Convictions On Or After Jan. 1, 2012) G.S. 15A-1301, -1340.13		
Name Of Defendant FAIRCLOTH,JERRY,LEE					
Race I	*Sex* M	*Date Of Birth* 10/05/1967			
Attorney For State IRENE C FINNEY	☐ *Def. Found Not Indigent* ☐ *Def. Waived Attorney*	*Attorney For Defendant* PATRICK DONALD NEWMAN	☒ *Appointed* ☐ *Retained*	*Crt Rptr Initials* JS	

The defendant was found guilty/responsible, pursuant to ☒ plea (☐ pursuant to *Alford*) (☐ of no contest) ☐ trial by judge ☐ trial by jury, of

File No.(s)	Off.	Offense Description	Offense Date	G.S. No.	F/M	CL.	*Pun. CL.
16CRS054477	51	BREAKING AND OR ENTERING (F)	09/20/2016	14-54(A)	F	H	
16CRS055135	51	FINANCIAL CARD FRAUD (F)	09/09/2016	14-113.13	F	I	

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

The Court: ☒ 1. has determined, pursuant to G.S. 15A-1340.14, the prior record points of the defendant to be 19. Any prior record level point under G.S. 15A-1340.14(b)(7) is based on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue.
☐ 2. makes no prior record level finding because none is required for Class A felony, violent habitual felon, or drug trafficking offenses.

PRIOR RECORD LEVEL: ☐ I ☐ III ☐ V ☐ II ☐ IV ☒ VI

The Court (NOTE: *Block 1 or 2 MUST be checked.*):

☒ 1. makes no written findings because the term imposed is: ☒ (a) in the presumptive range. ☐ (b) for a Class A felony. ☐ (c) for adjudication as a violent habitual felon, G.S. 14-7.12. ☐ (d) for drug trafficking. ☐ for which the Court finds the defendant provided substantial assistance, G.S. 90-95(h)(5). ☐ (e) in the aggravated range, pursuant to G.S. 20-141.4(b)(1a).

☐ 2. finds ☐ the Determination of aggravating and mitigating factors on the attached AOC-CR-605. ☐ egregious aggravation under G.S. 14-27.2A, 14-27.4A, 14-27.23, or 14-27.28, on the attached AOC-CR-618, which requires a sentence in excess of that authorized by G.S. 15A-1340.17.

☐ 3. adjudges the defendant to be a habitual felon to be sentenced ☐ *(offenses committed before Dec. 1, 2011)* as a Class C felon. ☐ *(offenses committed on or after Dec. 1, 2011)* four classes higher than the principal felony *(no higher than Class C)*.

☐ 4. adjudges the defendant to be a habitual breaking and entering status offender, to be sentenced as a Class E felon.

☐ 5. adjudges the defendant to be an armed habitual felon to be sentenced as a Class C felon (unless sentenced herein as a Class A, B1, or B2 felon) and with a minimum term of imprisonment of no less than 120 months.

☐ 6. finds enhancement pursuant to: ☐ G.S. 90-95(e)(3) (drugs). ☐ G.S. 14-3(c) (hate crime). ☐ G.S. 50B-4.1 (domestic violence). ☐ G.S. 14-50.22 (gang). ☐ Other: _____. This finding is based on the jury's determination of this issue beyond a reasonable doubt or on the defendant's admission.

☐ 7. finds that the defendant committed the felony by using, displaying, or threatening the use or display of a firearm or deadly weapon and actually possessed the firearm or weapon about his or her person. This finding is based on the jury's determination of this issue beyond a reasonable doubt or on the defendant's admission. Pursuant to G.S. 15A-1340.16A, the Court has increased the minimum sentence by *(check only one)*
☐ *(Class A-E felony committed prior to Oct. 1, 2013)* 60 months. ☐ *(Class A-E felony committed on or after Oct. 1, 2013)* 72 months.
☐ *(Class F or G felony committed on or after Oct. 1, 2013)* 36 months. ☐ *(Class H or I felony committed on or after Oct. 1, 2013)* 12 months.

☐ 8. finds the above-designated offense(s) is a reportable conviction under G.S. 14-208.6 *(check only one)*
☐ a. and therefore makes the additional findings and orders on the attached AOC-CR-615, Side One.
☐ b. but makes no finding or order concerning registration or satellite-based monitoring due to a sentence of life imprisonment without parole.

☐ 9. finds the above-designated offense(s) involved the ☐ physical or mental ☐ sexual abuse of a minor.
(NOTE: *If offense(s) is not also a reportable conviction in No. 8 above, this finding requires no further action by the court.*)

☐ 10. finds that a ☐ motor vehicle ☐ commercial motor vehicle was used in the commission of the offense and that it shall be reported to DMV.

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

☐ 12. *(offenses committed on or after Dec. 1, 2008, only)* finds the above-designated offense(s) involved criminal street gang activity. G.S. 14-50.25.

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

☐ 14. finds that the defendant used or displayed a firearm while committing the felony. G.S. 15A-1382.2.

☐ 15. finds that this was an offense involving child abuse or an offense involving assault or any of the acts as defined in G.S. 50B-1(a) committed against a minor. G.S. 15A-1382.1(a1).

The Court, having considered evidence, arguments of counsel and statement of defendant, Orders that the above offenses, if more than one, be consolidated for judgment and the defendant be sentenced *(check only one)*

☐ to Life Imprisonment Without Parole for ☐ Class A Felony. ☐ Class B1 Felony. ☐ Violent Habitual Felon. ☐ egregious aggravation under No. 2, above.	in the custody of: ☒ N.C. DAC. ☐ Other: _____
☐ to Life Imprisonment With Parole, pursuant to G.S. Chapter 15A, Article 81B, Part 2A.	
for a minimum term of: 20 months; and a maximum term of: 33 months; ☐ ASR term *(Order No. 4, Side Two)* months	☐ to Death *(see attached Death Warrant and Certificates)*

The defendant shall be given credit for 225 days spent in confinement prior to the date of this Judgment as a result of this charge(s).

☐ The sentence imposed above shall begin at the expiration of all sentences which the defendant is presently obligated to serve.
☐ The sentence imposed above shall begin at the expiration of the sentence imposed in the case referenced below:

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

Material opposite unmarked squares is to be disregarded as surplusage.

STATE'S EXHIBIT 93

The Court further Orders: *(check all that apply)*

1. The defendant shall pay to the Clerk of Superior Court the "Total Amount Due" shown below.

Costs	Fine	Restitution*	Attorney's fees	SBM Fee	Appt Fee/Misc	Total Amount Due
$ 2602.50	$	$ 1897.40	$ 1080.00	$ 0.00	$ 60.00	$ 5,639.90

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

☐ 2. The Court finds that restitution was recommended as part of the defendant's plea arrangement.

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

☐ 4. Without objection by the State, the defendant shall be admitted to the Advanced Supervised Release (ASR) program. If the defendant completes the risk reduction incentives as identified by the Division of Adult Correction, then he or she will be released at at the end of the ASR term specified on Side One. G.S. 15A-1340.18.

☐ 5. Other:

The Court recommends:

☐ 1. Substance abuse treatment. ☐ 2. Psychiatric and/or psychological counseling. ☐ 3. Work release ☐ should ☐ should not be granted.

☒ 4. Payment as a condition of post-release supervision or from work release earnings, if applicable, of the "Total Amount Due" set out above.
☐ but the Court does not recommend restitution be paid ☐ as a condition of post-release supervision. ☐ from work release earnings.

The Court further recommends:

ORDER OF COMMITMENT/APPEAL ENTRIES

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

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

SIGNATURE OF JUDGE

Date	Name Of Presiding Judge (type or print)	Signature Of Presiding Judge
05/03/2017	THE HONORABLE BENJAMIN G ALFORD	B. G. Alford

ORDER OF COMMITMENT AFTER APPEAL

Date Appeal Dismissed	Date Withdrawal Of Appeal Filed	Date Appellate Opinion Certified

It is ORDERED that this Judgment be executed. It is FURTHER ORDERED that the sheriff arrest the defendant, if necessary, and recommit the defendant to the custody of the agency named in this Judgment on the reverse and furnish that agency two certified copies of this Judgment and Commitment as authority for the commitment and detention of the defendant.

A TRUE COPY
CLERK OF SUPERIOR COURT
CARTERET COUNTY

Date	Signature Of Clerk
	BY: Assistant Deputy Clerk of Superior Court

☐ Deputy CSC ☐ Asst. CSC ☐ Clerk Of Superior Court

CERTIFICATION

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

☐ Appellate Entries (AOC-CR-350)
☐ Felony Judgment Findings Of Aggravating And Mitigating Factors (AOC-CR-605)
☐ Judicial Findings As To Forfeiture Of Licensing Privileges (AOC-CR-317)
☐ Victim Notification Tracking Form
☐ Additional File No.(s) And Offense(s) (AOC-CR-626)
☐ Restitution Worksheet, Notice And Order (Initial Sentencing) (AOC-CR-611)
☐ Judicial Findings And Order For Sex Offenders - Active Punishment (AOC-CR-615, Side One)
☐ Additional Findings (AOC-CR-618)
☐ Convicted Sex Offender Permanent No Contact Order (AOC-CR-620)
☐ Other: _____.

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

Material opposite unmarked squares is to be disregarded as surplusage.

STATE OF NORTH CAROLINA | File No. 18CRS053701 | 51

CARTERET County | BEAUFORT Seat of Court

NOTE: *[Use AOC-CR-342 for DWI offense(s).]*

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

STATE VERSUS

JUDGMENT AND COMMITMENT ACTIVE PUNISHMENT - FELONY (STRUCTURED SENTENCING)
(For Convictions On Or After Jan. 1, 2012)
G.S. 15A-1301, -1340.13

Name Of Defendant	Race	Sex	Date Of Birth
FAIRCLOTH,JERRY,LEE	W	M	10/05/1967

Attorney For State		Attorney For Defendant		Crt Rptr Initials
IRENE C FINNEY	☐ Def. Found Not Indigent ☐ Def. Waived Attorney	PATRICK DONALD NEWMAN	☒ Appointed ☐ Retained	KW

The defendant was found guilty/responsible, pursuant to ☐ plea (☐ pursuant to *Alford*) (☐ of no contest) ☐ trial by judge ☒ trial by jury, of

File No.(s)	Off.	Offense Description	Offense Date	G.S. No.	F/M	CL.	*Pun. CL.
18CRS053701	51	SEX OFFENDER/CHILD PREMISES	09/17/2018	14-208.18(A)	F	H	D
18CRS000999	51	HABITUAL FELON	09/17/2018	14-7.1	F	D	

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

The Court: ☒ 1. has determined, pursuant to G.S. 15A-1340.14, the prior record points of the defendant to be 11. Any prior record level point under G.S. 15A-1340.14(b)(7) is based on the determination of this issue by the trier of fact beyond a reasonable doubt or the defendant's admission to this issue.
☐ 2. makes no prior record level finding because none is required for Class A felony, violent habitual felon, or drug trafficking offenses.

PRIOR RECORD LEVEL: ☐ I ☐ III ☐ V ☐ II ☒ IV ☐ VI

The Court (**NOTE:** *Block 1 or 2 MUST be checked.*):

☒ 1. makes no written findings because the term imposed is: ☒ (a) in the presumptive range. ☐ (b) for a Class A felony. ☐ (c) for adjudication as a violent habitual felon, G.S. 14-7.12. ☐ (d) for drug trafficking. ☐ for which the Court finds the defendant provided substantial assistance, G.S. 90-95(h)(5). ☐ (e) in the aggravated range, pursuant to G.S. 20-141.4(b)(1a).

☐ 2. finds ☐ the Determination of aggravating and mitigating factors on the attached AOC-CR-605. ☐ egregious aggravation under G.S. 14-27.2A, 14-27.4A, 14-27.23, or 14-27.28, on the attached AOC-CR-618, which requires a sentence in excess of that authorized by G.S. 15A-1340.17.

☒ 3. adjudges the defendant to be a habitual felon to be sentenced ☐ *(offenses committed before Dec. 1, 2011)* as a Class C felon. ☒ *(offenses committed on or after Dec. 1, 2011)* four classes higher than the principal felony *(no higher than Class C)*.

☐ 4. adjudges the defendant to be a habitual breaking and entering status offender, to be sentenced as a Class E felon.

☐ 5. adjudges the defendant to be an armed habitual felon to be sentenced as a Class C felon (unless sentenced herein as a Class A, B1, or B2 felon) and with a minimum term of imprisonment of no less than 120 months.

☐ 6. finds enhancement pursuant to: ☐ G.S. 90-95(e)(3) (drugs). ☐ G.S. 14-3(c) (hate crime). ☐ G.S. 50B-4.1 (domestic violence). ☐ G.S. 14-50.22 (gang misdemeanor). ☐ Other: _____. This finding is based on the determination of this issue by the trier of fact beyond a reasonable doubt or on the defendant's admission.

☐ 7. finds that the defendant committed the felony by using, displaying, or threatening the use or display of a firearm or deadly weapon and actually possessed the firearm or weapon about his or her person. This finding is based on the jury's determination of this issue beyond a reasonable doubt or on the defendant's admission. Pursuant to G.S. 15A-1340.16A, the Court has increased the minimum sentence by *(check only one)*
☐ *(Class A-E felony committed prior to Oct. 1, 2013)* 60 months. ☐ *(Class A-E felony committed on or after Oct. 1, 2013)* 72 months.
☐ *(Class F or G felony committed on or after Oct. 1, 2013)* 36 months. ☐ *(Class H or I felony committed on or after Oct. 1, 2013)* 12 months.

☐ 8. finds the above-designated offense(s) is a reportable conviction under G.S. 14-208.6 *(check only one)*
☐ a. and therefore makes the additional findings and orders on the attached AOC-CR-615, Side One.
☐ b. but makes no finding or order concerning registration or satellite-based monitoring due to a sentence of life imprisonment without parole.

☐ 9. finds the above-designated offense(s) involved the ☐ physical or mental ☐ sexual abuse of a minor. (**NOTE:** *If offense(s) is not also a reportable conviction in No. 8 above, this finding requires no further action by the court.*)

☐ 10. finds that a ☐ motor vehicle ☐ commercial motor vehicle was used in the commission of the offense and that it shall be reported to DMV.

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

☐ 12. *(offenses committed on or after Dec. 1, 2017, only)* finds that the offense was committed as part of criminal gang activity as defined in G.S. 14-50.16A(2). ☐ and that the defendant was a criminal gang leader or organizer as defined in G.S. 14-50.16A(3). This finding is based on the determination of this issue by the trier of fact beyond a reasonable doubt or on the defendant's admission.

☐ 13. finds the above-designated offense(s) involved *(check one)* ☐ *(offenses committed Dec. 1, 2008 - Nov. 30, 2017)* criminal street gang activity ☐ *(offenses committed on or after Dec. 1, 2017)* criminal gang activity. G.S. 14-50.25.

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

☐ 15. finds that the defendant used or displayed a firearm while committing the felony. G.S. 15A-1382.2.

☐ 16. finds that this was an offense involving child abuse or an offense involving assault or any of the acts as defined in G.S. 50B-1(a) committed against a minor. G.S. 15A-1382.1(a1).

The Court, having considered evidence, arguments of counsel and statement of defendant, Orders that the above offenses, if more than one, be consolidated for judgment and the defendant be sentenced *(check only one)*

☐ to Life Imprisonment Without Parole for ☐ Class A Felony. ☐ Class B1 Felony. ☐ Violent Habitual Felon. ☐ egregious aggravation under No. 2, above.

☐ to Life Imprisonment With Parole, pursuant to G.S. Chapter 15A, Article 81B, Part 2A.

in the custody of: ☒ N.C. DACJJ. ☐ Other: _____.

for a minimum term of:	and a maximum term of:	☐ ASR term *(Order No. 4, Side Two)*	☐ to Death *(see attached Death Warrant and Certificates)*
84 months	113 months	months	

The defendant shall be given credit for 236 days spent in confinement prior to the date of this Judgment as a result of this charge(s).

