

N.C.P.I.—Crim 208.80
 INDEX TO INSTRUCTIONS IN 208.81 SERIES. ASSAULT ON AN OFFICER—
 ARREST SITUATIONS.
 CRIMINAL VOLUME
 JUNE 2015
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NOTE WELL: When there is no evidence of justification or excuse, such as self defense or resisting unlawful arrest, use N.C.P.I.-Crim. 208.82. An assault on an officer arising from an arrest usually presents multiple combinations of factual issues. Six separate pattern charges are presented (N.C.P.I.-Crim. 208.81A-F), each designed to cover one fairly typical combination of disputed and undisputed factual issues. A model instruction for arrest situations, which incorporates all of the scenarios from the six patterns, is presented in N.C.P.I.-Crim 208.81. Although these patterns do not cover all the possible combinations, they may be modified to address the factual issues in most situations. Particular care in selecting the most inclusive fact situation may help in your modification process. Please see the check-list index that follows.

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When these facts are NOT in dispute	And these facts ARE in dispute	Use This Instruction
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A. Unlawful Warrantless Arrest

These instructions make two assumptions about an unlawful warrantless arrest:

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- (1) An arrestee subjected to an unlawful warrantless arrest is justified in using reasonable force to resist the arrest, and if the arrestee does so, the arrestee has a complete defense to a charge of assault on a law enforcement officer while the officer was discharging a duty of the officer's office.
- (2) An arrestee using excessive force to resist an unlawful warrantless arrest commits an assault. Such an assault is a simple assault because the officer is not "discharging a duty of the officer's office" when the officer makes an illegal warrantless arrest.

These two assumptions reflect the common law rule stated in *S. v. Mobley*, 240 N.C. 476 (1954). *S. v. Mobley* was authoritatively quoted in *S. v. Sanders*, 295 N.C. 361, 367 (1978) (homicide following illegal arrest). The Court of Appeals follows a similar rule. *S. v. Partin*, 48 N.C. App. 274, 284 (1980).

B. Arrest Pursuant to Warrant Later Held Invalid

These instructions assume that the forgoing rules change when the officer has a warrant for arrest in the officer's possession, even if the warrant is later found to be invalid. Then:

- (1) An arrestee must submit to the arrest, and is not justified in offering any resistance.
- (2) An arrestee who uses any force to resist such an arrest commits an assault.

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- (3) The assault is an assault upon a law enforcement officer while the officer is discharging a duty of the officer's office, since it is the officer's duty to carry out the orders of a judicial officer, even if they are invalid.

Although our law is not entirely clear in this area, the Court of Appeals has consistently held that an arrestee under a warrant which may be invalid should not resist, but should "submit to the arrest and raise the question of the validity of the process in an orderly way in a court having the power to make a judicial determination of the matter." *S. v. Wright*, 1 N.C. App. 479, 489 (1968); *S. v. Sparrow*, 7 N.C. App. 107 (1969) *rev'd on other grounds*, 276 N.C. 499 (1970); *S. v. Miller*, 16 N.C. App. 1 (1972); *S. v. Hammock*, 22 N.C. App. 439 (1974); *S. v. Truzy*, 44 N.C. App. 53 (1979).

In *Wright*, the Court of Appeals cited *S. v. Jones*, 88 N.C. 671 (1883), which affirmed the murder conviction of an arrestee that used deadly force to resist an arrest under a technically defective warrant. The Court rejected the argument that the defects in that warrant gave the arrestee a right to resist the arrest. *Jones* was also cited in *S. v. Gupton*, 166 N.C. 257 (1914), which reversed the manslaughter conviction of an officer who attempted to make an arrest under a technically defective warrant. The officer killed the arrestee in self-defense when the arrestee used deadly force to resist the arrest. The court said, "The deceased mistook *his* remedy. *He* should have submitted to the arrest and asserted *his* right for a better warrant at the hearing, instead of defying the officer" *State v. Gupton, supra* p. 263.

Neither *Jones* nor *Gupton* has been cited recently by the Supreme

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Court. Because deadly force was used, both cases are arguably distinguishable. More recent Supreme Court cases suggest that an arrestee under an invalid warrant may use non-deadly force to resist the arrest. *S. v. McGowan*, 243 N.C. 431 (1955); *S. v. Sparrow*, 276 N.C. 499 (1970); *S. v. Carroll*, 21 N.C. App. 530 (1974). In *McGowan*, the court concluded that the purported warrant was no more than the officer's own signed affidavit and not a warrant at all. In *Sparrow*, the court did not hold that the defendants were justified in resisting the arrest itself under the invalid warrant, but held they were justified in resisting the entry into their premises to execute the warrant, since the entry was illegal even if the warrant was valid. And in *Carroll*, which followed *McGowan* and *Sparrow*, the arrest which the defendant resisted was itself for the defendant's earlier, clearly legal, resistance to the officer's "outrageously" illegal search of the defendant's premises. None of these cases undercuts the older, more general rule that one may not forcibly resist an arrest under a warrant, even if the warrant is invalid.

C. Officer's Use of Excessive Force to Effect Arrest Under Warrant or to Effect Lawful Warrantless Arrest

These instructions make the following assumptions with respect to an officer's use of excessive force to effect an arrest under a warrant or to effect a lawful warrantless arrest.

- (1) If an officer uses excessive force to effect the arrest, the arrestee may use reasonable force to defend [himself] [herself] against the officer's excessive force, and if the arrestee does so, the arrestee has a complete defense to the charge of assaulting

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the officer.

- (2) If the arrestee uses excessive force to defend against an officer's excessive force, the arrestee is guilty of an assault.
- (3) Because the officer's use of excessive force does not by itself put the officer outside the performance of the officer's duties, the assault is still an assault on an officer, and not a simple assault as it would be if the officer were making an unlawful warrantless arrest.