Chapter 8
Criminal Pleadings

8.1 Importance of Criminal Pleadings

A. Purposes of Pleadings

Pleadings are the tools that the State uses to charge criminal offenses. In cases tried in district court and on appeal for trial de novo in superior court, pleadings include arrest warrants, criminal summonses, citations, magistrate's orders, and statements of charges. In cases initially tried in superior court, the State must obtain an indictment or information. For a discussion of the pleading in juvenile cases (the petition), see Chapter 6, Petitions and Summons, of the North Carolina Juvenile Defender Manual (Oct. 2017).

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

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

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

Proper pleadings protect important constitutional entitlements, such as the Sixth Amendment right to fair notice of the charge and the Due Process protection against double jeopardy. *See Hamling v. United States*, 418 U.S. 87 (1974) (recognizing these constitutional requirements); *Russell v. United States*, 369 U.S. 749 (1962) (to same effect); s*ee also* N.C. CONST. art. 1, §23 (right to be informed of accusation).

Also, under North Carolina law, certain pleading defects strip the court of jurisdiction to enter judgment against the defendant. *See State v. Wallace*, 351 N.C. 481 (2000) (where an indictment is invalid on its face, it deprives the court of jurisdiction); *accord State v. Lawrence*, 352 N.C. 1 (2000); *State v. Sturdivant*, 304 N.C. 293 (1981).

Thus, it is critical to examine the pleadings closely, compare the allegations in the pleadings to the State's proof at trial, and be prepared to raise timely objections to deficiencies in the pleadings.

B. Chapter Summary

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

C. References

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

JEFFREY B. WELTY, ARREST WARRANT AND INDICTMENT FORMS (UNC School of Government, 2019 ed.) (contains form language for charging criminal offenses)

Jessica Smith, *North Carolina Sentencing after* Blakely v. Washington *and the* Blakely *Bill* (UNC School of Government, Sept. 2005)

Daniel Shatz, *Beyond Blakely* (Spring Public Defender Conference, May 2006)

Jeff Welty, *North Carolina's Habitual Felon, Violent Habitual Felon, and Habitual Breaking and Entering Laws*, ADMINISTRATION OF JUSTICE BULLETIN No. 2013/07 (UNC School of Government, Aug. 2013); *see also infra* § 8.4E, Habitual Felon Pleading Requirements.

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

Jessica Smith, CRIMINAL PROCEEDINGS BEFORE NORTH CAROLINA MAGISTRATES (UNC School of Government, 2014) (summarizes criminal procedure for magistrates, including criminal process and pleadings)

Robert L. Farb, *The "Or" Issue in Criminal Pleadings, Jury Instructions, and Verdicts; Unanimity in Jury Verdict* (UNC School of Government, Feb. 2010) (discusses disjunctive pleadings and jury instructions); *see also infra* § 8.6G, Disjunctive Pleadings.

Robert L. Farb, *Criminal Pleadings, State's Appeal from District Court, and Double Jeopardy Issues* (UNC School of Government, Feb. 2010)

8.2 Misdemeanors Tried in District Court

A. Process as Pleading

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

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

B. Requirements for Misdemeanor Pleadings

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

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

G.S. 15A-924(a) also requires in felony cases that the State allege in the pleading certain aggravating factors if it intends to use them. *See infra* § 8.7B, Notice and Pleading Requirements after *Blakely*. This requirement does not apply to misdemeanor impaired driving cases tried in district court; however, if the defendant is tried for an impaired driving offense in superior court, including in a trial de novo following appeal of a district court conviction, the State must give written notice of its intent to use any aggravating or grossly aggravating factors. G.S. 20-179(a1)(1).

Unlike other misdemeanor pleadings, citations are not subject to the requirements of G.S. 15A-924 but are instead governed by the more relaxed requirements of G.S. 15A-302. *State v. Jones*, 371 N.C. 548 (2018) (citation that omitted several elements valid to confer jurisdiction; citations not subject to G.S. 15A-924). Courts may also be more lenient in permitting amendments or tolerating technical mistakes in misdemeanor pleadings than in superior court pleadings. (For a discussion of application of these requirements in

superior court, see *infra* § 8.4C, Sufficiency of Pleadings.) Nevertheless, every pleading must be sufficient to serve the basic purposes listed at the beginning of this chapter, and pleadings that fail to do so may be challenged on statutory and constitutional grounds. Common errors in district court are addressed *infra* in § 8.2F, Common Pleading Defects in District Court; errors in superior court are addressed *infra* in § 8.5, Common Pleading Defects in Superior Court.

Pleading rules for certain offenses. There are specific statutory pleading requirements for some offenses, such as larceny, forgery, and receiving stolen goods. *See* G.S. 15-148 through G.S. 15-151. Some examples are discussed *infra* in § 8.2F, Common Pleading Defects in District Court and § 8.5C, Pleading Does Not State Required Elements of Crime.

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

Probable cause. A criminal charge must be supported by probable cause that a crime was committed and that the person in question committed the crime. Probable cause must exist to support each element of the offense and must be established by an affidavit or by oral testimony under oath or affirmation. JESSICA SMITH, CRIMINAL PROCEEDINGS BEFORE MAGISTRATES at 9 (UNC School of Government, 2014).