☐ The sentence imposed above shall begin at the expiration of all sentences which the defendant is presently obligated to serve.

☐ The sentence imposed above shall begin at the expiration of the sentence imposed in the case referenced below:

File No.	Offense	County	Court	Date

Material opposite unmarked squares is to be disregarded as surplusage.

The Court further Orders: *(check all that apply)*

1. The defendant shall pay to the Clerk of Superior Court the "Total Amount Due" shown below.

Costs	Fine	Restitution*	Attorney's fees	SBM Fee	Appt Fee/Misc	Total Amount Due
$ 2732.50	$	$ 0.00	$ 4500.00	$ 0.00	$ 60.00	$ 7,292.50

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

☐ 2. The Court finds that restitution was recommended as part of the defendant's plea arrangement.

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

☐ 4. Without objection by the State, the defendant shall be admitted to the Advanced Supervised Release (ASR) program. If the defendant completes the risk reduction incentives as identified by the Division of Adult Correction and Juvenile Justice, then he or she will be released at the end of the ASR term specified on Side One. G.S. 15A-1340.18.

☒ 5. Other:
ALL MONETARY CONDITIONS ARE TO BE A CIVIL JUDGMENT

The Court recommends:

☐ 1. Substance abuse treatment. ☐ 2. Psychiatric and/or psychological counseling. ☐ 3. Work release ☐ should ☐ should not be granted.

☐ 4. Payment as a condition of post-release supervision or from work release earnings, if applicable, of the "Total Amount Due" set out above.
☐ but the Court **does not recommend** restitution be paid ☐ as a condition of post-release supervision. ☐ from work release earnings.

The Court further recommends:

ORDER OF COMMITMENT/APPEAL ENTRIES

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

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

SIGNATURE OF JUDGE

Date	Name Of Presiding Judge (type or print)	Signature Of Presiding Judge
01/15/2020	THE HONORABLE JOSHUA W WILLEY JR.	

ORDER OF COMMITMENT AFTER APPEAL

Date Appeal Dismissed	Date Withdrawal Of Appeal Filed	Date Appellate Opinion Certified

It is ORDERED that this Judgment be executed. It is FURTHER ORDERED that the sheriff arrest the defendant, if necessary, and recommit the defendant to the custody of the agency named in this Judgment on the reverse and furnish that agency two certified copies of this Judgment and Commitment as authority for the commitment and detention of the defendant.

Date	Signature Of Clerk	☐ Deputy CSC ☐ Asst. CSC ☐ Clerk Of Superior Court

CERTIFICATION

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

☐ Appellate Entries (AOC-CR-350)
☐ Felony Judgment Findings Of Aggravating And Mitigating Factors (AOC-CR-605)
☐ Judicial Findings As To Forfeiture Of Licensing Privileges (AOC-CR-317)
☐ Victim Notification Tracking Form
☐ Additional File No.(s) And Offense(s) (AOC-CR-626)
☐ Restitution Worksheet, Notice And Order (Initial Sentencing) (AOC-CR-611)
☐ Judicial Findings And Order For Sex Offenders - Active Punishment (AOC-CR-615, Side One)
☐ Additional Findings (AOC-CR-618)
☐ Convicted Sex Offender Permanent No Contact Order (AOC-CR-620)
☐ Other: _____

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

Material opposite unmarked squares is to be disregarded as surplusage.

He will pay jail fees.

Do you know how much time you have at this point, Mr. Newman?

MR. NEWMAN: I believe it's sixty-three and a half.

THE COURT: Is that the sixty dollar rate?

MR. NEWMAN: Are we doing Class H or Class D?

THE COURT: Class D.

MR. NEWMAN: Class D I thought that was 75. I'm not sure. I think it's --

THE COURT: Mr. Faircloth, the Court is considering ordering you to reimburse the State $4500 for your lawyer's services. Do you think that's reasonable?

MR. FAIRCLOTH: (Nodding).

THE COURT: All right. The defendant shall reimburse the State in that amount.

All these moneys will be a civil judgment against the defendant.

Anything else from the State relative to sentencing?

MS. FINNEY: No, sir. Thank you.

THE COURT: From the defendant?

MR. NEWMAN: Your Honor for the record I need to enter that oral notice of appeal, but nothing else for the record as to sentencing.

THE COURT: All right.

MS. FINNEY: Do you want to go on and do those appellate entries?

THE COURT: I do.

We will adopt his prior affidavit, appoint the appellate defender to represent him.

The Court will not be setting any bond.

MR. NEWMAN: Thank you, your Honor.

THE COURT: Any other matters we need to discuss before I bring the jury back in?

MS. FINNEY: Nothing for the State, thank you.

MR. NEWMAN: Nothing for the defense.

THE COURT: Let's bring the jurors in.

MS. FINNEY: Do you want the defendant removed from the courtroom?

THE COURT: Yeah.

(End of State v Faircloth, Volume 3 of 3, transcript. Carteret File 18 CRS 53701, January 15, 2020.)

STATE OF NORTH CARO IA

CARTERET County

File No.
18CRS053701

Additional File No.(s)
18CRS000999

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

STATE VERSUS

Name Of Defendant
FAIRCLOTH,JERRY,LEE

Date(s) Of Trial
01/15/2020

Codefendant(s) If Tried Jointly

Name And Address Of Trial Prosecutor
IRENE C FINNEY
300 COURTHOUSE SQUARE
BEAUFORT, NC 28516

Telephone No. | Email Address

Name And Address Of Trial Transcriptionist
WESTBROOK,KAY,W
310 BROAD STREET
NEW BERN, NC 28560

Telephone No.
252-717-7724
Email Address

Name And Address Of Trial Transcriptionist

Telephone No. | Email Address

Name And Address Of Transcriptionist Of Other Proceedings On The Following Date(s)

Date(s) | Telephone No.

Email Address

APPELLATE ENTRIES

Rules 7, 9, 11, and 27 of the N.C. Rules of Appellate Procedure

Name And Address Of Defendant's Trial Counsel
PATRICK DONALD NEWMAN
534 N. 35th St., Suite I
MOREHEAD CITY, NC 28557

Telephone No. | Email Address

Name And Address Of Defendant's Trial Counsel

Telephone No. | Email Address

Name And Address Of Defendant's Appellate Counsel
☒ **The Appellate Defender (919) 354-7210**
123 W. Main Street, Suite 500, Durham, NC 27701
NOTE: *All indigent appeals are assigned to the Appellate Defender.*
☐ Retained Appellate Counsel

Telephone No. | Email Address

Name And Address Of Transcriptionist Of Other Proceedings On The Following Date(s)

Date(s) | Telephone No.

Email Address

(Attach additional sheet(s) if necessary)

JUDGE'S INITIAL APPEAL ENTRIES

1. ☒ a. The defendant has given Notice of Appeal to the N.C. Court of Appeals, or
   ☐ b. This is a capital case appealable as of right to the N.C. Supreme Court.
2. Release of the defendant pursuant to G.S. 15A-536 is ☒ denied. ☐ allowed upon execution of a secured bond in the amount of $ _____ and compliance with the following additional conditions:

   _____
3. Unless indigent, the defendant shall arrange for the transcription of the proceedings as provided in the Rules of Appellate Procedure.

☒ 4. (**NOTE:** *Check in all cases where defendant is indigent.*) The defendant is indigent and has requested a transcript and the appointment of counsel. It is ORDERED that the defendant is allowed to appeal as an indigent and:
   a. The Office of Indigent Defense Services shall pay the costs of producing a transcript, and of reproducing the record and the defendant's brief.
   b. The Appellate Defender is appointed to perfect the defendant's appeal or assign other appellate counsel pursuant to rules issued by the Office of Indigent Defense Services.
   c. Upon request, the Clerk shall furnish to the Appellate Defender, or to alternate counsel designated by the Appellate Defender, a copy of the complete trial division file in the case and, upon request, any documentary exhibits.
   d. Unless the parties stipulate that parts of the proceedings shall not be transcribed, the Clerk shall order from the transcriptionist(s) a transcript of all parts of the proceedings except:

   _____

JUDGE'S INITIAL APPEAL ENTRIES (continued)

5. If a transcript has been ordered, the defendant in a non-capitally tried case shall serve a proposed record on appeal on the State within 35 days after the reporter's or transcriptionist's certification of delivery of the transcript. If a transcript has been ordered, the defendant in a capitally tried case shall serve a proposed record on appeal on the State within 70 days after the reporter's or transcriptionist's certification of delivery of the transcript. If no transcript has been ordered, the defendant shall serve a proposed record on appeal on the State within 35 days after filing notice of appeal.
6. The State shall serve its amendments, objections or proposed alternative record on appeal on the defendant within 30 days if this is a non-capital case or 35 days if this is a capital case, after service upon it of the defendant's proposed record on appeal.
7. The indigent defendant does not read or speak the English language, but reads and/or speaks his or her native language of _____. The Court therefore authorizes the services of a language translator or interpreter during the pendency of the appeal for the purposes of (1) written translation of attorney-client correspondence, assignments of error in the settled record on appeal, appellate briefs filed by the defendant and the State, and appellate opinion(s), and/or (2) verbal interpretation of attorney-client communication at each critical stage of the appellate proceedings.

   The Court further Orders that a language translator or interpreter with the necessary knowledge, skill, experience, training and education to perform the above services shall be selected and paid by the Administrative Office of the Courts.
8. The Clerk shall deliver a copy of these Appellate Entries to the Appellate Defender, counsel for all parties, or the defendant, if not represented by counsel.

Date	*Name Of Presiding Judge (type or print)*	*Signature Of Presiding Judge*
01/15/2020	HONORABLE JOSHUA W. WILLEY, JR.	

CLERK'S TRANSCRIPT ORDER AND CERTIFICATE

(NOTE: *To be completed ONLY when defendant is indigent.)*

To The Transcriptionist(s) Named On The Reverse:

Prepare and deliver to the parties a transcript of all portions of the proceedings in the above-captioned case except:
(Specify any portions of the proceedings which need not be transcribed pursuant to a stipulation filed by the parties under Rule 7(a)(2), or pursuant to No. 4.d. on reverse side.)

I certify that I delivered a copy of this Transcript Order to the transcriptionist(s) on the date shown below:

☒ personally.
☐ by mailing it to the transcriptionist(s) at the address(es) shown on the reverse.

Date Clerk's Transcript Order Entered And Filed	*Date Order Delivered To Transcriptionist(s), If Different*	
	01/15/2020	
Name Of Clerk (type or print)	*Signature Of Clerk*	☒ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court*
TRACY L. SKIBA		

EXTENSION OF TIME TO PREPARE TRANSCRIPT OR SERVE RECORD

☐ 1. **Extension of time to file transcript:** Pursuant to Rule 7, N.C. Rules of Appellate Procedure, upon motion of the appellant and for good cause shown, the Court finds that this is a criminal case that did not result in a sentence of death and it is ORDERED that the time for preparation of the transcript is extended for 30 days.

☐ 2. **Extension of time to serve proposed record on appeal:** Pursuant to Rules 11 and 27, N.C. Rules of Appellate Procedure, upon motion of the appellant and for good cause shown, it is ORDERED that the time for service of the proposed record on appeal is extended for 30 days.

NOTE: *The trial court may grant only one extension of time to serve the proposed record on appeal. Any additional motion for an extension of time to serve the proposed record on appeal must be made to the appellate court where the appeal is to be heard. In a case in which a sentence of death was not entered, the trial court may grant one motion for an extension of time to prepare the transcript. Any subsequent motions for an extension of time to prepare the transcript must be made to the appellate court where the appeal is to be heard. In capitally tried cases that resulted in the imposition of the death penalty, motions for an extension of time to prepare the transcript must be made directly to the Supreme Court. Rules 7 and 27, N.C. Rules of Appellate Procedure.*

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

CERTIFICATION

I certify this Appellate Entries form is a true and complete copy of the original on file in this case.

Date	*Signature And Seal*	☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court*

Material opposite unmarked squares is to be disregarded as surplusage.

JERRY L FAIRCLOTH JR
Offender ID: 0125187
Inmate Status: ACTIVE
Probation/Parole/Post Release Status: INACTIVE
Gender: MALE
Race: WHITE
Ethnic Group: EUROPEAN/N.AM./AUSTR
Birth Date: 10/05/1967
Age: 52
Current Location: WARREN CI

Name(s) Of Record

Last Name	Suffix	First Name	Middle Name	Name Type
FAIRCLOTH		JERRY	L	COMMITTED
FAIRCLOTH		JERRY	LEE	COMMITTED
FAIRCLOTH	JR	JERRY	LEE	COMMITTED
FAIRCLOTH		JERRY	LEE	ALIAS

Most Recent Incarceration Summary

Incarceration Status: ACTIVE
Conviction Date: 01/15/2020
Primary Crime: HABITUAL FELON (PRINCIPAL)
Special Characteristics: REGULAR
Admission Date: 02/19/2020
Control Status: REGULAR POPULATION
Custody Classification: MEDIUM
Number Of Infractions: 2
Current Location: WARREN CI
Last Movement : RECEIVED FROM MAURY C.I.

Total Incarceration Term: 9 YEARS 5 MONTHS
Projected Release Date: 05/22/2026
Primary Crime Type: FELON
Current Status: FELON
Admission Facility: CRAVEN CI
Next Control Review: UNKNOWN
Next Custody Review: UNKNOWN
Last Infraction Date: 07/01/2020
Previous Location: MAURY C.I.
Last Movement Date: 06/01/2020

Escapes?: N

Offender Sentence History

Most Recent Period of Incarceration Record

Offender Sentence History

Sentence Number: BD-001
Conviction Date: 01/15/2020
Service Status: ACTIVE
Sentence Status: ACTIVE
Punishment Type: ACTIVE SS
Sentence Type 1: DEPT OF CORR DIV OF PRISONS
Sentence Type 2: HABITUAL FELON
Minimum Term: 7 YEARS
Commitment Type: INMATE
County Of Conviction: CARTERET
Sentence Begin Date: 01/15/2020
Actual Release Date:
Projected Release Date: 05/22/2026
Maximum Term: 9 YEARS 5 MONTHS

Commitment	Docket#	Offense (Qualifier)	Offense Date	Type	Sentencing Penalty Class Code
INITIAL	18000999	HABITUAL FELON (PRINCIPAL)	09/17/2018	FELON	CLASS D
CONSOLIDATED FOR JUDGMENT	18053701	SEX OFFENDER/CHILD PREMISES (PRINCIPAL)	09/17/2018	FELON	CLASS H

Previous Period of Incarceration Record

Sentence Number: BC-001
Conviction Date: 05/03/2017
Service Status: EXPIRED
Punishment Type: POST RELEASE
Sentence Type 1: DEPT OF CORR DIV OF PRISONS
Sentence Type 3: POST RELEASE SENTENCE
Minimum Term: 1 YEAR 8 MONTHS
Parole Begin Date: 06/09/2018
Commitment Type: INMATE
County Of Conviction: CARTERET
Sentence Begin Date: 05/03/2017
Actual Release Date: 06/08/2018
Projected Release Date: 06/08/2018
Maximum Term: 2 YEARS 9 MONTHS
Parole End Date: 03/06/2019

Commitment	Docket#	Offense (Qualifier)	Offense Date	Type	Sentencing Penalty Class Code
INITIAL	16054477	FELONY B&E (PRINCIPAL)	09/20/2016	FELON	CLASS H
CONSOLIDATED FOR JUDGMENT	16055135	FINANCIAL CARD FRAUD/FELON (PRINCIPAL)	09/09/2016	FELON	CLASS I

Sentence Number: BC-002
Conviction Date: 12/22/2018
Service Status: EXPIRED
Punishment Type: POST RELEASE
Sentence Type 1: DEPT OF CORR DIV OF PRISONS
Sentence Type 2: POST RELEASE SENTENCE
Minimum Term:
Commitment Type: INMATE
County Of Conviction: CARTERET
Sentence Begin Date: 12/22/2018
Actual Release Date: 08/14/2019
Projected Release Date: 08/14/2019
Maximum Term: 9 MONTHS

Offender Sentence History

Commitment	Docket#	Offense (Qualifier)	Offense Date	Type	Sentencing Penalty Class Code
CONCURRENT TO SENTENCE NUMBER BC*001	16054477	POST RELEASE REVOCATION (PRINCIPAL)	10/10/2018	FELON	POST RELEASE REVOC-ATION

Most Recent Period of Supervision Record

Sentence Number: 08-001
Commitment Type: PROBATION/PAROLE
Conviction Date: 11/29/2012
County Of Conviction: CRAVEN
Punishment Type: COMMUNITY SS (DCC)
Sentence Type 1: PROBATION
Sentence Type 2: SUSPENDED SENTENCE
Sentence Type 3: COUNTY JAIL

Commitment	Docket#	Offense (Qualifier)	Offense Date	Type	Sentencing Penalty Class Code
CONCURRENT TO SENTENCE NUMBER 07-001	11702027	DRIV LICENSE REVOKED (PRINCIPAL)	03/19/2011	MISD.	CLASS 1 MISDEMEANOR SS

Sentence Number: 07-001
Commitment Type: PROBATION/PAROLE
Conviction Date: 04/13/2012
County Of Conviction: CARTERET
Punishment Type: COMMUNITY SS (DCC)
Sentence Type 1: PROBATION
Sentence Type 2: SUSPENDED SENTENCE
Sentence Type 3: DEPT OF CORR DIV OF PRISONS

Commitment	Docket#	Offense (Qualifier)	Offense Date	Type	Sentencing Penalty Class Code
CONCURRENT TO SENTENCE NUMBER 06-001	12050894	ASSAULT POINTING GUN (PRINCIPAL)	02/26/2012	MISD.	CLASS A1 MISDEMEAN-OR SS

Sentence Number: 06-001
Commitment Type: PROBATION/PAROLE
Conviction Date: 04/13/2012
County Of Conviction: CARTERET
Punishment Type: COMMUNITY SS (DCC)
Sentence Type 1: PROBATION
Sentence Type 2: SUSPENDED SENTENCE
Sentence Type 3: DEPT OF CORR DIV OF PRISONS

Offender Sentence History

Commitment	Docket#	Offense (Qualifier)	Offense Date	Type	Sentencing Penalty Class Code
INITIAL	12050893	COM L FALSE IMPRISONMENT (PRINCIPAL)	02/24/2012	MISD.	CLASS 1 MISDEMEANOR SS

Previous Period of Incarceration Record

Sentence Number: BB-001
Conviction Date: 08/27/2010
Revocation Docket#: 10051246
Service Status: EXPIRED

Punishment Type: ACTIVE SS
Sentence Type 1: DEPT OF CORR DIV OF PRISONS
Sentence Type 2: PROBATION REVOCATION
Minimum Term:

Commitment Type: INMATE
County Of Conviction: CARTERET
County Of Revocation: CARTERET
Sentence Begin Date: 05/17/2011
Actual Release Date: 08/29/2011
Projected Release Date: 08/29/2011

Maximum Term: 4 MONTHS

Commitment	Docket#	Offense (Qualifier)	Offense Date	Type	Sentencing Penalty Class Code
INITIAL	10051246	DRUG PARA - USE/POSSESS (PRINCIPAL)	03/14/2010	MISD.	CLASS 1 MISDEMEANOR SS

Previous Period of Supervision Record

Sentence Number: 05-001
Conviction Date: 02/24/2011
Punishment Type: DWI
Sentence Type 1: PROBATION
Sentence Type 2: SUSPENDED SENTENCE
Sentence Type 3: COUNTY JAIL

Commitment Type: PROBATION/PAROLE
County Of Conviction: CARTERET

Commitment	Docket#	Offense (Qualifier)	Offense Date	Type	Sentencing Penalty Class Code
CONCURRENT TO SENTENCE NUMBER 04-001	10053137	DWI LEVEL 5 (PRINCIPAL)	07/18/2010	MISD.	NON CLASS CODE

Sentence Number: 04-001
Conviction Date: 08/27/2010
Punishment Type: COMMUNITY SS (DCC)

Commitment Type: PROBATION/PAROLE
County Of Conviction: CARTERET

Offender Sentence History

Sentence Type 1: PROBATION
Sentence Type 2: SUSPENDED SENTENCE

Commitment	Docket#	Offense (Qualifier)	Offense Date	Type	Sentencing Penalty Class Code
INITIAL	10051246	DRUG PARA - USE/POSSESS (PRINCIPAL)	03/14/2010	MISD.	CLASS 1 MISDEMEANOR SS

Previous Period of Incarceration Record

Sentence Number: BA-001
Conviction Date: 04/09/1997
Service Status: EXPIRED
Punishment Type: POST RELEASE
Sentence Type 1: DEPT OF CORR DIV OF PRISONS
Sentence Type 3: POST RELEASE SENTENCE
Minimum Term: 4 YEARS
Parole Begin Date: 11/09/2000
Commitment Type: INMATE
County Of Conviction: CARTERET
Sentence Begin Date: 04/09/1997
Actual Release Date: 11/09/2000
Projected Release Date: 11/09/2000
Maximum Term: 5 YEARS 7 MONTHS
Parole End Date: 05/08/2001

Commitment	Docket#	Offense (Qualifier)	Offense Date	Type	Sentencing Penalty Class Code
INITIAL	96012836	BURGLARY 1ST DEGREE (PRINCIPAL)	11/11/1996	FELON	CLASS D

Previous Period of Supervision Record

Sentence Number: 03-001
Conviction Date: 02/07/1995
Punishment Type: PRE-SS (FAIR) DCC
Sentence Type 1: PROBATION
Sentence Type 2: SUSPENDED SENTENCE
Sentence Type 3: DEPT OF CORR DIV OF PRISONS
Commitment Type: PROBATION/PAROLE
County Of Conviction: CARTERET

Commitment	Docket#	Offense (Qualifier)	Offense Date	Type	Sentencing Penalty Class Code
CONCURRENT TO SENTENCE NUMBER 02-001	94004623	RECEIVING STOLEN GOODS (PRINCIPAL)	05/03/1994	MISD.	MISD.(PRE-STRUCTURE)

Sentence Number: 02-001
Conviction Date: 02/07/1995
Commitment Type: PROBATION/PAROLE
County Of Conviction: CARTERET

Offender Sentence History

Punishment Type: PRE-SS (FAIR) DCC
Sentence Type 1: PROBATION
Sentence Type 2: SUSPENDED SENTENCE
Sentence Type 3: DEPT OF CORR DIV OF PRISONS

Commitment	Docket#	Offense (Qualifier)	Offense Date	Type	Sentencing Penalty Class Code
INITIAL	94004626	RECEIVING STOLEN GOODS (PRINCIPAL)	05/03/1994	MISD.	MISD.(PRE-STRUCTURE)

Previous Period of Supervision Record

Sentence Number: 01-001
Commitment Type: PROBATION/PAROLE
Conviction Date: 07/09/1990
County Of Conviction: CARTERET
Punishment Type: PRE-SS (FAIR) DCC
Sentence Type 1: PROBATION
Sentence Type 2: SUSPENDED SENTENCE
Sentence Type 3: DEPT OF CORR DIV OF PRISONS

Commitment	Docket#	Offense (Qualifier)	Offense Date	Type	Sentencing Penalty Class Code
INITIAL	90001555	TRESPASS - DWELLING (PRINCIPAL)	02/10/1990	MISD.	MISD.(PRE-STRUCTURE)

N.C. Gen. Stat. § 14-208.18

Current through Session Laws 2020-94 of the 2020 Regular Session

NC - General Statutes of North Carolina Annotated > CHAPTER 14. CRIMINAL LAW > SUBCHAPTER 07 . OFFENSES AGAINST PUBLIC MORALITY AND DECENCY > ARTICLE 27A. SEX OFFENDER AND PUBLIC PROTECTION REGISTRATION PROGRAMS > PART 2. SEX OFFENDER AND PUBLIC PROTECTION REGISTRATION PROGRAM

§ 14-208.18. (See Editor's note for contingent expiration date) Sex offender unlawfully on premises

(a) It shall be unlawful for any person required to register under this Article, if the offense requiring registration is described in subsection (c) of this section, to knowingly be at any of the following locations:

(1) On the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds.

(2) Within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors, including, but not limited to, places described in subdivision (1) of this subsection that are located in malls, shopping centers, or other property open to the general public.

(3) At any place where minors frequently congregate, including, but not limited to, libraries, arcades, amusement parks, recreation parks, and swimming pools, when minors are present.

(4) On the State Fairgrounds during the period of time each year that the State Fair is conducted, on the Western North Carolina Agricultural Center grounds during the period of time each year that the North Carolina Mountain State Fair is conducted, and on any other fairgrounds during the period of time that an agricultural fair is being conducted.

(b) Notwithstanding any provision of this section, a person subject to subsection (a) of this section who is the parent or guardian of a minor may take the minor to any location that can provide emergency medical care treatment if the minor is in need of emergency medical care.

(c) The subdivisions of subsection (a) of this section are applicable as follows:

(1) Subdivisions (1), (3), and (4) of subsection (a) of this section apply to persons required to register under this Article who have committed any of the following offenses:

a.Any offense in Article 7B of this Chapter or any federal offense or offense committed in another state, which if committed in this State, is substantially similar to an offense in Article 7B of this Chapter.

b.Any offense where the victim of the offense was under the age of 18 years at the time of the offense.

(2) Subdivision (2) of subsection (a) of this section applies to persons required to register under this Article if either of the following applies:

a.The person has committed any offense in Article 7B of this Chapter or any federal offense or offense committed in another state, which if committed in this State is substantially similar to an offense in Article 7B of this Chapter, and a finding has been made in any criminal or civil proceeding that the person presents, or may present, a danger to minors under the age of 18.

b.The person has committed any offense where the victim of the offense was under the age of 18 years at the time of the offense.

(d)A person subject to subsection (a) of this section who is a parent or guardian of a student enrolled in a school may be present on school property if all of the following conditions are met:

(1) The parent or guardian is on school property for the purpose for one of the following:

a.To attend a conference at the school with school personnel to discuss the academic or social progress of the parents' or guardians' child; or

b.The presence of the parent or guardian has been requested by the principal or his or her designee for any other reason relating to the welfare or transportation of the child.

(2) The parent or guardian complies with all of the following:

a.Notice: The parent or guardian shall notify the principal of the school of the parents' or guardians' registration under this Article and of his or her presence at the school unless the parent or guardian has permission to be present from the superintendent or the local board of education, or the principal has granted ongoing permission for regular visits of a routine nature. If permission is granted by the superintendent or the local board of education, the superintendent or chairman of the local board of education shall inform the principal of the school where the parents' or guardians' will be present. Notification includes the nature of the parents' or guardians' visit and the hours when the parent or guardian will be present at the school. The parent or guardian is responsible for notifying the principal's office upon arrival and upon departure. Any permission granted under this sub-subdivision shall be in writing.

b.Supervision: At all times that a parent or guardian is on school property, the parent or guardian shall remain under the direct supervision of school personnel. A parent or guardian shall not be on school property even if the parent or guardian has ongoing permission for regular visits of a routine nature if no school personnel are reasonably available to supervise the parent or guardian on that occasion.

(e)A person subject to subsection (a) of this section who is eligible to vote may be present at a location described in subsection (a) used as a voting place as defined by *G.S. 163-165* only for the purposes of voting and shall not be outside the voting enclosure other than for the purpose of entering and exiting the voting place. If the voting place is a school, then the person subject to subsection (a) shall notify the principal of the school that he or she is registered under this Article.

(f)A person subject to subsection (a) of this section who is eligible under *G.S. 115C-378* to attend public school may be present on school property if permitted by the local board of education pursuant to *G.S. 115C-390.11(a)(2)*.

(g)A juvenile subject to subsection (a) of this section may be present at a location described in that subsection if the juvenile is at the location to receive medical treatment or mental health services and remains under the direct supervision of an employee of the treating institution at all times.

(g1) Notwithstanding any provision of this section, a person subject to subsection (a) of this section who is required to wear an electronic monitoring device shall wear an electronic monitoring device that provides exclusion zones around the premises of all elementary and secondary schools in North Carolina.

(h)A violation of this section is a Class H felony.

History

2008-117, s. 12 ; *2009-570, s. 5* ; *2011-245, s. 2(b)* ; *2011-282, s. 14* ; *2015-62, s. 5(a)* ; *2015-181, s. 47* ; *2016-102, s. 1* ; *2017-6, s. 3* ; *2017-102, s. 33.1* ; *2018-146, ss. 3.1(a)* , (b), 6.1

General Statutes of North Carolina

End of Document

2012 N.C. Gen. Stat. § 14-208.18

2012 North Carolina Code Archive

General Statutes of North Carolina > CHAPTER 14. CRIMINAL LAW > SUBCHAPTER 07 . OFFENSES AGAINST PUBLIC MORALITY AND DECENCY > ARTICLE 27A. SEX OFFENDER AND PUBLIC PROTECTION REGISTRATION PROGRAMS > PART 2. SEX OFFENDER AND PUBLIC PROTECTION REGISTRATION PROGRAM

§ 14-208.18. Sex offender unlawfully on premises

(a) It shall be unlawful for any person required to register under this Article, if the offense requiring registration is described in subsection (c) of this section, to knowingly be at any of the following locations:

(1) On the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds.

(2) Within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors, including, but not limited to, places described in subdivision (1) of this subsection that are located in malls, shopping centers, or other property open to the general public.

(3) At any place where minors gather for regularly scheduled educational, recreational, or social programs.

(b) Notwithstanding any provision of this section, a person subject to subsection (a) of this section who is the parent or guardian of a minor may take the minor to any location that can provide emergency medical care treatment if the minor is in need of emergency medical care.

(c) Subsection (a) of this section is applicable only to persons required to register under this Article who have committed any of the following offenses:

(1) Any offense in Article 7A of this Chapter.

(2) Any offense where the victim of the offense was under the age of 16 years at the time of the offense.

(d)A person subject to subsection (a) of this section who is a parent or guardian of a student enrolled in a school may be present on school property if all of the following conditions are met:

(1) The parent or guardian is on school property for the purpose for one of the following:

a.To attend a conference at the school with school personnel to discuss the academic or social progress of the parents' or guardians' child; or

b.The presence of the parent or guardian has been requested by the principal or his or her designee for any other reason relating to the welfare or transportation of the child.

(2) The parent or guardian complies with all of the following:

a.Notice: The parent or guardian shall notify the principal of the school of the parents' or guardians' registration under this Article and of his or her presence at the school unless the parent or guardian has permission to be present from the superintendent or the local board of education, or the principal has granted ongoing permission for regular visits of a routine nature. If permission is granted by the superintendent or the local board of education, the superintendent or chairman of the local board of education shall inform the principal of the school where the parents' or guardians'

will be present. Notification includes the nature of the parents' or guardians' visit and the hours when the parent or guardian will be present at the school. The parent or guardian is responsible for notifying the principal's office upon arrival and upon departure. Any permission granted under this sub-subdivision shall be in writing.

b.Supervision: At all times that a parent or guardian is on school property, the parent or guardian shall remain under the direct supervision of school personnel. A parent or guardian shall not be on school property even if the parent or guardian has ongoing permission for regular visits of a routine nature if no school personnel are reasonably available to supervise the parent or guardian on that occasion.