C. Types of Misdemeanor Pleadings

Citation. A citation is a written charge issued by a law enforcement officer. A principal difference between a citation and other forms of process is that a law enforcement officer rather than a judicial official issues it. An officer may issue a citation for any misdemeanor or infraction for which the officer has probable cause. *See* G.S. 15A-302(b). An officer may arrest a person for a misdemeanor if grounds exist for a warrantless arrest under G.S. 15A-401(b) but has no authority to arrest for an infraction. *See* G.S. 15A-1113; ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 88 (5th ed. 2016). A person arrested without a warrant must be taken before a magistrate. If the magistrate finds probable cause that a crime has been committed, the magistrate may issue a magistrate's order, discussed below. If a magistrate issues a magistrate's order by signing a citation or issuing a separate magistrate's order for the offense alleged in the citation, the special rules for citations discussed here do not apply.

The North Carolina courts have held that because a citation is typically prepared by an officer on the scene, citations are not subject to the pleading requirements of G.S. 15A-

924 but are instead governed by the lesser requirements of G.S. 15A-302. *State v. Jones*, 371 N.C. 548 (2018). Under G.S. 15A-302(c), the citation must:

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

Unlike the requirements of G.S. 15A-924(a), citations need only "identify" the crime charged and need not recite each element of the offense. In *Jones*, the court found a citation sufficient that alleged that a motorist violated G.S. 20-138.7(a) by having an open container after drinking. The court found that the citation adequately put the defendant on notice of the crime charged even though it did not allege every element of the offense (operating a motor vehicle when having an open container of alcohol while alcohol remained in the driver's system).

Under G.S. 15A-922(c), the defendant has the right to object to being tried on a citation. Upon the defendant's objection, the prosecution must prepare a separate pleading. Usually the new pleading is a statement of charges, discussed below. Objecting to trial on a citation may not be advisable because the objection gives the prosecution an opportunity before trial to correct errors or add new charges in a statement of charges. If the defendant wishes to object to being tried on a citation, he or she must do so in district court; the objection may not be raised for the first time in superior court on a trial de novo. *See State v. Jones*, 371 N.C. 548 (2018); *State v. Monroe*, 57 N.C. App. 597 (1982).

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

Magistrate's order. A magistrate's order is used when a person has been arrested without a warrant. A magistrate may issue an order for any criminal offense (felony or misdemeanor) for which the magistrate finds probable cause. *See* G.S. 15A-511(c) (describing procedures magistrate must follow). If an officer issues a citation for a misdemeanor and arrests the person, the magistrate may convert the citation into a magistrate's order by signing the citation, or he or she may prepare a separate magistrate's order on a form similar to an arrest warrant. A magistrate sometimes will issue an arrest warrant instead of a magistrate's order when a person has been arrested without a warrant. Although technically improper (since the person already is under arrest), the error is probably inconsequential. *See generally State v. Matthews*, 40 N.C.

App. 41 (1979) (failure of magistrate to issue magistrate's order after defendant was cited and arrested for traffic offenses did not render arrest unlawful).

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

North Carolina law expresses a preference for the use of a criminal summons over an arrest warrant. *See* G.S. 15A-304(b)(1); Official Commentary to G.S. 15A-303, G.S. 15A-304 (expressing preference for summons when circumstances do not necessitate taking person into custody). Further, the law ordinarily requires a summons instead of a warrant for citizen-initiated charges. G.S. 15A-304(b)(3) states that where the information supporting probable cause is supplied by someone other than a sworn law enforcement officer, the judicial official must issue a criminal summons instead of an arrest warrant except where: (1) there is corroborating evidence from a law enforcement officer or at least one other disinterested witness; (2) the judicial official determines that having the complainant obtain investigative services from law enforcement would constitute a substantial burden to the complainant; or (3) there is substantial evidence that the accused should be taken into custody based on the factors in G.S. 15A-304(b)(1).

Legislative note: Effective December 1, 2017, G.S. 15A-304 was amended for citizen-initiated charges to require a written affidavit in support of probable cause where the complainant is not a law enforcement officer. 2017 N.C. Sess. Laws Ch. 176 (S 384). Effective October 1, 2018, the requirement of a written affidavit from a citizen complainant was repealed. 2018 N.C. Sess. Laws 40 (S 168). Some districts may still require written affidavits for citizen-initiated charges. Required or not, affidavits are often used in citizen-initiated cases as a matter of practice. The affidavit will normally be placed in the court file and thus available for review. Because affidavits contain sworn statements of the complainant or witnesses, it is important for defense counsel to obtain and review any affidavits in the file before trial or plea negotiations.

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

Statement of charges. A misdemeanor statement of charges is a criminal pleading prepared by the prosecutor, charging a misdemeanor. A statement of charges supersedes all previous pleadings in the case. Only those charges alleged in the statement of charges

(not those in the original warrant or other process) may proceed to trial. *See* G.S. 15A-922(a).

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

After arraignment in district court, the prosecutor may file a statement of charges only if the defendant objects to the sufficiency of the pleading (for example, an arrest warrant), the judge finds the pleading insufficient, and the statement of charges does not change the nature of the offense. *See* G.S. 15A-922(e); *State v. Capps*, ___ N.C. App. ___, 828 S.E.2d 733, *rev. granted*, 372 N.C. 358 (2019); *State v. Wall*, 235 N.C. App. 196 (2014). In other words, without an objection from the defendant, the prosecution has no authority to issue a statement of charges after arraignment in district court (although the prosecution may be allowed to amend the existing pleading under G.S. 15A-922(f) if the amendment does not change the nature of the offense, discussed in D, below). For more information on the use of statements of charges, see Jeff Welty, *Court of Appeals "Capps" Prosecutors' Use of Statements of Charges in Superior Court*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 3, 2019). [The North Carolina Supreme Court reversed the Court of Appeals' decision in *Capps* on June 5, 2020, after this chapter was completed.]

A judge's order finding a pleading insufficient must set a time limit on filing a statement of charges—ordinarily, three working days unless the judge determines that a longer period is justified. The order also must provide that if a statement of charges is not filed within the time allowed, the charges must be dismissed. *See* G.S. 15A-922(b)(3). If the prosecutor files a statement of charges, the defendant is entitled to a continuance of at least three working days unless the judge finds that a continuance is not required. *See* G.S. 15A-922(b)(2).

If permissible, a statement of charges adding new offenses or amending charges that are insufficient must be filed within the statute of limitations, ordinarily two years from the date of offense. *See State v. Madry*, 140 N.C. App. 600 (2000); *State v. Caudill*, 68 N.C. App. 268 (1984). Under the former version of G.S. 15-1, dismissal of a fatally defective misdemeanor pleading after two years from the date of offense barred the State from proceeding on a new pleading. Current G.S 15-1 allows the State one additional year after dismissal of a misdemeanor pleading for a fatal defect in which to recharge the defendant with the same offense. For more information on the statute of limitations, see *supra* § 7.1A, Statute of Limitations for Misdemeanors. *See also* G.S. 15-1(b) (establishing ten-year statute of limitations for certain misdemeanors against children committed on or after December 1, 2019).

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

D. Amendment of Misdemeanor Pleadings

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

A prosecutor may prepare a statement of charges that changes the nature of the offense alleged in a warrant or other process, but only before arraignment and as permitted by the applicable statute of limitations. *See* G.S. 15A-922(d); *State v. Bryant*, ___ N.C. App. ___, 833 S.E.2d 641 (2019); Shea Denning, *Changing Charges after State v. Bryant*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Oct. 9, 2019); *see also supra* § 8.2C, Types of Misdemeanor Pleadings.

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

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

Motion to dismiss for defective pleading. The remedy for a defective pleading is a motion to dismiss under G.S. 15A-952. *See* G.S. 15A-924(e). A motion to dismiss is the equivalent of a motion to quash under pre-15A practice. *See State v. Brown*, 81 N.C. App. 281 (1986). Some defects, including the failure to include an element of the offense or the misidentification of the victim, may strip the district court of jurisdiction over the offense. A defendant may move to dismiss for a jurisdictional defect "at any time." *See* G.S. 15A-952(d); G.S. 15A-954(c); *see also State v. Wallace*, 351 N.C. 481, 503 (2000) ("where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court").

Generally, defense counsel should move to dismiss for a defective pleading at or after arraignment in district court. Thus, when the judge or prosecutor calls the case and asks the defendant how he or she pleads, counsel may say, "Mr. Jones pleads not guilty and moves to dismiss the pleading as fatally defective because [state ground]." Unless the defect concerns a matter on which an amendment is allowable, the court "must" dismiss. *See* G.S. 15A-924(e). If the motion to dismiss is made before arraignment, the State can correct the error by filing a statement of charges. *See supra* § 8.2C, Types of Misdemeanor Pleadings. If counsel does not move to dismiss until after the State has presented its evidence, the judge may be less receptive to the motion; the judge may be more invested in the case, having spent time on it and heard evidence of guilt. Ordinarily, a fatally defective pleading that fails to confer jurisdiction on the court does not implicate double jeopardy concerns—because the court never had jurisdiction, the defendant was never placed in jeopardy. The defendant may therefore be retried on a new pleading (as long as the new pleading issues within the statute of limitations), regardless of whether the matter was dismissed before, during, or after trial. *See infra* "Effect of dismissal on subsequent charges" in this subsection E (discussing circumstances in which double jeopardy may apply).

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

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

A challenge to a variance between pleading and proof should be raised by a motion to dismiss for insufficient evidence at the close of the State's evidence and at the close of all of the evidence. *State v. Faircloth*, 297 N.C. 100, 107 (1979) (explaining that a fatal variance between the indictment and the proof is properly raised by a motion to dismiss). When moving to dismiss, counsel should specifically allege a fatal variance between the pleading and proof as to each charge to alert the judge to the nature of the problem. For example, if the pleading charges assault on an officer, and the proof shows resisting an officer but not an assault, move to dismiss for insufficient evidence of assault and for fatal variance between the crime alleged in the charging instrument and the State's evidence. In superior court, the failure to specifically assert fatal variance when moving to dismiss waives the error on appeal. *See State v. Mason*, 222 N.C. App. 223 (2012) (by failing to assert fatal variance as a basis for his motion to dismiss in superior court, defendant failed to preserve the argument for appellate review).

A related problem arises when the pleading charges one offense and the prosecution seeks conviction of a greater offense—for example, the pleading charges simple assault and the prosecution seeks to prove assault with a deadly weapon. The prosecution is bound by its pleading, and defense counsel should object to judgment on the greater offense. *See, e.g.*, *State v. Moses*, 154 N.C. App. 332 (2002) (State could not amend indictment alleging misdemeanor eluding arrest to add allegation of aggravating factor and charge felony eluding arrest; amendment substantially altered charge).

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

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

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

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

G.S. 15-1 provides a one-year grace period for refiling when a pleading is dismissed as fatally defective. Former G.S. 15-1 provided that if an indictment obtained within the statute of limitations period was found to be defective, the State had one year from the time it abandoned the indictment to correct the error and re-indict the defendant. This provision applied only to defective indictments; it did not apply to defective warrants or other pleadings. *Madry*, 140 N.C. App. at 603. Under the current version of G.S. 15-1, if any pleading is found defective, so that no judgment may be entered on it, the State has one year from the time of the dismissal of the flawed pleading to recharge the defendant with the same offense in a new pleading.