(e)A person subject to subsection (a) of this section who is eligible to vote may be present at a location described in subsection (a) used as a voting place as defined by *G.S. 163-165* only for the purposes of voting and shall not be outside the voting enclosure other than for the purpose of entering and exiting the voting place. If the voting place is a school, then the person subject to subsection (a) shall notify the principal of the school that he or she is registered under this Article.

(f)A person subject to subsection (a) of this section who is eligible under *G.S. 115C-378* to attend public school may be present on school property if permitted by the local board of education pursuant to *G.S. 115C-390.11(a)(2)*.

(g)A juvenile subject to subsection (a) of this section may be present at a location described in that subsection if the juvenile is at the location to receive medical treatment or mental health services and remains under the direct supervision of an employee of the treating institution at all times.

(g1) Notwithstanding any provision of this section, a person subject to subsection (a) of this section who is required to wear an electronic monitoring device shall wear an electronic monitoring device that provides exclusion zones around the premises of all elementary and secondary schools in North Carolina.

(h)A violation of this section is a Class H felony.

History

2008-117, s. 12; *2009-570, s. 5*; *2011-245, s. 2(b)*; *2011-282, s. 14*.

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State v. Harris

Court of Appeals of North Carolina

February 8, 2011, Heard in the Court of Appeals; April 3, 2012, Filed

NO. COA11-1031

Reporter
219 N.C. App. 590 *; 724 S.E.2d 633 **; 2012 N.C. App. LEXIS 444 ***; 2012 WL 1081459

STATE OF NORTH CAROLINA v. CHARLES FITZGERALD HARRIS

Prior History: **[***1]** Mecklenburg County. Nos. 10 CRS 41882, 10 CRS 53612. H. William Constangy, Judge.

Disposition: VACATED.

Counsel: Attorney General Roy Cooper, by Assistant Attorney General Catherine F. Jordan, for the State.

Thomas, Ferguson & Mullins LLP, by James H. Monroe, for defendant-appellant.

Judges: ERVIN, Judge. JUDGES BRYANT AND ELMORE concur.

Opinion by: ERVIN

Opinion

[*590] [634]** Appeal by defendant from judgment entered 17 May 2011 by Judge H. William Constangy in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 February 2011.

ERVIN, Judge.

Defendant Charles Fitzgerald Harris appeals from a judgment sentencing him to 88 to 115 months imprisonment based upon his convictions for having been a sex offender unlawfully on the premises of a place intended primarily for the use, care, or supervision of minors in violation of *N.C. Gen. Stat. § 14-208.18* and having attained the status of an habitual felon. On appeal, Defendant contends that the trial court lacked subject matter jurisdiction over this case because the indictment lodged against him failed to allege all the essential elements of the offense defined in

N.C. Gen. Stat. § 14-208.18. After careful consideration of Defendant's challenge to the trial court's judgment in light of **[**635]** the record and the applicable law, we conclude **[***2]** that the trial court's judgment should be vacated.

[*591] I. Factual Background

A. Substantive Facts

On the morning of 14 January 2010, Officers Darryl Norton and Brett Hock of the Charlotte-Mecklenburg Police Department responded to a suspicious vehicle call at an elementary school located in Charlotte. According to the caller, a black male was asleep in a vehicle parked in the school parking lot.

After their arrival at the school, the officers observed a vehicle matching that described by the caller in the location which the caller had specified. Upon approaching the vehicle, the officers found Defendant asleep in the driver's seat. At that point, Officer Norton knocked on the vehicle's window, woke Defendant, and asked for identification, which Defendant provided.

While Officer Hock ran a records check on Defendant, Officer Norton talked to him. Defendant told Officer Norton that he was at the school for the purpose of picking up his girlfriend, who worked there. After the records check revealed that Defendant was a registered sex offender, Defendant was handcuffed and placed in the back of a patrol car while the officers attempted to obtain more information about the parameters associated **[***3]** with Defendant's sex offender registration status.

After making appropriate inquiries, Officer Norton learned that Defendant was required to have obtained written permission from the principal or the principal's agent before coming onto school grounds. Although Officer Norton was able to verify that Defendant's girlfriend worked at the school, the school's principal stated that he did not know Defendant and that Defendant did not have permission to be on school grounds. As a result, the officers placed Defendant under arrest.

B. Procedural History

On 6 July 2010 and 23 August 2010, the Mecklenburg County grand jury returned bills of indictment charging Defendant with being a sex offender unlawfully on premises primarily intended for the use, care, or supervision of minors in violation of N.C. Gen. Stat. § 14-208.18 and having attained the status of an habitual felon. The charges against Defendant came on for trial before the trial court and a jury at the 16 May 2011 criminal session of Mecklenburg County Superior Court. At trial, the State and Defendant stipulated that Defendant was required to register as a sex offender as the result of **[*592]** prior convictions for attempted second degree rape **[***4]** and sexual battery. On 17 May 2011, the jury returned a verdict convicting Defendant of having violated N.C. Gen. Stat. § 14-208.18. After the return of the jury's verdict, Defendant pled guilty to having attained habitual felon status. Based upon the jury's verdict and Defendant's guilty plea, the trial court entered a judgment sentencing Defendant to 88 to 115 months imprisonment. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

In his sole challenge to the trial court's judgment, Defendant contends that the trial court lacked subject matter jurisdiction over this case because the indictment purporting to charge him with violating N.C. Gen. Stat. § 14-208.18 failed to allege all the essential elements of the offense defined in that statutory provision. More specifically, Defendant contends that the indictment failed to (1) "clearly and lucidly set forth that [Defendant] was on the premises of the school[;]" (2) "allege [that Defendant] was 'knowingly' on the premises of the school[;]" or (3) "allege

[that Defendant] had been convicted of an offense under *Article 7A of Chapter 14 of the North Carolina General Statutes* or an offense involving **[***5]** a minor child." We conclude that at least a portion of Defendant's argument has merit.

According to *N.C. Gen. Stat. § 15A-924(a)(5)* an indictment must contain:

> A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

[636]** "As a '[p]rerequisite to its validity, an indictment must allege every essential element of the criminal offense it purports to charge,'" *State v. Billinger, N.C. App. , , 714 S.E.2d 201, 206 (2011)* (quoting *State v. Courtney, 248 N.C. 447, 451, 103 S.E.2d 861, 864 (1958)*), although it "need only allege the ultimate facts constituting each element of the criminal offense." *State v. Rambert, 341 N.C. 173, 176 459 S.E.2d 510, 512 (1995)* (citation omitted). "Our courts have recognized that[,] while an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form." *In re S.R.S., 180 N.C. App. 151, 153, 636 S.E.2d 277, 280 (2006)*. **[***6]** "The general rule in this **[*593]** State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words." *State v. Greer, 238 N.C. 325, 328, 77 S.E.2d 917, 920 (1953)*.

"North Carolina law has long provided that '[t]here can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity.'" *State v. Neville, 108 N.C. App. 330, 332, 423 S.E.2d 496, 497 (1992)* (quoting *McClure v. State, 267 N.C. 212, 215, 148 S.E.2d 15, 17-18 (1966)*). "[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of [subject matter] jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace, 351 N.C. 481, 503, 528 S.E.2d 326, 341*, *cert. denied, 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000)*. This Court "review[s] the sufficiency of an indictment *de novo*." *State v. McKoy, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409*, **[***7]** *appeal dismissed and disc. review denied, 363 N.C. 586, 683 S.E.2d 215 (2009)*. "An arrest of judgment is proper when the indictment 'wholly fails to charge some offense cognizable at law or fails to state some essential and necessary element of the offense of which the defendant is found guilty.'" *State v. Kelso, 187 N.C. App. 718, 722, 654 S.E.2d 28, 31 (2007)* (quoting *State v. Gregory, 223 N.C. 415, 418, 27 S.E.2d 140, 142 (1943)*, *disc. review denied, 362 N.C. 367, 663 S.E.2d 432 (2008)*. "'The legal effect of arresting the judgment is to vacate the verdict and sentence of imprisonment below, and the State, if it is so advised, may proceed against the defendant upon a sufficient bill of indictment.'" *State v. Marshall, 188 N.C. App. 744, 752, 656 S.E.2d 709, 715* (quoting *State v. Fowler, 266 N.C. 528, 531, 146 S.E.2d 418, 420 (1966)*, *disc. review denied, 362 N.C. 368, 661 S.E.2d 890 (2008)*.

The indictment by means of which the grand jury attempted to charge Defendant with violating *N.C. Gen. Stat. § 14-208.18* alleged, in pertinent part, that:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 14th day of January, 2010, in Mecklenburg County, Charles Fitzgerald Harris **[***8]** *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.*

[*594] (emphasis added). According to *N.C. Gen. Stat. § 14-208.18*:

> (a) It shall be unlawful for any person required to register under this Article, if the offense requiring registration is described in subsection (c) of this section, to knowingly be at any of the following locations:
>
> (1) On the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds.
>
> . . . .
>
> (c) Subsection (a) of this section is applicable only to persons required to register under this Article who have committed any of the following offenses:

(1) Any offense in Article 7A of this Chapter.
(2) Any offense where the victim of the offense was under the age of 16 years at the time of the offense.

[637]** As a result, the essential elements of the offense defined in N.C. Gen. Stat. § 14-208.18(a) are that the defendant was (1) knowingly on the premises of any place **[***9]** intended primarily for the use, care, or supervision of minors and (2) at a time when he or she was required by North Carolina law to register as a sex offender based upon a conviction for committing an offense enumerated in Article 7A of Chapter 14 of the North Carolina General Statutes or an offense involving a victim who was under the age of 16 at the time of the offense. N.C. Gen. Stat. § 14-208.18.

A. Omission of "Go" or "Went"

First, Defendant contends that the indictment failed to "clearly and lucidly" allege that Defendant went onto the premises of the school. Defendant's argument hinges on the fact that the language contained in the indictment to the effect that Defendant "did unlawfully, willfully and feloniously on the premises of Winget Park Elementary School" omitted any affirmative assertion that Defendant actually went on the school's premises. We do not find this argument persuasive.

Although "'an indictment may be couched in ungrammatical language, this will not, of itself, render the indictment insufficient, provided the intention and meaning of the pleader is clearly apparent,'" since "'[i]t is the general rule that an indictment is not vitiated by **[*595]** mistakes which are **[***10]** merely clerical, where they do not destroy the sense of the indictment, and the meaning is apparent.'" State v. Hawkins, 155 N.C. 466, 470, 71 S.E. 326, 327 (1911) (quoting Howard C. Joyce, *Treatise on the Law Governing Indictments* §§ 201 & 202, at 215-19 (1st ed. 1908)) (holding that an indictment alleging that the defendant "unlawfully, willfully and feloniously break and enter" with the intent to commit larceny was not fatally defective based upon the omission of the word "did"). A cursory analysis of the language in which the challenged indictment is couched clearly indicates that Defendant was being charged with having been "on the premises" of the school. The absence of words such as "go" or "went," while less than optimal, does not render the indictment unclear. As a result, given that the challenged language, taken in context, sufficiently apprised Defendant that he was alleged to have entered the grounds of a school, *see* State v. Thrift, 78 N.C. App. 199, 201-02, 336 S.E.2d 861, 862 (1985) (holding that the fact that a statutory term was misspelled in an indictment did not render that charging instrument fatally defective), *appeal dismissed and disc. review denied, 316 N.C. 557, 344 S.E.2d 15 (1986)*, **[***11]** this component of Defendant's challenge to the indictment lacks merit.

B. Omission of "Knowingly"

Secondly, Defendant argues that the fact that the indictment failed to allege that he "knowingly" entered the school grounds rendered the indictment fatally defective. We do not find this contention persuasive either.

"Our Supreme Court has held that '[t]he term *willfully* implies that the act is done knowingly . . . .'" State v. Memminger, 186 N.C. App. 681, 652 S.E.2d 71, 2007 N.C. App. LEXIS 2234, *6 (2007) (unpublished) (quoting State v. Falkner, 182 N.C. 793, 798, 108 S.E. 756, 758 (1921)) (holding that the absence of the term "knowingly" from an indictment which stated that the defendant "'did . . . willfully . . . possess [cocaine] with intent to sell or deliver . . .'" did not render the indictment invalid given that the allegations in the indictment sufficiently tracked the applicable statutory language and given that the allegation that the defendant acted "willfully" implied that knowing conduct had occurred).[1] As we have already noted, the indictment returned against Defendant alleged that he was "unlawfully, willfully **[*596]** and feloniously on the premises" of the school. Although the **[***12]** indictment did not

[1] Although we recognize that our decision in Memminger has no precedential effect, United Services Automobile Ass'n v. Simpson, 126 N.C. App. 393, 396, 485 S.E.2d 337, 339, *disc. review denied,* ***347 N.C. 141, 492 S.E.2d 37 (1997)***, we find its reasoning persuasive.

explicitly track the relevant statutory language by alleging that Defendant was "knowingly" on the school's premises, the fact that the indictment stated that **[**638]** Defendant acted "willfully," sufficed to allege the requisite "knowing" conduct. *Falkner, 182 N.C. at 798, 108 S.E. at 758*. As a result, we conclude that this aspect of Defendant's challenge to the indictment attempting to charge him with violating *N.C. Gen. Stat. § 14-208.18* lacks merit.

C. Omission of Allegations Concerning Prior Convictions

Finally, Defendant contends that the indictment failed to allege that he had been convicted of an offense enumerated in *Article 7A of Chapter 14 of the North Carolina General Statutes* or an offense involving a victim who was under 16 years of age at the time of the offense as required by *N.C. Gen. Stat. § 14-208.18(a)*. This aspect of Defendant's argument has merit.

N.C. Gen. Stat. § 14-208.7 provides that "[a] person **[***13]** who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides." A "reportable conviction" is defined as:

> a. A final conviction for an offense against a minor, a sexually violent offense, or an attempt to commit any of those offenses unless the conviction is for aiding and abetting. A final conviction for aiding and abetting is a reportable conviction only if the court sentencing the individual finds that the registration of that individual under this Article furthers the purposes of this Article as stated in [*N.C. Gen. Stat. §] 14-208.5*.
> b. A final conviction in another state of an offense, which if committed in this State, is substantially similar to an offense against a minor or a sexually violent offense as defined by this section, or a final conviction in another state of an offense that requires registration under the sex offender registration statutes of that state.
> c. A final conviction in a federal jurisdiction (including a court martial) of an offense, which is substantially similar to an offense against a minor or a sexually violent offense as defined by this section.
>
> d. A final conviction **[***14]** for a violation of [*N.C. Gen. Stat. §§] 14-202(d)*, (e), (f), (g), or (h), or a second or subsequent **[*597]** conviction for a violation of [N.C. Gen. Stat. §§] 14-202(a), (a1), or (c), only if the court sentencing the individual issues an order pursuant to [*N.C. Gen. Stat. §] 14-202(l)* requiring the individual to register.

N.C. Gen. Stat. § 14-208.6(4). The offenses punishable by virtue of *Article 7A of Chapter 14 of the North Carolina General Statutes* include first degree rape, rape of a child, second degree rape, first degree sexual offense, sexual offense with a child, second degree sexual offense, sexual battery, intercourse and sexual offenses with certain victims, and statutory rape. *N.C. Gen. Stat. §§ 14-27.1*-.10. As a result, a number of convictions that result in the imposition of a registration requirement pursuant to *N.C. Gen. Stat. 14-208.7*, including certain forms of secret peeping, *N.C. Gen. Stat. §§ 14-202(d)-(h)*, and sexually violent offenses, *N.C. Gen. Stat. § 14-208.6(5)* (defining sexually violent offenses so as to include offenses set forth in *Article 7A of Chapter 14 of the North Carolina General Statutes* and certain other offenses, such as incest and taking indecent liberties **[***15]** with a student), do not constitute offenses which are listed in *Article 7A of Chapter 14 of the North Carolina General Statutes* or involve a victim under the age of 16. For that reason, the simple fact that an individual required to register as a sex offender enters the premises of any place intended primarily for the use, care, or supervision of minors does not inevitably mean that a violation of *N.C. Gen. Stat. § 14-208.18* has occurred.