F. Common Pleading Defects in District Court

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

Failure to charge offense or element of offense. Like other pleadings, most misdemeanor pleadings must state all essential elements of the crime. *See* G.S. 15A-924(a)(5); *State v. Palmer*, 293 N.C. 633, 639 (1977) (both indictments and warrants must "allege lucidly and accurately all the essential elements of the offense endeavored to be charged" (citation omitted)); *State v. Camp*, 59 N.C. App. 38 (1982) (stating these requirements for warrants); *see also State v. Cook*, 272 N.C. 728 (1968) (reference to statute allegedly violated was insufficient to cure failure of warrant to allege element of offense of driving without a license, namely, that the offense was committed on a public highway). *But cf. State v. Martin*, 13 N.C. App. 613 (1972) (warrant was not fatally defective where it failed to allege highway was a "public" highway). In *State v. Jones*, 371 N.C. 548 (2018), the Supreme Court found an exception to the general rule that a pleading must state all essential elements of the crime for offenses charged by citation, holding that a citation is sufficient if it identifies and puts the defendant on sufficient notice of the crime charged. *See supra* "Citation" in § 8.2C, Types of Misdemeanor Pleadings.

If an essential element is missing, or if the charging language is too vague to identify an offense clearly, the defendant should move to dismiss. Any attempt to revise the charge may constitute a change in the nature of the offense and therefore be impermissible. *See State v. Moore*, 162 N.C. App. 268 (2004) (in pleading for possession of drug paraphernalia, State must apprise defendant of item State contends was drug paraphernalia; State could not amend indictment to change alleged item, which would constitute substantial alteration of charge); *State v. Madry*, 140 N.C. App. 600 (2000) (warrant that charged "taking bears with bait" too vague to charge offense where statute prohibited possessing, selling, buying, or transporting bears); *State v. Wells*, 59 N.C. App. 682 (1982) (citation that charged resisting arrest was fatally defective for omitting duty that officer was performing); *State v. Wallace*, 49 N.C. App. 475 (1980) (citation that

charged unlawfully operating vehicle for purpose of hunting deer with dogs did not clearly and properly charge violation of deer hunting statute); *State v. Powell*, 10 N.C. App. 443 (1971) (the words "resist arrest" in citation were insufficient to charge offense). *But see State v. Hill*, 262 N.C. App. 113 (2018) (indictment for assault that omitted the word "assault" from the allegation was sufficient where the pleading identified the correct offense and statute and alleged willful injury of the victim by the defendant); *State v. Mather*, 221 N.C. App. 593 (2012) (when charging carrying a concealed gun under G.S. 14-269, the exception in G.S. 14-269(a1)(2) (having a permit) is a defense, not an essential element, and need not be alleged in the indictment); *State v. Ballance*, 218 N.C. App. 202, (2012) (statute governing the taking of black bears with bait does not create a separate offense for each type of bait listed; the crime may be established by evidence showing any one of various alternative elements); *State v. Bollinger*, 192 N.C. App. 241 (2008) (description of weapon in pleading for carrying concealed weapon was surplusage), *aff'd per curiam*, 363 N.C. 251 (2009). For further discussion of these principles, see Jonathan Holbrook, *Not Quite Defective Indictments*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Nov. 13, 2018).

Misidentification of victim. A pleading must correctly identify the victim of the alleged offense. Failure to identify the victim constitutes grounds to dismiss. *See State v. Powell*, 10 N.C. App. 443 (1971) (failure to name officer who was victim of assault on officer rendered warrant invalid); *see also State v. Banks*, 263 N.C. 784 (1965) (warrant charging peeping into room occupied by female was fatally defective because it failed to name female); *State v. Schuler*, 263 N.C. App. 366 (2018) (indictment that used "Victim #1" to identify victim fatally defective); *In re M.S.*, 199 N.C. App. 260 (2009) (juvenile petitions alleging first-degree sexual offense that did not name the victim or give the victim's initials, but simply stated "a child under the age of 13 years," were fatally defective and deprived the court of jurisdiction to accept the juvenile's admission of delinquency); *State v. McKoy*, 196 N.C. App. 650 (2009) (use of initials "RTB" with no periods to identify victim upheld in second-degree rape and sexual offense case).

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

A misspelling or incorrect order in the victim's name, if it does not mislead the defendant as to the identity of the victim, will not provide grounds for dismissal. *See, e.g., State v. Williams*, 269 N.C. 376 (1967) (indictment sufficient where victim's name "Madeleine" was stated in indictment as "Mateleane"); *State v. Hewson*, 182 N.C. App. 196 (2007) (no error in allowing State to amend murder indictment to change victim's name from "Gail Hewson Tice" to "Gail Tice Hewson"; no indication defendant was surprised or confused

about identity of victim); *State v. McNair*, 146 N.C. App. 674 (2001) (no error where State was allowed to change "Donald" to "Ronald" on two of seven indictments; defendant could not have been surprised or misled); *State v. Wilson*, 135 N.C. App. 504 (1999) (no fatal variance between indictment naming victim "Peter M. Thompson" and evidence at trial indicating victim's name was "Peter Thomas" where defendant's testimony revealed that he was aware of the identity of the victim); *State v. Isom*, 65 N.C. App. 223 (1983) (indictment adequate that named victim as "Eldred Allison" when actual name was "Elton Allison"; names were sufficiently similar to fall within doctrine of *idem sonans*, which means sounds the same).

For a further discussion of these principles, see Smith, *Criminal Indictment*, at 9–12; Shea Denning, *Naming the Victim of a Sexual Assault*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 12, 2019); Jessica Smith, *What's in a Name?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jan. 17, 2012); Jeff Welty, *Use of Initials in Charging Documents*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jan. 23, 2009).

Allegation of ownership of property for larceny and related offenses. Generally, a pleading for theft offenses must correctly name the owner of the stolen property. *See State v. Greene*, 289 N.C. 578 (1976) (indictment in larceny case must allege person who has property interest in property stolen, and State must prove that alleged person is owner); *State v. Biller*, 252 N.C. 783 (1960) (judgment arrested where superior court judge denied defendants' motion to quash warrants that did not sufficiently name owner of stolen property) (per curiam); *State v. Thompson*, 6 N.C. App. 64 (1969) (warrant charging theft from "Belk's Department Store" was fatally defective for failure to allege owner of property was either a natural person or a legal entity capable of owning property). *But see State v. Brawley*, 370 N.C. 626 (2018) (indictment alleged victim as "Belk's Department Stores, an entity capable of owning property"; State need not identify specific form of legal entity as long as there is some allegation that names the entity and identifies it as an entity capable of owning property). The requirement that the property owner be correctly identified does not apply in shoplifting cases. *See State v. Wooten*, 18 N.C. App. 652 (1973) (State need not allege corporate status of store in shoplifting prosecution).

The failure to identify the owner, or to identify an entity capable of owning property, can make the pleading defective and subject to dismissal. *See, e.g.*, *State v. Woody*, 132 N.C. App. 788 (1999) (indictment alleging conversion was fatally defective and could not support conviction because it failed to allege that victim, P & R Unlimited, was a legal entity capable of owning property); *State v. Hughes*, 118 N.C. App. 573 (1995) (error to allow amendment to indictment that changed alleged victim of embezzlement from individual, "Mike Frost, President of Petroleum World, Inc.," to corporation, "Petroleum World, Inc."). *But see State v. Campbell*, 368 N.C. 83 (2015) (indictment identifying property owner as "Manna Baptist Church" was sufficient to plead an entity capable of ownership; the word "church" sufficiently pleads an entity capable of ownership, overruling previous cases holding otherwise); *State v. Ellis*, 368 N.C. 342 (2015) (public universities are authorized by statute to hold property in North Carolina; injury to personal property indictment that alleged North Carolina State University and NCSU

High Voltage Distribution as victims was sufficient); *State v. Wooten*, 18 N.C. App. 652 (1973) (State need not allege corporate status of store in shoplifting prosecution).

Misidentification of the rightful owner is grounds for dismissal if the State's evidence on ownership varies from the allegations in the pleading. *See State v. Eppley*, 282 N.C. 249 (1972) (fatal variance when person named in indictment as owner of shotgun testified that gun was property of his father). *But cf. State v. Warren*, 225 N.C. App. 791 (2013) (no fatal variance in embezzlement case where indictment named Smokey Park Hospitality, Inc., d/b/a Comfort Inn; while evidence showed Smokey Park Hospitality never owned the hotel, it acted as a management company and ran the business and thus had a special property interest in the embezzled money); *State v. Holley*, 35 N.C. App. 64 (1978) (no fatal variance where larceny indictment named owner of gun and lawful possessor while evidence was presented only as to identity of lawful possessor); *State v. Robinette*, 33 N.C. App. 42 (1977) (no fatal variance where indictment alleged ownership of stolen property in father, but evidence showed that it belonged to his minor child and was kept in the father's residence where father had custody and control of minor child's property).

Some offenses involving theft do not require that the owner of the property be alleged. *See State v. Thompson*, 359 N.C. 77 (2004) (indictment for armed robbery need not name subject of robbery); *State v. Jones*, 151 N.C. App. 317 (2002) (not necessary to allege name of owner of goods in prosecution for possession of stolen goods); *State v. Burroughs*, 147 N.C. App. 693 (2001) (indictment for robbery need not name actual legal owner of property); *State v. Willis*, 127 N.C. App. 549 (1997) (evidence of ownership not required for armed robbery prosecution; State need only show the property was taken from the presence of the victim); *see also State v. Spivey*, 368 N.C. 739 (2016) (indictment for injury to real property need not state name of owner but instead need only identify the real property at issue); *State v. Wooten*, 18 N.C. App. 652 (1973) (State need not allege corporate status of store in shoplifting prosecution).

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

For a further discussion of alleging ownership in larceny and other cases, see Smith, *Criminal Indictment*, at 32–38; *see also* Shea Denning, *Brawley, Belk's, and Charging Crime in Modern, Southern Style*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG, (May 9, 2018).

Misidentification of defendant. All criminal pleadings must name or otherwise identify the defendant. *See* G.S. 15A-924(a)(1). Omission of the defendant's name constitutes grounds to dismiss. *See State v. Simpson*, 302 N.C. 613 (1981) (failure to name or otherwise identify defendant was fatal defect in indictment). A criminal pleading that identifies the defendant by a nickname or street name may be acceptable. *See State v. Spooner*, 28 N.C. App. 203 (1975) (pleading that named Michael Spooner as "Mike Spooner" acceptable); *State v. Taylor*, 61 N.C. App. 589 (1983) (warrant that included only defendant's street name "Blood" was not invalid; warrant had correct address, and

State knew defendant's street name only); *see also State v. Young*, 54 N.C. App. 366 (1981) (in superior court, defendant waived objection to misnomer regarding his name by entering plea and going to trial without making objection), *aff'd*, 305 N.C. 391 (1982).

Date, time, and place of offense. A pleading must allege the time and place of an offense with enough specificity to enable the defendant to defend against the charge. *See* G.S. 15A-924(a)(3), (a)(4); *see also State v. Smith*, 267 N.C. 755 (1966) (per curiam) (pleading alleging breaking and entering was fatally defective where it did not identify building with particularity). *But see State v. McCormick*, 204 N.C. App. 105 (2010) (no fatal variance where burglary indictment alleged defendant broke and entered house located at 407 Ward's Branch Road, Sugar Grove Watauga County" but evidence at trial was house number was 317).