The indictment in which the grand jury attempted to charge Defendant with violating *N.C. Gen. Stat. § 14-208.18* simply alleged that Defendant was a "registered sex offender." In view of the fact that certain individuals are required to register as sex offenders despite the fact that they did not commit an offense that is listed in *Article 7A of Chapter 14* or involved a victim under the age of 16, an allegation that Defendant was a "registered sex offender" does not suffice to allege all of the elements of the criminal offense **[**639]** enumerated in *N.C. Gen. Stat. § 14-208.18*. *Greer, 238 N.C. at 328, 77 S.E.2d at 920*. Thus, we are compelled to conclude that the indictment returned against Defendant fails to "'allege every essential element of the criminal offense **[***16]** it purports to charge,'" *Billinger, N.C. App. at , 714 S.E.2d at 206* (quoting *Courtney, 248 N.C. at 451, 103 S.E.2d at 864*), thereby

depriving the trial court of jurisdiction to enter judgment against Defendant for his alleged violation of *N.C. Gen. Stat. § 14-208.18(a)*. In view of the fact that we are required to "vacate [D]efendant's underlying felony conviction, we [must] also vacate **[*598]** [D]efendant's judgment sentencing [D]efendant as a[n] habitual felon." *State v. Fox, N.C. App. , , 721 S.E.2d 673, 678 (2011)* (citing *N.C. Gen. Stat. § 14-7.5*).

In seeking to persuade us to reach a contrary result, the State contends that the "specific offense committed would be mere surplusage" and that the allegation that Defendant's conduct was "unlawful" gave him ample notice that his status as a registered sex offender precluded him from entering the premises of the school in question. However, according to well-established North Carolina law, only those allegations which are "beyond *the essential elements of the crime sought to be charged* are irrelevant and may be treated as surplusage." *State v. Taylor, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972)* (emphasis added). An allegation **[***17]** that the underlying offense requiring sex offender registration was an offense listed in *Article 7A of Chapter 14 of the North Carolina General Statutes* or involved a victim under the age of 16 is an essential element for purposes of the offense set out in *N.C. Gen. Stat. § 14-208.18(a)* and cannot, for that reason, be treated as mere surplusage. In addition, we do not believe an allegation that Defendant's conduct was "unlawful" satisfies the requirement that the indictment allege every essential element of an offense under *N.C. Gen. Stat. § 14-208.18(a)*. *Billinger, N.C. App. at , 714 S.E.2d at 206*. Alleging that Defendant was a "registered sex offender" and that his conduct was "unlawful" does not, standing alone, provide any notice of the nature of Defendant's allegedly unlawful conduct or the reason that his alleged conduct was unlawful. As a result, we conclude that neither of the State's justifications for upholding the challenged "prior offense" allegation have merit.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the indictment returned against Defendant for the purpose of charging him with violating *N.C. Gen. Stat. § 14-208.18* was insufficient **[***18]** to confer subject matter jurisdiction upon the trial court. As a result, the trial court's judgment should be, and hereby is, arrested and Defendant's convictions are vacated without prejudice to the State's right to attempt to prosecute Defendant based upon a valid indictment.

VACATED.

JUDGES BRYANT AND ELMORE concur.

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State v. Herman

Court of Appeals of North Carolina

April 25, 2012, Heard in the Court of Appeals; June 5, 2012, Filed

NO. COA11-1291

Reporter
221 N.C. App. 204 *; 726 S.E.2d 863 **; 2012 N.C. App. LEXIS 717 ***; 2012 WL 1988491

STATE OF NORTH CAROLINA v. TRACY SCOTT HERMAN, Defendant.

Prior History: **[***1]** Catawba County. No. 11CRS1008. Robert T. Sumner, Judge.

Disposition: DISMISSED.

Counsel: Attorney General Roy A. Cooper, III, by Assistant Attorney General Laura E. Parker, for the State.

Glenn Gerding, for defendant-appellee.

Judges: STROUD, Judge. Judges HUNTER, Robert C. and ERVIN concur.

Opinion by: STROUD

Opinion

[*204] **[**863]** Appeal by the State from order entered 31 August 2011 by Judge Robert T. Sumner in Superior Court, Catawba County. Heard in the Court of Appeals 25 April 2012.

[*205] STROUD, Judge.

This matter is before this Court on the State's appeal from a trial court's order allowing Tracy Scott Herman's ("defendant") motion to have certain portions of *N.C. Gen. Stat. § 14-208.18* declared unconstitutional. As the indictment charging defendant was insufficient, we do not have subject matter jurisdiction and dismiss the State's appeal.

I. Background

On 3 January 2011, defendant was indicted for one count of being a sex offender on unlawful premises, pursuant to N.C. Gen. Stat. § 14-208.18(a)(2). On 16 August 2011, defendant filed a motion requesting that the trial court find N.C. Gen. Stat. § 14-208.18(a)(2) and (3) unconstitutional, arguing that these portions of this statute (1) violated **[**864]** defendant's First Amendment right to freedom of association because they are "unconstitutionally **[***2]** overbroad[;]" (2) are unconstitutionally so vague as to not "give notice to a reasonable citizen of whether his conduct is illegal" and to encourage "law enforcement to enforce the law in an arbitrary and discriminatory manner[;]" and (3) violated defendant's First Amendment and State constitutional rights to free exercise of religion and association. Defendant's motion came on for hearing and by order entered 31 August 2011, the trial court, after making findings of fact and conclusions of law, declared N.C. Gen. Stat. § 14-208.18(a)(2) "unconstitutional[,]" and dismissed the pending charges against defendant. On 17 August 2011, the State filed written notice of appeal from the trial court's order. On appeal, the State argues that (1) the trial court erred in determining the constitutionality of N.C. Gen. Stat. § 14-208.18(a)(2) because defendant did not have standing to challenge this statute; and (2) the trial court erred in finding N.C. Gen. Stat. § 14-208.18(a)(2) unconstitutional. Based on our recent holding in State v. Harris, 219 N.C. App. 590, 724 S.E.2d 633, 2012 N.C. App. LEXIS 444 (N.C. Ct. App. April 3, 2012) (COA11-1031), the record before us presents a preliminary jurisdictional **[***3]** issue.

II. Jurisdictional issue

In *Harris*, the defendant argued on appeal that "the trial court lacked subject matter jurisdiction over this case because the indictment **[*206]** purporting to charge him with violating N.C. Gen. Stat. § 14-208.18[(a)(1)] failed to allege all the essential elements of the offense defined in that statutory provision." Id. at *4. Specifically, the defendant argued that the indictment was insufficient because it failed to allege that (1) the defendant was on the school premises; (2) the defendant was knowingly on the school's premises; or (3) the defendant had been "convicted of an offense under Article 7A of Chapter 14 of the North Carolina General Statutes or an offense involving a minor child." Id. at *4-5 (emphasis omitted). In explaining the relevant law, this Court stated

> According to N.C. Gen. Stat. § 15A-924 (a)(5) an indictment must contain:
>
> A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the **[***4]** accusation.
>
> "As a '[p]rerequisite to its validity, an indictment must allege every essential element of the criminal offense it purports to charge,'" State v. Billinger, ___ N.C. App. ___, ___, 714 S.E.2d 201, 206 (2011) (quoting State v. Courtney, 248 N.C. 447, 451, 103 S.E.2d 861, 864 (1958)), although it "need only allege the ultimate facts constituting each element of the criminal offense." State v. Rambert, 341 N.C. 173, 176[,] 459 S.E.2d 510, 512 (1995) (citation omitted). "Our courts have recognized that[,] while an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form." In re S.R.S., 180 N.C. App. 151, 153, 636 S.E.2d 277, 280 (2006). "The general rule in this State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words." State v. Greer, 238 N.C. 325, 328, 77 S.E.2d 917, 920 (1953).
>
> "North Carolina law has long provided that '[t]here can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation **[***5]** the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity.'" State v. Neville, 108 N.C. App. 330, 332, 423 S.E.2d 496, 497 (1992) (quoting McClure v. State, 267 N.C. 212, 215, ***[*207]*** 148 S.E.2d 15, 17-18 (1966)). "[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of [subject matter] jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." State v. Wallace, 351 N.C. 481, 503, 528 S.E.2d 326, 341, *cert. denied*, *531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000)*. This Court "review[s] the sufficiency **[**865]** of an indictment *de novo*." State v.

> McKoy, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409, *appeal dismissed and disc. review denied*, *363 N.C. 586, 683 S.E.2d 215 (2009)*. "An arrest of judgment is proper when the indictment 'wholly fails to charge some offense cognizable at law or fails to state some essential and necessary element of the offense of which the defendant is found guilty.'" State v. Kelso, 187 N.C. App. 718, 722, 654 S.E.2d 28, 31 (2007) (quoting State v. Gregory, 223 N.C. 415, 418, 27 S.E.2d 140, 142 (1943)), *disc. review denied*, *362 N.C. 367, 663 S.E.2d 432 (2008)*. **[***6]** "'The legal effect of arresting the judgment is to vacate the verdict and sentence of imprisonment below, and the State, if it is so advised, may proceed against the defendant upon a sufficient bill of indictment.'" State v. Marshall, 188 N.C. App. 744, 752, 656 S.E.2d 709, 715 (quoting State v. Fowler, 266 N.C. 528, 531, 146 S.E.2d 418, 420 (1966)), *disc. review denied*, *362 N.C. 368, 661 S.E.2d 890 (2008)*.

*Id. at *5-7*. The indictment in *Harris* stated the following:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 14th day of January, 2010, in Mecklenburg County, Charles Fitzgerald *Harris* 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.

*Id. at *7-8* (emphasis omitted). After looking at the relevant portions of *N.C. Gen. Stat. § 14-208.18*, this Court determined that

> the essential elements of the offense defined in *N.C. Gen. Stat. § 14-208.18(a)* are that the defendant was (1) knowingly on the premises of any place intended primarily for the use, care, or supervision of **[***7]** minors and (2) at a time when he or she was required by North Carolina law to register as a sex offender based upon a conviction for committing an offense enumerated in *Article 7A of Chapter 14 of the North Carolina General Statutes* or an offense involving a victim who was under the age of 16 at the time of the offense. *N.C. Gen. Stat. § 14-208.18*.

[*208] *Id. at *8-9*. This Court first overruled the defendant's argument that the indictment failed to clearly allege that he went onto the school premises as the indictment stated that defendant was being charged with being "on the premises[.]" *Id. at *9-10*. This Court also overruled the defendant's second argument that the indictment was invalid because it did not contain the word "knowingly" as the indictment alleged that defendant acted "willfully" which was sufficient "to allege the requisite 'knowing' conduct." *Id. at *12*. In addressing the defendant's third argument, the Court, after looking to the relevant statutes, determined that because

> certain individuals are required to register as sex offenders despite the fact that they did not commit an offense that is listed in Article 7A of Chapter 14 or involved a victim under the age of 16, an **[***8]** allegation that Defendant was a 'registered sex offender' does not suffice to allege all of the elements of the criminal offense enumerated in *N.C. Gen. Stat. § 14-208.18*.

*Id. at *15* (emphasis omitted). The Court vacated the defendant's convictions after concluding that the indictment failed to "allege every essential element of the criminal offense it purports to charge," and therefore, the trial court was deprived of jurisdiction to enter a judgment against defendant for an alleged violation of *N.C. Gen. Stat. § 14-208.18(a)*. *Id. at *15-16* (citation omitted). The Court went on to address the State's arguments "that the 'specific offense committed would be mere surplusage' and that the allegation that Defendant's conduct was 'unlawful' gave him ample notice that his status as a registered sex offender precluded him from entering the premises of the school in question." *Id. at *16-17*. In concluding that "neither of the State's justifications for upholding the challenged 'prior offense' allegation have merit[,]" this Court explained that

> **[**866]** [a]n allegation that the underlying offense requiring sex offender registration was an offense listed in *Article 7A of Chapter 14 of the North Carolina General Statutes* **[***9]** or involved a victim under the age of 16 is an essential element for purposes of the offense set out in *N.C. Gen. Stat. § 14-208.18(a)* and cannot, for that reason, be treated as mere surplusage. In addition, we do not believe an allegation that Defendant's conduct was "unlawful" satisfies the requirement that the indictment allege every essential element of an offense under *N.C. Gen. Stat. § 14-208.18(a)*. *Billinger, N.C. App. at , 714 S.E.2d at 206*. Alleging that

> Defendant was a "registered sex offender" and that his conduct was "unlawful" **[*209]** does not, standing alone, provide any notice of the nature of Defendant's allegedly unlawful conduct or the reason that his alleged conduct was unlawful.

*Id. at *16-17*.

Unlike *Harris*, neither party here has raised an issue on appeal regarding the validity of the indictment and the presence or absence of subject matter jurisdiction. However, "an appellate court has the power to inquire into jurisdiction in a case before it at any time, even sua sponte." *Xiong v. Marks, 193 N.C. App. 644, 652, 668 S.E.2d 594, 599 (2008)*. "'Jurisdiction of the court over the subject matter of an action is the most critical aspect of the court's authority to act. **[***10]** Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question.'" *Cunningham v. Selman, 201 N.C. App. 270, 281, 689 S.E.2d 517, 524 (2009)* (quoting *Harris v. Pembaur, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987)*). Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal. *State v. Abbott, N.C. App. , , 720 S.E.2d 437, 439 (2011)*. "A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity[,]" and "in its absence a court has no power to act[.]" *In re T.R.P., 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006)* (citations and quotation marks omitted).

The relevant portions of *N.C. Gen. Stat. § 14-208.18* (2009) state the following:

> (a) It shall be unlawful for any person required to register under this Article, if the offense requiring registration is described in subsection (c) of this section, to knowingly be at any of the following locations:
>
> (1) On the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, **[***11]** and playgrounds.
> (2) Within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors, including, but not limited to, places described in subdivision (1) of this subsection that are located in malls, shopping centers, or other property open to the general public.
>
> **[*210]** . . . .
> (c) Subsection (a) of this section is applicable only to persons required to register under this Article who have committed any of the following offenses:
> (1) Any offense in Article 7A of this Chapter.
> (2) Any offense where the victim of the offense was under the age of 16 years at the time of the offense.

The indictment in this case has similar defects as the indictment in *Harris.* The indictment against defendant stated the following:

> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully, and feloniously was knowingly present at and within 300 feet of a location intended primarily for the use, care, or supervision of minors and that place was located on premises that **[***12]** were not intended primarily for the use, care, or supervision of minors, said property being the Catawba County Fairgrounds, located at 1127 Conover Blvd., Newton, NC, property **[**867]** which is open to the general public. This act was in violation of the law referenced above.

We first note that the defendant in *Harris* was charged with an offense pursuant to *N.C. Gen. Stat. § 14-208.18(a)(1)* and defendant here is charged pursuant to *N.C. Gen. Stat. § 14-208.18(a)(2)*. Although those charges would have different first "elements" pursuant to *N.C. Gen. Stat. § 14-208.18(a)(1)* or *(2)* both indictments charging those offenses would both have to allege that defendants acted with knowledge, pursuant to *N.C. Gen. Stat. § 14-208.18(a)*, and, pursuant to *N.C. Gen. Stat. § 14-208.18(c)*, would still have to allege that:

> at a time when he or she was required by North Carolina law to register as a sex offender based upon a conviction for committing an offense enumerated in *Article 7A of Chapter 14 of the North Carolina General Statutes* or an offense involving a victim who was under the age of 16 at the time of the offense.

*Harris, 219 N.C. App. 590, 724 S.E.2d 633, 2012 N.C. App. LEXIS 444 at *8-9* (emphasis omitted).

Like the *Harris* indictment, **[***13]** the indictment here states that defendant acted "willfully[,]" which as determined in *Harris* satisfies the knowledge requirement. *See id. at *12*. Also, the indictment generally follows the language of *N.C. Gen. Stat. § 14-208(a)(2)* in describing **[*211]** the nature of the location of the offense. *See Harris, 219 N.C. App. 590, 724 S.E.2d 633, 2012 N.C. App. LEXIS 444 at *6*; *Greer, 238 N.C. at 328, 77 S.E.2d at 920*. But like the indictment in *Harris*, the indictment before us fails to allege that defendant was convicted of an offense enumerated in *Article 7A of Chapter 14 of the North Carolina General Statutes* or an offense involving a victim who was under the age of 16 at the time of the offense. *See N.C. Gen. Stat. § 14-208.18(c)*. Also, the use of the word "unlawfully" and the sentence, "This act was in violation of the law referenced above[,]" in the indictment, just as in the *Harris* indictment, "does not, standing alone, provide any notice of the nature of Defendant's allegedly unlawful conduct or the reason that his alleged conduct was unlawful." *See Harris, 219 N.C. App. 590, 724 S.E.2d 633, 2012 N.C. App. LEXIS 444 at *17*. As the indictment failed to allege this essential element of the offense, the trial court did not have subject matter jurisdiction to **[***14]** consider a charge against defendant based on *N.C. Gen. Stat. § 14-208.18(a)* and therefore, the trial court's order is a "nullity." *See In re T.R.P., 360 N.C. at 590, 636 S.E.2d at 790*. Therefore, as the trial court did not have subject matter jurisdiction, we also have "no power to act" on the State's appeal. *See id.* Thus, the State's appeal is dismissed.

DISMISSED.

Judges HUNTER, Robert C. and ERVIN concur.

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State v. Easter

Court of Appeals of North Carolina

September 9, 2015, Heard in the Court of Appeals; January 5, 2016, Filed

No. COA15-199

Reporter
2016 N.C. App. LEXIS 7 *; 244 N.C. App. 777; 781 S.E.2d 531; 2016 WL 47921

STATE OF NORTH CAROLINA v. FRANK HARRY EASTER, JR.

Notice: THIS IS AN UNPUBLISHED OPINION. PLEASE REFER TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE SOUTH EASTERN REPORTER.

PUBLISHED IN TABLE FORMAT IN THE NORTH CAROLINA COURT OF APPEALS REPORTS.

Prior History: **[*1]** Carteret County, Nos. 13 CRS 52835-36, 52942.

Disposition: VACATED in part; DISMISSED in part; NO PREJUDICIAL ERROR in part; REMANDED for resentencing.

Counsel: Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel L. Spiegel, for Defendant.

Judges: STEPHENS, Judge. Judges MCCULLOUGH and ZACHARY concur.

Opinion by: STEPHENS

Opinion

Appeal by Defendant from judgments entered 16 July 2014 by Judge John E. Nobles, Jr., in Carteret County Superior Court. Heard in the Court of Appeals 9 September 2015.

STEPHENS, Judge.

I. Factual Background and Procedural History

On 7 October 2013, Defendant Frank Harry Easter, Jr., was indicted by a Carteret County grand jury on two counts of possession with intent to sell or deliver a Schedule II controlled substance; two counts of possession with intent to sell or deliver a Schedule II controlled substance within 1,000 feet of a public park; one count of possession with intent to sell or deliver a Schedule II controlled substance within 1,000 feet of an elementary or secondary school; one count of possession with intent to sell or deliver a Schedule II controlled substance within 1,000 feet of a **[*2]** child care center; and one count of being a registered sex offender unlawfully on premises. These charges were based on allegations that on 19 December 2012 and 11 January 2013, Easter sold oxycodone to a confidential informant working with Morehead City Police Department ("MCPD") Narcotics Detective Daniel Black.

The matter was called for trial on 14 July 2014 during the criminal session of Carteret County Superior Court. Before the trial began, Easter made a motion to allow his court-appointed counsel, Public Defender James Q. Wallace, III, to withdraw from the case so that Easter could represent himself. The trial court granted this motion and appointed Wallace to serve as standby counsel during the trial and all associated proceedings.

During the trial that followed, Detective Black testified that he had heard rumors that Easter was selling prescription pills since Black joined the MCPD as a patrol officer in 2008, and that he decided to set up a controlled buy after a confidential informant named Susan Velasquez, who was a friend of Easter, told him that she could buy oxycodone from Easter. On 19 December 2012, Detective Black met with Velasquez in the parking lot of a strip mall, **[*3]** where he conducted a search of her person and vehicle to verify that she did not possess any contraband, then gave her $60 and an inconspicuous audio/video recording device attached to a key fob in order to record her controlled buy from Easter. Detective Black then observed from a distance as the controlled buy took place in Easter's vehicle, which was parked approximately 158 feet from a childcare center, 372 feet from a public recreation center, and 438 feet from Saint Egbert Catholic School. As Detective Black explained at trial, he "didn't actually see the deal go down because they were inside a car, so I can't say I saw the deal go down. But I saw the vehicle; I saw Ms. Velasquez get in the car, meet with [Easter]. The money was exchanged. She got out of the car." Detective Black testified that he met with Velasquez shortly thereafter, at which point she returned the recording device and also gave him two 30mg oxycodone tablets she had just purchased from Easter. Detective Black testified further that he arranged for Velasquez to conduct a second controlled buy from Easter on 11 January 2013. Once again, Detective Black met with Velasquez beforehand, conducted a search to verify **[*4]** that she did not possess any contraband, and gave her a recording device. This time, the transaction took place in Easter's home. Afterwards, Velasquez returned Detective Black's recording device and gave him two 5mg oxycodone tablets that Easter had sold to her for $10.

When Velasquez testified at trial, she described both of the controlled buys she conducted with Easter in detail, corroborating Detective Black's testimony about the events. Velasquez testified further that she had been considering moving to Florida for several months and had previously asked Easter to help arrange her transportation. Four days before the trial was scheduled to begin, Easter told her he was driving to West Palm Beach, Florida with his stepdaughter, Carla Eppard, and this would be Velasquez's "last chance to go down there." Velasquez testified that she accepted Easter's offer and that during the drive, Easter told her he knew she had been working as a confidential informant for Detective Black. In addition, Velasquez testified that on the way to Florida, Easter asked her to write a letter to his court-appointed counsel stating that she had told Easter she was working with Detective Black before the controlled **[*5]** buys ever occurred; that Easter had proposed they stage a fake drug transaction in order to get back at Black by making him "look stupid"; that, as part of this revenge plot, she gave Easter a clandestine signal during the controlled buys and as a result, the two of them performed an empty fist-bump for the camera but Easter never actually gave her any oxycodone tablets; and that the pills she turned over to Detective Black after the controlled buys had been secretly hidden on her person all along in order to trick Black. Velasquez explained that she complied with Easter's request to write the letter because she was scared. Velasquez also stated that the allegations in the letter were false, and that Easter "told me what to write, and I wrote as fast as I could, abbreviated a lot, and everything was—this was [in Easter's] words." Shortly after they arrived in

Florida, Easter drove back to North Carolina, leaving Velasquez with no money and no place to stay until the Carteret County District Attorney's office located her on the day before Easter's trial was scheduled to begin and paid for her plane ticket home.

The recordings of both controlled buys were admitted into evidence and played **[*6]** for the jury. The State also presented expert testimony from two North Carolina State Crime Lab analysts who confirmed that the substance Velasquez purchased during the controlled buys was oxycodone. In addition, MCPD Detective Harold Pendergrass testified that Easter had registered as a sex offender with the Carteret County Sheriff's Office in 2009, based on a 1971 rape conviction from Pennsylvania, and had signed a form acknowledging that he understood the limitations imposed on his travel and whereabouts as a result.

For his part, Easter presented testimony from his stepdaughter, who stated that Velasquez did not seem anxious or afraid during the drive to Florida and that she had, in fact, offered to help Easter by volunteering to write the letter to his attorney. When Easter testified on his own behalf, he contended that he had been repeatedly harassed by law enforcement but denied ever selling prescription pills. Easter acknowledged that his wife "had a liver condition, plus sciatica, and she was receiving 120 20-milligram pills a month." Easter testified further that he had begun to carry his wife's prescription bottles with him at all times after he learned that some of his roommates **[*7]** had been stealing her medication, but was quick to emphasize that the dosage of his wife's pills differed from the dosages of the pills recovered after both the controlled buys. Easter also testified that Velasquez had come to him "upset and scared to death that she was going to jail forever and always" unless she helped Detective Black "set him up" by serving as a confidential informant. According to Easter, at that point, he and Velasquez concocted a plan "to get even with the police for all the garbage they've been dumping on us." As Easter explained:

> . . . I told [Velasquez] what we'd do. You set up a buy, we go in, and all I do is bump hands and then you give [Detective Black] some pills. And basically, that's what happened on the first video [from the 19 December 2012 controlled buy], if you take a look. She gave me money, I gave her money back. I never give her any pills. All right. If you take a real close [look]—you don't see any pills being transferred from one place to the other.
>
> In the second video [from the 11 January 2013 controlled buy], I was [not] aware that she was under a wire, until two-thirds of the way through the deal, when she finally gave me a wink to let me **[*8]** know what was going on, so I knew what was going on. So I got up and I made out like I was getting some pills out of a bottle and I put them on the table and left to go. And she took it from there.

Easter subsequently introduced the letter Velasquez wrote during their road trip to Florida into evidence.

At the close of all the evidence, the trial court dismissed the charge of possession with intent to sell or deliver a Schedule II controlled substance within 1000 feet of a child care center and both counts of possession with intent to sell or deliver a Schedule II controlled substance within 1,000 feet of a public park. The trial court submitted the remaining charges to the jury on 15 July 2014. That same day, the jury returned its verdict finding Easter guilty on all charges, including two counts of possession with intent to sell or deliver a Schedule II controlled substance, one count of possession with intent to sell or deliver a Schedule II controlled substance within 1000 feet of an elementary or secondary school, and one count of being a registered sex offender unlawfully on premises.

On 16 July 2014, the trial court arrested judgment on one of Easter's convictions for possession **[*9]** with intent to sell or deliver a Schedule II controlled substance and then entered a consolidated judgment on the remaining convictions imposing a sentence of 44 to 65 months imprisonment. Immediately following entry of judgment, the court heard another matter involving Easter, in which he pled no contest to one felony count of obstruction of justice arising from his road trip to Florida with Velasquez. Public Defender Wallace represented Easter during that proceeding. After the court entered judgment on his client's plea, Wallace stated, "As to the earlier cases, just to be on the record, [Easter] plans to enter Notice of Appeal. And I believe . . . [the court] would need to find that he's still indigent; I certainly contend that he is. And that will trigger the appointment of the Appellate [Defender]." The trial court agreed, stating, "That's fine. And I'll note the appeal," and entered appellate entries the same day. However, no subsequent written or oral notice of appeal was entered.

II. Analysis

A. Easter's petition for writ of certiorari

On 3 March 2015, Easter's appellate counsel filed a petition for writ of *certiorari* with this Court acknowledging that Easter had inadvertently **[*10]** waived his right to appeal by failing to comply with the timing requirements imposed by Rule 4 of our Rules of Appellate Procedure insofar as he failed to give oral notice of appeal immediately after judgment was entered on his convictions, and there was otherwise "nothing in the record [that] appear[ed] to constitute timely notice of appeal from judgment . . . as required to confer jurisdiction upon this Court." *See, e.g.,* State v. Robinson, 236 N.C. App. 446, 448, 763 S.E.2d 178, 180 (2014) (granting *certiorari* after concluding that a defendant who attempted to give notice of appeal after the jury returned its verdict but did not give notice of appeal following entry of the trial court's final judgment had failed to give timely notice of appeal, despite the trial court's indication that it would note the appeal for the record and assign the case to the Appellate Defender's Office), *affirmed as modified*, 368 N.C. 402, 777 S.E.2d 755 (2015). Although noncompliance with Rule 4 divests this Court of jurisdiction to hear Easter's appeal, *see, e.g.,* State v. Hughes, 210 N.C. App. 482, 484, 707 S.E.2d 777, 778 (2011), Easter requests *certiorari* review pursuant to Rule 21, which provides that a writ of *certiorari* "may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely **[*11]** action." N.C.R. App. P. 21(a)(1). In its response to Easter's petition, the State agrees that Easter's failure to comply with Rule 4 waived his right to appeal but concedes that it is within our discretion to grant Easter's petition. We now choose to do so in order to reach the merits of Easter's appeal.[1]

B. Easter's conviction for violation of section 14-208.18(a)(2)

Easter argues first that his conviction for violating section 14-208.18(a)(2) of our General Statutes must be vacated because the trial court lacked subject matter jurisdiction to convict him for being a sex offender unlawfully on premises. Specifically, Easter contends that the indictment charging him with being a sex offender unlawfully on premises was fatally defective insofar as it failed to allege each essential element of the offense. We agree.

It is the law in this State that a valid indictment must contain:

> A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C. Gen. Stat. § 15A-924(a)(5) (2013). Our prior cases recognize that

> North Carolina law has long provided that there can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an **[*13]** accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity. Where an indictment is alleged to be invalid on its face, thereby depriving the trial court of subject matter jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court. This Court reviews the sufficiency of an

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[1] In his brief, Easter's appellate counsel also calls our attention to what he characterizes as a clerical error in this Court's electronic docketing system. Specifically, Easter's counsel asserts that our electronic docket for this case erroneously states that this Court received the evidentiary exhibits introduced at trial by both parties on 25 February 2015 "from [the] Appellate Defender's Office," and he further complains that although he notified the Clerk of Court of this error on 18 March 2015, it had not been corrected by the time Easter filed his appellate brief on 25 March 2015. While counsel appears to be correct insofar as the exhibits were received from the Clerk of Superior Court for Carteret County, rather than directly from the Appellate Defender's Office, this Court's policy is to identify all filings made in conjunction with an appeal by the party responsible for filing them. In the present case, **[*12]** Easter's counsel works for the Appellate Defender's Office and was responsible for requesting that these exhibits be included in the record on appeal.

> indictment *de novo*. An arrest of judgment is proper when the indictment wholly fails to charge some offense cognizable at law or fails to state some essential and necessary element of the offense of which the defendant is found guilty. The legal effect of arresting the judgment is to vacate the verdict and sentence of imprisonment below, and the State, if it is so advised, may proceed against the defendant upon a sufficient bill of indictment.

State v. Harris, 219 N.C. App. 590, 593, 724 S.E.2d 633, 636 (2012) (citations, internal quotation marks, and brackets omitted).

Section 14-208.18 of our General Statutes provides in pertinent part that

> (a) It shall be unlawful for any person required to register under this Article, if the offense requiring registration is described in subsection (c) of this section, to knowingly be at any of the following locations:
>
> (1) On the premises of any place intended primarily for the use, **[*14]** care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds.
> (2) Within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors, including, but not limited to, places described in subdivision (1) of this subsection that are located in malls, shopping centers, or other property open to the general public.
> . . .
> (c) Subsection (a) of this section is applicable only to persons required to register under this Article who have committed any of the following offenses:
> (1) Any offense in Article 7A of this Chapter.
> (2) Any offense where the victim of the offense was under the age of 16 years at the time of the offense.

N.C. Gen. Stat. § 14-208.18 (2013). In our recent decision in *Harris*, we observed that because there are two essential elements for the offense defined in section 14-208.18, a proper indictment must allege that the defendant was:

> (1) knowingly on the premises of any place intended primarily for the use, care, or supervision of minors and (2) at a time when he was required by North Carolina law to register as a sex offender based upon **[*15]** a conviction for committing an offense enumerated in Article 7A of Chapter 14 of the North Carolina General Statutes or an offense involving a victim who was under the age of 16 at the time of the offense.