A defendant who objects to the lack of specificity in the date of a pleading must demonstrate that the vagueness impaired his or her defense. *See* G.S. 15A-924(a)(4) ("Error as to a date or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice."); G.S. 15-155 ("No judgment upon any indictment . . . shall be stayed or reversed . . . for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly . . . .").

The N.C. Supreme Court has stated that the requirement of temporal specificity diminishes in cases of sexual offenses on children; it remains a requirement, however. *See State v. Everett*, 328 N.C. 72 (1991) (child sex offense indictment where date could have been February or March was not too vague to support conviction); *State v. Custis*, 162 N.C. App. 715 (2004) (explaining that a variance as to time, even in child sexual abuse cases, is material and of the essence if the variance deprives the defendant the opportunity to adequately present a defense).

The North Carolina courts have often permitted amendments of pleadings to correct errors in the date or place of an offense. *See*, *e.g.*, *State v. Grady*, 136 N.C. App. 394 (2000) (allowing amendment of indictment to change address of dwelling where controlled substance was used); *State v. Campbell*, 133 N.C. App. 531(1999) (allowing amendment of dates alleged in indictment where defendant was not misled as to nature of charges).

However, variance between the State's proof as to the date or time of an offense and the date and time alleged in the pleading is material, and grounds for dismissal of the charge, when it deprives the defendant of an opportunity to present his or her defense, such as when the defendant relies on an alibi defense. *See State v. Stewart*, 353 N.C. 516 (2001) (where defendant presented alibi evidence for the entire period of time alleged in the indictment and the State's evidence showed no specific conduct during that date range, defendant was prejudiced and the motion to dismiss should have been allowed); *State v. Christopher*, 307 N.C. 645 (1983) (fatal variance where defendant prepared alibi defense based on conspiracy to commit larceny indictment alleging a specific date, but State

offered evidence showing crime might have occurred over a three-month period); *State v. Avent*, 222 N.C. App. 147 (2012) (no error to allow State to amend date of offense from December 28, 2009, to December 27, 2009 in first-degree murder indictment; defendant was not deprived of his opportunity to present alibi defense because alibi testimony covered Dec. 27, and other pieces of State's evidence cited Dec. 27 date).

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

Resist, obstruct, or delay. "A warrant or bill of indictment charging a violation of G.S. 14-223 must identify the officer by name and indicate the official duty he was discharging or attempting to discharge, and should point out, in a general way at least, the manner in which the defendant is charged with having resisted, delayed, or obstructed such officer." *State v. Smith*, 262 N.C. 472, 474 (1964); *see also State v. Wells*, 59 N.C. App. 682 (1982) (citation that charged resisting arrest was fatally defective for omission of duty officer was performing); *State v. Powell*, 10 N.C. App. 443 (1971) (the words "resist arrest" in citation were insufficient to charge offense).

Assault on officer. In contrast with a prosecution for resisting arrest, in a prosecution for assault on an officer under G.S. 14-33(c)(4) it is not necessary to allege the specific duty being performed by the officer at the time of the assault. *See State v. Noel***,** 202 N.C. App. 715 (2010) (indictments alleging malicious conduct by a prisoner and assault on a governmental official do not have to allege the duty officer was performing; where the duty was alleged it was surplusage and variance between allegations and proof was not material); *State v. Bethea*, 71 N.C. App. 125 (1984) (sufficient to state that officer was performing a duty of his or her office when the assault occurred; not necessary to allege the particular duty in the indictment).

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

officer). For a further discussion of this issue, see *supra* "Misidentification of Victim" in this subsection F.

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

Duplicity. Each separate offense charged against a defendant must be pled in a separate pleading or a separate count within a single pleading. *See* G.S. 15A-924(a)(2). A pleading may be challenged for duplicity if it contains more than one charge in a single count. When a pleading is challenged on this ground, the State must elect between the offenses charged; if the State fails to elect, the court may dismiss the entire count. *See* G.S. 15A-924(b); *State v. Rogers*, 68 N.C. App. 358 (1984) (with leave of court, prosecutor may amend indictment to state in separate counts charges that were initially alleged in single count); *State v. Beaver*, 14 N.C. App. 459 (1972) (stating same principle but finding that in circumstances presented defendant was entitled to have prosecutor elect). The problem of duplicity often arises where the initial pleading is a Uniform Citation. (Sometimes a magistrate will sign the citation, converting it to a magistrate's order). A Uniform Citation, AOC-CR-500, contains two counts *only*. The first count (numbers 1 through 16 on the citation) may be used to charge one offense only; and the second count (number 17) likewise may charge one offense only. If the citation charges more than one offense in either count, the defendant may move to require the State to elect a single offense alleged in the particular count.

Ordinarily in district court, defendants may make motions addressed to the pleadings at or after arraignment. *See* G.S. 15A-953 (motions in district court ordinarily should be made upon arraignment or during trial); *see also supra* § 8.2E, Timing and Effect of Motions to Dismiss in District Court. To be safe, however, counsel should make a duplicity motion before the defendant enters a plea. *See* G.S. 15A-924(b) (duplicity motion must be "timely"); *cf.* G.S. 15A-952(b)(6) (in superior court, certain motions addressed to pleadings must be made before arraignment); *State v. Williamson*, 250 N.C. 204 (1959) (in pre-15A case involving appeal for trial de novo in superior court, court states that motion to quash for duplicity is waived if not made before defendant enters plea).