219 N.C. App. at 594, 724 S.E.2d at 637 (citation omitted). In *Harris*, we vacated the defendant's conviction for violating section 14-208.18(a)(1) because the indictment against him failed to allege the second element of the offense and was therefore fatally defective. Id. at 596-97, 724 S.E.2d at 638-39. As we explained, "a number of convictions that result in the imposition of a registration requirement . . . do not constitute offenses which are listed in Article 7A of Chapter 14 of the North Carolina General Statutes or involve a victim under the age of 16." Id. at 597, 724 S.E.2d at 638. "For that reason, the simple fact that an individual required to register as a sex offender enters the premises of any place intended primarily for the use, care, or supervision of minors does not inevitably mean that a violation of N.C. Gen. Stat. § 14-208.18 has occurred." *Id.* In so holding, we rejected the State's argument that the indictment had sufficiently alleged each essential element of the offense because it alleged that the defendant was a "registered sex offender." As we explained,

> [i]n view of the fact that certain individuals are required to register as sex offenders despite the fact that they did not commit an offense that is listed in Article 7A of Chapter **[*16]** 14 or involved a victim under the age of 16, an allegation that [the d]efendant was "a registered sex offender" does not suffice to allege all of the elements of the criminal offense enumerated in N.C. Gen. Stat. § 14-208.18.

Id. at 597, 724 S.E.2d at 638-39. In our subsequent decision in State v. Herman, 221 N.C. App. 204, 726 S.E.2d 863 (2012), we vacated the defendant's conviction for violating section 14-208.18(a)(2) based on the same rationale as we applied in *Harris*. Id. at 210-11, 726 S.E.2d at 867. In so holding, we explained that the fact the defendant in *Herman* was charged under a different subsection of the statute was immaterial to our analysis because,

> [a]lthough those charges would have different first elements pursuant to N.C. Gen. Stat. § 14-208.18(a)(1) or (2)[,] both indictments charging those offenses would both have to allege that [the] defendants acted with knowledge, pursuant to N.C. Gen. Stat. § 14-208.18(a), and, pursuant to N.C. Gen. Stat. § 14-208.18(c), would still have to allege that:
> "at a time when he or she was required by North Carolina law to register as a sex offender based upon a conviction for committing an offense enumerated in Article 7A of Chapter 14 of the North Carolina General Statutes or an offense involving a victim who was under the age of 16 at the time of the offense."

Id. at 210, 726 S.E.2d at 867 (quoting Harris, 219 N.C. App. at 594, 724 S.E.2d at 637). We also observed that "the use of the word 'unlawfully' and the sentence, 'This act was in violation of the law referenced above[,]' in the indictment, just as in the *Harris* indictment, does not, standing **[*17]** alone, provide any notice of the nature of [the d]efendant's allegedly unlawful conduct or the reason that his alleged conduct was unlawful." Id. at 211, 726 S.E.2d at 867 (citation and certain internal quotation marks omitted). Thus, just as in *Harris*, we concluded that because the indictment failed to allege each essential element of the offense charged, the trial court lacked subject matter jurisdiction to consider the charge against the defendant. *Id.*

In the present case, the indictment charging Easter with violating section 14-208.18(a)(2) alleged that:

> The jurors for the State upon their oath present that on or about [19 December 2012] and in [Carteret County] the defendant named above unlawfully, willfully and feloniously did as a person required to register as a sex offender, go on property located within 300 feet of a location (Child Care Network) intended for the use, care or supervision of minors, when the location is upon premises not primarily intended for such use.

Here, as in Harris and Herman, the indictment against Easter does not specifically allege that his purported violation of section 14-208.18(a)(2) occurred at a time when he was required by North Carolina law to register as a sex offender based upon a conviction for committing an offense **[*18]** enumerated in Article 7A, Chapter 14 of our General Statutes or of an offense involving a victim under 16. Moreover, the State concedeas that it is unable to distinguish the facts of the present case from those in *Harris* and *Herman*, and consequently agrees that Easter's conviction must be vacated.

Because the indictment charging Easter with being a sex offender unlawfully on premises failed to allege each essential element of the offense, we hold that the trial court lacked subject matter jurisdiction to consider this charge. We therefore vacate Easter's conviction for violating section 14-208.18(a)(2) "without prejudice to the State's right to attempt to prosecute [Easter] based upon a valid indictment." *See* Harris, 219 N.C. App. at 598, 724 S.E.2d at 639. Because the trial court consolidated all of Easter's convictions into a single judgment for sentencing, we remand for resentencing. In light of our holding on this threshold jurisdictional issue, we need not address Easter's related argument that his conviction on this charge must be vacated because the State failed to introduce substantial evidence of an essential element of the offense charged.

C. Easter's conviction for violating section 90-95(e)(8)

Easter argues next that his conviction for possession with intent to sell or distribute oxycodone within 1,000 feet **[*19]** of an elementary or secondary school in violation of *section 90-95(e)(8) of our General Statutes* must be vacated because the State did not explicitly demonstrate that Saint Egbert Catholic School "taught elementary, middle, or high school courses rather than post-secondary, continuing education, or Bible study classes," and

therefore failed to introduce substantial evidence of each essential element of the offense charged.[2] We conclude this issue has not been properly preserved for our review.

Rule 10(a)(3) of our Rules of Appellate Procedure provides, in pertinent part, that a criminal defendant "may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial." N.C. R. App. P. 10(a)(3); *see also* State v. Williams, 235 N.C. App. 211, 213, 760 S.E.2d 382, 384 (2014) (dismissing the defendant's argument that the State failed to present sufficient evidence of the charge against him because the defendant "did not move to dismiss that charge either at the close of the State's evidence or at the close of all of the evidence" and finding that, as a result of his failure to comply with Rule 10, "[t]he question of the sufficiency of the State's evidence is therefore not preserved for appellate review").

In the present case, the record indicates that at trial, Easter failed to make any motion to dismiss the charge brought against him under *section 90-95(e)(8)*. However, Easter argues based on this Court's decision in State v. Hargett, 157 N.C. App. 90, 92, 577 S.E.2d 703, 705 (2003), *abrogation recognized by* State v. Williams, 215 N.C. App. 412, 425, 715 S.E.2d 553, 561 (2011), as well as our Supreme Court's decision in State v. Canady, 330 N.C. 398, 401-02, 410 S.E.2d 875, 878 (1991), that this issue is automatically preserved for *de novo* review, even without an objection at trial, because it involves a sentencing error.

We find Easter's reliance on *Hargett* and **[*21]** *Canady* wholly misplaced. In *Hargett*, the defendant argued that the trial court "erred in convicting and sentencing him for both larceny and possession of the same goods." 157 N.C. App. at 92, 577 S.E.2d at 705. Although we noted that the defendant had failed to object to this sentencing error at trial, we nevertheless reviewed his argument because "[o]ur Supreme Court has held that an error at sentencing is not considered an error at trial for the purpose of [Rule 10(b)(1)]."[3] *Id.* (citation omitted). In so holding, we relied on our Supreme Court's decision in *Canady*. There, the defendant argued that the trial court erred in finding an aggravating factor during his sentencing hearing. The State contended that the defendant's failure to preserve the issue by timely objection as required by the then-extant version of Rule 10(b)(1) should bar him from raising the issue on appeal. The *Canady* Court disagreed, explaining:

> [Rule 10(b)(1)] is directed to matters which occur at trial and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal. The purpose of the rule is to require a party to call the court's attention to a matter upon which he or she wants a ruling before he or she can assign error to the matter on appeal. **[*22]**

330 N.C. at 401, 410 S.E.2d at 878 (citation omitted). Given its conclusion that the defendant had no opportunity to object during trial to an error that occurred after his conviction during sentencing, the Court concluded that Rule 10(b)(1) was inapplicable and ultimately held that the defendant was entitled to a new sentencing hearing. *Id.* at 403, 410 S.E.2d at 878.

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[2] On 27 April 2015, in response to Easter's argument, the State filed a motion requesting that this Court take judicial notice of public records from the North Carolina Department of Administration, Division of Non-Public Education, that list Saint Egbert Catholic School as teaching grades K-5. Easter opposes this motion, arguing that if he is correct that the State failed to establish an essential element of the offense charged during his trial, it would be improper for this Court to judicially notice a fact that should have been proven to the jury. However, in light of our conclusion that Easter's challenge to the sufficiency of the evidence introduced at trial has not been properly preserved for our review and must be dismissed, we deny **[*20]** the State's motion for judicial notice as moot.

[3] At the time, Rule 10(b)(1) provided, "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. Any such question which was properly preserved for review by action of counsel taken during the course of the proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be made the basis of an assignment of error in the record on appeal." Although this Rule has since been revised and re-codified as Rule 10(a)(1), its substance remains largely the same.

We note here that, unlike the alleged violations of Rule 10(b)(1) at issue in *Hargett* ***[*23]*** and *Canady*, the preservation issue in the present case arises from Easter's failure to comply with Rule 10(a)(3), which specifically requires that a criminal defendant who seeks to challenge the sufficiency of the evidence introduced against him at trial must do so through a timely motion to dismiss. *See* N.C.R. App. P. 10(a)(3). Further, in contrast to the defendants' arguments in *Hargett* and *Canady*, Easter's argument here focuses entirely on the sufficiency of the evidence presented at trial, rather than on any error that allegedly occurred after his conviction during sentencing. We therefore conclude that *Hargett* and *Canady* are inapposite to the present case. Moreover, Easter's characterization of this issue as an automatically preserved sentencing error is further undermined by the cases he cites in support of his substantive contention that the State failed to introduce substantial evidence of each essential element required to convict him for violating *section 90-95(e)(8)*. Specifically, Easter relies on this Court's prior decisions in *State v. Alderson, 173 N.C. App. 344, 349, 618 S.E.2d 844, 848 (2005)* (holding that the trial court did not err in denying the defendant's motion to dismiss the charge of manufacturing methamphetamine within 300 feet of a school where the evidence showed that "the defendant's **[*24]** residence is within 300 feet of an elementary school"); *State v. Alston, 111 N.C. App. 416, 420, 432 S.E.2d 385, 387 (1993)* (rejecting the defendant's argument that the State failed to prove an essential element to support his conviction under *section 90-95(e)(8)* where only verbal testimony, rather than maps or plats, was offered to prove that he sold drugs to a police officer within 300 feet of Lenoir Middle School); and *State v. Ussery, 106 N.C. App. 371, 374, 416 S.E.2d 610, 611 (1992)* (holding the trial court did not err in denying the defendant's motion to dismiss where both the principal and superintendent testified that he sold drugs within 300 feet of the property boundary for Chaloner Middle School). While the defendants in *Alderson*, *Alston*, and *Ussery* made similar arguments to the one Easter attempts to raise here, nothing in our analysis from those cases indicates that such issues should be treated as sentencing errors. Instead, we analyzed those defendants' claims that the evidence was insufficient to sustain their convictions for violating *section 90-95(e)(8)* by examining the sufficiency of the evidence presented at trial.

We therefore conclude that Easter's argument that this issue involves a sentencing error that is automatically preserved for our review is without merit. We further conclude that because Easter failed to preserve his challenge **[*25]** to the sufficiency of the evidence by making a timely motion to dismiss as required by Rule 10(b)(3), this issue is not properly before us. Easter also requests that we review his challenge to the sufficiency of the evidence pursuant to Rule 2, which provides this Court with the discretion to suspend the Rules of Appellate Procedure in order to prevent manifest injustice. However, our Supreme Court has made clear that Rule 2 is only to be used on rare occasions and for exceptional cases, *see, e.g., State v. Hart, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007)*, and we do not believe that Easter's unpreserved sufficiency challenge presents such a case. This argument is dismissed.

D. Prosecutor's closing argument

Easter argues next that the trial court committed reversible error by failing to intervene *ex mero motu* during the State's closing argument. Specifically, Easter takes issue with the prosecutor's statements that his defense was "absurd" and a "whopper of a story," and that the reason Easter was representing himself was because his court-appointed counsel was ethically precluded from presenting his defense. We disagree.

Because Easter failed to object to the State's closing argument at trial, our review is limited to assessing "whether the remarks were so grossly **[*26]** improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Oakes, 209 N.C. App. 18, 22, 703 S.E.2d 476, 480* (citations and internal quotation marks omitted), *appeal dismissed and disc. review denied*, *365 N.C. 197, 709 S.E.2d 920 (2011)*. "Under this standard, only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *Id.* "To establish such an abuse, [the] defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *Id.* (citation omitted). Moreover, our Supreme Court has made clear that "in order to constitute reversible error, the prosecutor's remarks must be both improper and prejudicial." *State v. Jones, 355 N.C. 117, 133, 558 S.E.2d 97, 107-08 (2002)* (citation omitted).

In the present case, during the State's closing argument, the prosecutor stated:

> Mr. Easter, he's going to have to explain a lot. Why doesn't he have [Public Defender] Wallace represent him? He's given you his reason. I'll give you my reason. It's because [Public Defender] Wallace ain't going to sit up here as a professional **[*27]** and put this kind of show on. He can't present this case, ethically. He can't present a case that is all a big, made-up show on behalf of Frank Easter, because there's an ethical duty not to do that. And that's why he is sitting back there, and that's why [Easter], who is under no ethical duty of any sort, is doing it himself.

Easter argues that this statement was improper because it argued facts not in evidence, implied that Easter's appointed counsel had personal knowledge that Easter's testimony was false, and—combined with the prosecutor's characterization of Easter's defense as "absurd" and "a whopper of a story"—impermissibly expressed the prosecutor's personal opinion about the veracity of Easter's testimony and the strength of his case. For its part, the State contends that in light of the audio/video recordings of the controlled buys and other evidence in the record, the prosecutor's argument was an accurate statement of *Rule 3.3 of the North Carolina Rules of Professional Conduct*, which prohibits a lawyer from knowingly "offer[ing] evidence that the lawyer knows to be false." *N.C. Rev. R. Prof. Conduct 3.3(a)(3)*. The State also argues that the prosecutor's statement came in direct response to a statement Easter made during his own closing argument about the reason for his *pro* ***[*28]*** *se* representation:

> Okay. As you-all know, I am representing myself, and there's a couple reasons there. . . .
> [Public Defender] Wallace and I have become friends over the years. And I really didn't like the idea of him representing me and possibly failing and having to take the burden onto himself. I know he's going to represent me as well as he can, but there's always the possibility that he might believe the State. Hopefully, not this time.

In North Carolina, prosecutors are generally "given wide latitude in the scope of their [closing] argument[s] and may argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom." *State v. Phillips, 365 N.C. 103, 135, 711 S.E.2d 122, 145 (2011)* (citations and internal quotation marks omitted), *cert. denied*, *565 U.S. 1204, 132 S. Ct. 1541, 182 L. Ed. 2d 176 (2012)*. However, while a prosecutor "can argue to the jury that they should not believe a witness," *see, e.g., State v. Sexton, 336 N.C. 321, 363, 444 S.E.2d 879, 903*, *cert. denied*, *513 U.S. 1006, 115 S. Ct. 525, 130 L. Ed. 2d 429 (1994)*, during closing arguments an attorney "may not . . . express his personal belief as to the truth or falsity of the evidence." *N.C. Gen. Stat. § 15A-1230(a)* (2013). Prosecutors are likewise prohibited from arguing facts not introduced into evidence during closing arguments because, as our prior holdings demonstrate, "[f]rom the earliest time, traveling outside the record in jury argument has been disapproved **[*29]** by our courts." *State v. Caldwell, 68 N.C. App. 488, 489, 315 S.E.2d 362, 363* (citation and internal quotation marks omitted) (finding prejudice and granting a new trial where the prosecutor stated during closing arguments that the defendant's co-conspirator had not testified because he was already in jail and uncooperative, since "the jury could have easily inferred therefrom that [the co-conspirator] was in jail because he had been convicted of the offenses that [the] defendant was being tried for"), *disc. review denied*, *312 N.C. 86, 321 S.E.2d 901 (1984)*. It has also been held improper for a prosecutor to imply during closing arguments that defense counsel "had personal knowledge of both the validity and the damaging nature of the State's evidence" or the veracity, or lack thereof, of a witness's testimony. *See, e.g., State v. Rivera, 350 N.C. 285, 291, 514 S.E.2d 720, 723 (1999)*.