Prior convictions of charged offense and other enhancements. North Carolina law raises a number of offenses to a higher class, subject to increased punishment, based on the defendant's prior convictions of the charged offense. *See, e.g.*, G.S. 14-72(b)(6) (habitual misdemeanor larceny); G.S. 14-33.2 (habitual misdemeanor assault); G.S. 14-

72.1 (shoplifting); G.S. 14-107 (worthless check); G.S. 14-56.1 (breaking into a coin operated machine); G.S. 90-95(a)(3) (possession of marijuana). To subject the accused to the higher penalty, North Carolina law requires generally that pleadings allege all essential elements of an offense (G.S. 15A-924(a)(5)) and requires specifically that prior convictions raising an offense to a higher class be alleged. *See* G.S. 15A-928; *State v. Miller*, 237 N.C. 427 (1953); *State v. Williams*, 21 N.C. App 70 (1974). *But cf. State v. Alston*, 233 N.C. App. 152 (2014) (requirements of G.S. 15A-928 do not apply to prosecutions for possession of firearm by felon).

Practice note: G.S. 15A-928 contains procedures specific to superior court for alleging and proving prior convictions that increase an offense to a higher class. Essentially, the statute requires that prior convictions be alleged in a separate indictment or other pleading to limit disclosure of the information to the jury during a trial of the current offense. The requirement of a separate pleading does not apply to cases tried in district court. The North Carolina Supreme Court also has held that that the requirements of G.S. 15A-928 calling for a separate pleading or count are not jurisdictional even in superior court, and the failure to follow those requirements is not a fatal defect. *See State v. Brice*, 370 N.C. 244 (2017); *cf. State v. Stephens*, 188 N.C. App. 286 (2008) (charge against defendant was not substantially altered where State amended indictment for stalking by striking the allegation of the prior conviction, which was included in single count of indictment with current offense, and making allegation into separate count in indictment in compliance with the requirements of G.S. 15A-928).

The pleading, whether in a district court or superior court case, still must allege any prior convictions that raises an offense to a higher class because North Carolina law requires generally that offense elements be alleged and G.S. 15A-928 requires specifically that such convictions be alleged. G.S. 15A-928(d) implicitly recognizes this basic pleading requirement in cases tried in district court, stating that on appeal for a trial de novo the State must replace the district court pleading with superseding statements of charges alleging separately the current offense and any prior convictions.

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

8.3 Misdemeanor Appeals

A. Scope of Jurisdiction on Appeal

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

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

The superior court ordinarily does not have jurisdiction over any offenses that are not strictly lesser included offenses of the conviction below. *See State v. Hardy*, 298 N.C. 191 (1979) (defendant was charged with and convicted of assault on officer in district court; on appeal, superior court did not have jurisdiction to try defendant for resisting arrest); *State v. Caldwell*, 21 N.C. App. 723 (1974) (defendant was charged with and convicted of assault on officer in district court; on appeal, superior court did not have jurisdiction to try defendant for assault by pointing gun). If the prosecution wants to charge a new misdemeanor, it must start again in district court except in the rare circumstance in which the grand jury initiates a misdemeanor prosecution by presentment in superior court. (Presentments are discussed *infra* in § 8.4B, Types of Pleadings and Related Documents.) For a discussion of potential Double Jeopardy and Due Process concerns involved in charging greater offenses in superior court following a district court proceeding, see *infra* § 8.6, Limits on Successive Prosecution.

Requirement of conviction. To confer appellate jurisdiction on the superior court, the defendant ordinarily must have been convicted of the offense charged in district court; it is not enough that a defendant was charged with the offense in district court. *See State v. Reeves***,** 218 N.C. App. 570 (2012) (where defendant was charged with impaired driving and reckless driving and State took voluntary dismissal of reckless driving in district court that was not pursuant to a plea agreement, reckless driving charge was not properly before superior court on appeal for trial de novo); *State v. Guffey*, 283 N.C. 94 (1973) (district court judgment indicated that defendant was convicted of impaired driving and was silent on whether defendant was convicted of charge of driving while license revoked; superior court did not have jurisdiction over charge of driving while license

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

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

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

B. Required Pleadings in Superior Court

The pleading in district court may be used as the pleading in superior court on a trial de novo. *See State v. Chase*, 117 N.C. App. 686 (1995) (information or indictment not required on appeal of misdemeanor because the case was not initiated in superior court within meaning of G.S. 15A-923(a)). Although the prosecution need not obtain an indictment or information, the warrant or other district court pleading still must meet the rules for proper pleadings (discussed *supra* in § 8.2, Misdemeanors Tried in District Court). *See also State v. Jones*, 157 N.C. App. 472 (2003) (like other pleadings, citation may not be read to jury). Thus, the defendant may move to dismiss in superior court if the warrant or other pleading is defective. *See State v. Biller*, 252 N.C. 783 (1960) (judgment arrested where superior court judge erroneously denied defendants' motion to quash fatally defective warrants) (per curiam); *State v. Madry*, 140 N.C. App. 600 (2000) (motion to dismiss for failure to charge an offense was permissible in superior court on appeal for trial de novo); *see also* G.S. 15A-952(d) (defendant may move to dismiss for a jurisdictional defect "at any time"). *But see State v. Jones*, 371 N.C. 548 (2018)

(defendant has right to object to being tried on citation and require that offense be charged in new pleading; however, defendant's failure to object in district court, where he was initially tried, precluded him from objecting to being tried on citation in superior court). [In the authors' opinion, if a citation is fatally defective and fails to meet even the more relaxed requirements for citations, discussed *supra* in "Citation" in § 8.2C, Types of Misdemeanor Pleadings, the defendant still may object to the sufficiency of the citation in superior court whether or not the defendant objected in district court; in that instance the defendant is not objecting to being tried on a citation but rather objecting to the sufficiency of the allegations. Further, the defendant may be able to challenge the sufficiency of the citation as a matter of basic due process-notice requirements under the state and federal constitution, an issue not specifically argued in *Jones*.]