We recognize that *pro se* defendants often pose uniquely frustrating challenges for prosecutors, and that in the present case, those challenges were likely exacerbated not only by Easter's lack of familiarity with the rules of evidence and criminal procedure, but also by his efforts to render one of the State's key witnesses, Velasquez, unavailable for trial by driving her to Florida and leaving her there without any money or any way to return home. Nevertheless, **[*30]** we agree with Easter that the prosecutor's statement that his court-appointed counsel was ethically precluded from representing him was improper. The statement was based on matters outside the evidence, referenced Easter's appointed counsel's personal knowledge of the case, and—when combined with the prosecutor's characterization of Easter's defense as "a big, made-up show"—invited the jury to infer that Easter was being dishonest in his arguments and his testimony to the court. Such statements do not comport with the high standards of prosecutorial professionalism that our case law demands in even the most challenging and frustrating cases.

However, this conclusion does not end our inquiry, as our Supreme Court has made clear that we must consider the prosecutor's improper statement in the context of all the facts and circumstances revealed in the record and that it is the defendant's burden to show that the statement was prejudicial. *See* Sexton, 336 N.C. at 363, 444 S.E.2d at 903 (concluding that the defendant was not entitled to a new trial because although the prosecutor's characterization of the defendant as a liar was improper, the defendant was unable to demonstrate any prejudice in light of the "overwhelming evidence **[*31]** against [him]"). To that end, Easter argues that the prosecutor's statement was prejudicial, and likely tipped the scales toward the jury finding him guilty, because the State's case "was hardly overwhelming and resulted in dismissals of almost half the charges" against him. We note here that although the printed record includes orders dismissing three of the charges, there is no reference to these dismissals or the reasons for them in the trial transcript. It appears from our review that the trial court dismissed these charges during an off-the-record conference it conducted in chambers after the close of the evidence to discuss the jury instructions. The State highlights the fact that during sentencing, the trial court arrested judgment on one of Easter's convictions after expressing concerns it might otherwise result in a double jeopardy issue, and the State further suggests that the court's decision to dismiss three of the charges before submitting the case to the jury was rooted in similar concerns. Whatever the case may be, our review of the record does not support Easter's argument that the State's case against him on the remaining charges was "hardly overwhelming." Indeed, **[*32]** apart from his improper statement regarding Easter's *pro se* representation, the majority of the prosecutor's closing argument focused on summarizing the State's evidence, which included testimony from Velasquez and Detective Black about the controlled buys on 19 December 2012 and 11 January 2013, as well as audio/visual recordings of those controlled buys, and expert testimony confirming that the substance Velasquez purchased from Easter was oxycodone.

In light of the overwhelming evidence the State introduced against Easter, we conclude that he is unable to meet his burden of showing that the prosecutor's improper statement was prejudicial. *See* Sexton, 336 N.C. at 363, 444 S.E.2d at 903. We therefore hold that the trial court did not commit reversible error by failing to intervene *ex mero motu* during the State's closing argument.

E. Easter's prior record level

Finally, Easter argues that the trial court erred in calculating his prior record level during sentencing by using his out-of-state felony conviction absent a proper showing of substantial similarity to a North Carolina offense. We agree.

"The determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal." State v. Bohler, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citation **[*33]** omitted), *disc. review denied*, ___ *N.C.* ___, *691 S.E.2d 414 (2010)*. "It is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court's determination of a defendant's prior record level to be preserved for appellate review." *Id.* (citations omitted).

Under North Carolina law, a defendant's prior record level "is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court . . . finds to have been proved in accordance with this section." N.C. Gen. Stat. § 15A-1340.14(a) (2013). Section 15A-1340.14(b) of our General Statutes specifies the number of prior record points the trial court shall assign for each class of felony and misdemeanor offense. "The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14(f). The statute further provides that a prior conviction may be proven by

> (1) [s]tipulation of the parties[, or] (2) [a]n original copy of the court record of the prior conviction[, or] (3) [a] copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of **[*34]** the Courts[, or] (4) [a]ny other method found by the court to be reliable.

Id. Section 15A-1340.14(e) governs classification of offenses from other jurisdictions and provides that,

> [e]xcept as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony, or is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. If the offender proves by the preponderance of the evidence that an offense classified as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points. If the State proves by the preponderance **[*35]** of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e). "Whether an out-of-state offense is substantially similar to a North Carolina offense is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense." *State v. Burgess, 216 N.C. App. 54, 57, 715 S.E.2d 867, 870 (2011)* (citation omitted). This Court has repeatedly held that when the trial court erroneously increases a defendant's prior record level based on an out-of-state conviction that the State has not proved by a preponderance of the evidence was substantially similar to a North Carolina offense, the case must be remanded for resentencing. *See id.*; *see also State v. Fortney, 201 N.C. App. 662, 671, 687 S.E.2d 518, 525 (2010)* (remanding for resentencing to determine whether the defendant should be a prior record level V or VI after the trial court erroneously assigned one prior record level point to an out-of-state conviction without any showing that it was substantially similar to a North Carolina offense).

In the present case, during Easter's sentencing hearing, **[*36]** the prosecutor informed the trial court that Easter was on the North Carolina sex offender registry "for a first-degree rape out of Pennsylvania in 1971. I have placed this—given this only six points and put it down as a second-degree rape in an abundance of caution, and I would argue that that's a Class D felony in North Carolina or the equivalent thereof." Easter stipulated to the existence of this out-of-state conviction, but the State did not offer any proof of its substantial similarity to any North Carolina offense. Nevertheless, the trial court assigned Easter six prior record level points based on this out-of-state conviction and determined that Easter was a level V offender with 14 prior record level points. The record before us indicates that absent this out-of-state conviction, Easter would have had only 8 prior record level points—based on North Carolina convictions for one Class F, one Class H, and one Class I felony—which would classify him as a level III offender. Because the State failed to prove that Easter's out-of-state conviction was substantially similar to a North Carolina offense, we hold that the trial court erred in its calculation of Easter's prior record **[*37]** level. *See Burgess, 216 N.C. App. at 57, 715 S.E.2d at 870*; *Fortney, 201 N.C. App. at 671, 687 S.E.2d at 525*.

We have already concluded that this case must be remanded for resentencing in light of our holding that Easter's conviction for being a sex offender unlawfully on premises in violation of *section 14-208.18(a)(2)* must be vacated. In light of its unsupported determination that Easter is a level V offender, we instruct the trial court on remand to allow the parties to offer whatever evidence is necessary in order to determine whether Easter's out-of-state conviction was substantially similar to a North Carolina offense and recalculate his prior record level accordingly.

VACATED in part; DISMISSED in part; NO PREJUDICIAL ERROR in part; REMANDED for resentencing.

Judges MCCULLOUGH and ZACHARY concur.

Report per Rule 30(e).

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State v. Randall

Court of Appeals of North Carolina

June 24, 2013, Heard in the Court of Appeals; July 2, 2013, Filed

NO. COA12-1573

Reporter
2013 N.C. App. LEXIS 700 *; 228 N.C. App. 282; 748 S.E.2d 775; 2013 WL 3356878

STATE OF NORTH CAROLINA v. MATTHEW TYSON RANDALL

Notice: THIS IS AN UNPUBLISHED OPINION. PLEASE REFER TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE SOUTH EASTERN REPORTER.

PUBLISHED IN TABLE FORMAT IN THE NORTH CAROLINA COURT OF APPEALS REPORTS.

Prior History: **[*1]** Wilson County. No. 11 CRS 55362.

Disposition: VACATED.

Counsel: Attorney General Roy Cooper, by Assistant Attorney General Laura E. Parker, for the State.

Winifred H. Dillon for Defendant.

Judges: STEPHENS, Judge. Judges MCGEE and ELMORE concur.

Opinion by: STEPHENS

Opinion

Appeal by Defendant from judgment entered 23 May 2012 by Judge Milton F. Fitch, Jr., in Wilson County Superior Court. Heard in the Court of Appeals 24 June 2013.

STEPHENS, Judge.

Defendant Matthew Tyson Randall appeals from the judgment entered upon his guilty plea to a violation of N.C. Gen. Stat. § 14-208.18(a)(1) (2011), which prohibits registered sex offenders from knowingly being present on the premises of a school or any other place used primarily for child care. Defendant contends the indictment failed to allege an essential element of the offense. We agree and vacate the judgment.

On 9 April 2012, the Wilson County grand jury returned an indictment against Defendant alleging he had violated section 14-208.18 by entering the premises of an elementary school while he was a registered sex offender. On 23 May 2012, Defendant agreed to enter an *Alford* plea to that charge in exchange for the State's dismissal of other charges. The trial court sentenced Defendant to 11 **[*2]** to 23 months imprisonment, suspended the sentence, and placed him on supervised probation for 24 months. Defendant did not give oral notice of appeal, but wrote a letter to the trial court, dated 23 May 2012, in which he purported to give notice of appeal. The letter was not file-stamped until 13 June 2012. Nevertheless, the trial court signed appellate entries on 20 July 2012.

On 11 February 2013, after Defendant had filed his brief with this Court, the State filed a motion to dismiss the appeal. The State argued that Defendant's written notice of appeal did not comply with N.C.R. App. P. 4(a) and 26(a)(1), because it was not filed within fourteen days of the entry of judgment and did not include a certificate of service. We agree with the State that Defendant's notice of appeal was not timely filed pursuant to N.C.R. App. P. 4, and that the failure to give timely notice of appeal deprives this Court of jurisdiction to hear the appeal. State v. McCoy, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (citation omitted), *appeal dismissed*, *360 N.C. 73, 622 S.E.2d 626 (2005)*. Accordingly, we allow the State's motion and dismiss this appeal.

However, in response to the State's motion to dismiss, **[*3]** Defendant has filed a petition for writ of *certiorari* seeking review of the judgment. Finding this an "appropriate circumstance[,]" we elect to exercise our discretion to reach the merits of Defendant's appeal. State v. Hammonds, 218 N.C. App. 158, 162, 720 S.E.2d 820, 823 (2012) (citation omitted); N.C.R. App. 21(a)(1) ("The writ of *certiorari* may be issued in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]") (italics added).

Here, Defendant argues the indictment failed to allege an essential element of the offense, to wit, that he had previously committed an offense under Article 7A of Chapter 14 of our General Statutes or an offense where the victim was younger than sixteen years of age. The State concedes that the indictment does not include such an allegation and is unable to distinguish this case from *State v. Harris*:

> The indictment in which the grand jury attempted to charge [the d]efendant with violating N.C. Gen. Stat. § 14-208.18 simply alleged that [the d]efendant was a registered sex offender. In view of the fact that certain individuals **[*4]** are required to register as sex offenders despite the fact that they did not commit an offense that is listed in Article 7A of Chapter 14 or involved a victim under the age of 16, an allegation that [the d]efendant was a registered sex offender does not suffice to allege all of the elements of the criminal offense enumerated in N.C. Gen. Stat. § 14-208.18. Thus, we are compelled to conclude that the indictment returned against [the d]efendant fails to allege every essential element of the criminal offense it purports to charge, thereby depriving the trial court of jurisdiction to enter judgment against [the d]efendant for his alleged violation of N.C. Gen. Stat. § 14-208.18(a). . . . [Thus,] we are required to vacate [the d]efendant's underlying felony conviction[.]

219 N.C. App. 590, 597, 724 S.E.2d 633, 638-39 (2012) (citations and quotation marks omitted). We agree that Harris is controlling and dispositive of this appeal. Accordingly, the judgment entered 23 May 2012 is

VACATED.

Judges MCGEE and ELMORE concur.

Report per Rule 30(e).

End of Document

North Carolina Court of Appeals

DANIEL M. HORNE JR., Clerk

Fax: (919) 831-3615
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Mailing Address:
P. O. Box 2779
Raleigh, NC 27602

No. 20-719

STATE OF NORTH CAROLINA

v.

JERRY LEE FAIRCLOTH

From Carteret
(18CRS53701 18CRS999)

O R D E R

The following order was entered:

The petition filed in this cause by petitioner Jerry Lee Faircloth on 24 September 2020 and designated 'Application for Writ of Habeas Corpus' is decided as follows: A writ of habeas corpus is hereby issued to Warden Shanticia Taylor of Warren Correctional Institution. Warden Taylor or other authorized representative of Warren Correctional Institution is hereby ordered to file a return in this matter with this Court on or before 7 October 2020. The return shall address petitioner's challenge to the legality of his confinement pursuant to the judgment entered in file numbers 18 CRS 999 and 18 CRS 53701 on 15 January 2020 by Joshua W. Willey, Jr. upon petitioner's convictions for sex offender unlawfully on premises and for attaining habitual felon status.

A copy of this order shall be mailed to Special Deputy Attorney General Jonathan P. Babb.

By order of the Court this the 29th of September 2020.

The above order is therefore certified to the Clerk of the Superior Court, Carteret County.

WITNESS my hand and the seal of the North Carolina Court of Appeals, this the 29th day of September 2020.

Daniel M. Horne Jr.
Clerk, North Carolina Court of Appeals

Copy to:
Mr. Sterling P. Rozear, Assistant Appellate Defender, For Faircloth, Jerry Lee
Mr. Daniel P. O'Brien, Special Deputy Attorney General, For State of North Carolina
Mr. Glenn Gerding, Appellate Defender
Mr. Erik A. Hooks, Secretary of Public Safety
Ms. Irene Finney, Assistant District Attorney, 3B
Mr. Jonathan P. Babb, Special Deputy Attorney General

North Carolina Court of Appeals

DANIEL M. HORNE JR., Clerk

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No. 20-719

STATE OF NORTH CAROLINA

v.

JERRY LEE FAIRCLOTH

From Carteret
(18CRS53701 18CRS999)

O R D E R

The following order was entered:

The petition filed in this cause by petitioner Jerry Lee Faircloth on 24 September 2020 and designated 'Application for Writ of Habeas Corpus' is decided as follows: The judgment entered upon petitioner's convictions for sex offender unlawfully on premises and for attaining habitual felon status in 18 CRS 999 and 18 CRS 53701 is vacated for the reason that the indictment charging petitioner with sex offender unlawfully on premises is insufficient to confer jurisdiction upon the superior court. Petitioner shall be immediately released from custody unless a separate basis exists to confine him.

A copy of this order shall be mailed to the Senior Resident Superior Court Judge and District Attorney of Judicial District 3B and to Appellate Defender Glenn Gerding.

By order of the Court this the 8th of October 2020.

The above order is therefore certified to the Clerk of the Superior Court, Carteret County.

WITNESS my hand and the seal of the North Carolina Court of Appeals, this the 8th day of October 2020.

Daniel M. Horne Jr.
Clerk, North Carolina Court of Appeals

Copy to:
Mr. Sterling P. Rozear, Assistant Appellate Defender, For Faircloth, Jerry Lee
Mr. Daniel P. O'Brien, Special Deputy Attorney General, For State of North Carolina
Mr. Glenn Gerding, Appellate Defender
Ms. Irene Finney, Assistant District Attorney, 3B
Mr. Jonathan P. Babb, Special Deputy Attorney General
Mr. Joseph L. Hyde, Assistant Attorney General
Hon. Joshua W. Willey, Jr, Senior Resident Superior Court Judge

Mr. Scott Thomas, District Attorney, 3B
Hon. Ken Raper, Clerk of Superior Court