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

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

In an impaired driving case, if the defendant appeals to superior court and the State intends to use an aggravating or grossly aggravating factor, the State must provide the defendant with written notice no later than 10 days before trial. G.S. 20-179(a1)(1); *State v. Hughes*, ___ N.C. App. ___, 827 S.E.2d 318 (2019) (holding this requirement applies without regard to whether the defendant received notice of aggravating factors in district court).

C. Refiling of Misdemeanor Charges

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

D. Due Process Limits

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

8.4 Felonies and Misdemeanors Initiated in Superior Court

A. Scope of Original Jurisdiction

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

B. Types of Pleadings and Related Documents

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

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

Information. An information is an accusation drafted by the prosecutor and filed in superior court, charging one or more criminal offenses. It permits the prosecution of a felony without an indictment by grand jury where the defendant and the defendant's attorney sign a waiver of indictment, consenting to have the case tried on the information. *See* AOC Form AOC-CR-123, "Bill of Information" (Jan. 2013). An information may be filed only if the defendant waives indictment. *See State v. Nixon*, 263 N.C. App. 676 (2019) (information that failed to include language expressly waiving indictment was insufficient and failed to confer jurisdiction). Defendants who are unrepresented or who are charged with capital crimes may not waive indictment. *See* G.S. 15A-642(b). The requirements of G.S. 15A-642 that the defendant, defense counsel, and the prosecutor all sign the bill of information are mandatory and the absence of a required signature fails to

confer jurisdiction on the court. *See State v. Futrelle*, ___ N.C. App. ___, 831 S.E.2d 99 (2019) (so holding where defense counsel failed to sign information).

A defendant might agree to waive indictment and proceed on an information to permit immediate disposition of the case. For example, a plea bargain may involve a defendant pleading guilty to an offense for which he or she has not been indicted, thus requiring a waiver of indictment and filing of an information if the case is to be resolved promptly. Where the plea bargain requires the defendant to plead guilty to an offense for which he or she has not been indicted and that is not a lesser included offense of an indicted offense, an information is required to confer jurisdiction on the court to accept the plea to the unindicted offense. An information is not required to plead guilty to a lesser included offense for which the defendant has been indicted.

Presentment. A presentment is a written accusation by the grand jury, filed in superior court, charging a defendant with one or more crimes. A presentment is initiated by the grand jury. It does not commence a criminal proceeding and is not a pleading. The district attorney is statutorily required to investigate the allegations in a presentment and to submit a bill of indictment to the grand jury if appropriate. Where the State submits a presentment to the grand jury, the State still must investigate the allegations following the grand jury's issuance of a presentment. *State v. Baker*, 263 N.C. App. 221 (2018) (presentment and indictment prepared by the district attorney and simultaneously submitted to the grand jury invalid as a matter of law and deprived superior court of jurisdiction; remedy is remand to district court, not dismissal, where misdemeanor was pending in district court before presentment). A misdemeanor prosecution that is not joined to a related felony may not be commenced in superior court except by presentment. *See* G.S. 7A-271(a)(2); G.S. 15A-641(c); G.S. 15A-644; G.S. 15A-922(g); G.S. 15A-923(a). For a further discussion of limitations on presentments, see *supra* § 9.3C, Investigative Function and Presentments.

Bill of particulars. A bill of particulars is prepared by the prosecutor and filed with the court. It is not a pleading, but it supplements an indictment or information by providing the defendant with additional information. *See* G.S. 15A-925. The defendant must file a motion for a bill of particulars before arraignment. *See* G.S. 15A-952. In the motion, the defendant must request specific information and allege that the defendant cannot adequately prepare or conduct his or her defense without such information. *See* G.S. 15A-925(b); *State v. Garcia*, 358 N.C. 382, 389–90 (2004) (trial court did not abuse discretion in denying bill of particulars specifying underlying felony in felony murder prosecution because "the State's legal theories are not 'factual information' subject to inclusion in a bill of particulars"; concurrence finds no error but observes that North Carolina law regarding bill of particulars contains more promise than substance); *State v. Randolph*, 312 N.C. 198 (1984) (trial court must order State to respond to motion for bill of particulars when defendant shows that requested information is necessary to adequately prepare defense; denial of motion is error if lack of timely access to information significantly impaired defendant's preparation and conduct of case; trial court did not abuse discretion in denying motion in this case); *see also State v. Tunstall*, 334 N.C. 320

(1993) (trial court granted motion for bill of particulars requiring State to provide date, time, and location of murder and certain information about theory of crime).

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

C. Sufficiency of Pleadings

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

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

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

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

essential element of the offense; indictment may not be amended by consent). Where a separate count in an indictment supplies a missing element for another count in the indictment, a court may be more inclined to find the indictment sufficient. *See State v. Nickens*, 262 N.C. App. 353, 361–62 (2018) (indictment identified officer by his specific law enforcement position in the first count, but only as a "public officer" of North Carolina in the second; "both counts, taken together, provide Defendant with sufficient information to identify and locate the officer" and were not fatally defective).

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

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

Short-form indictment. The North Carolina General Assembly has enacted statutes permitting abbreviated forms of indictment for certain offenses, known as "short-form" indictments. Short-form indictments are permitted for murder (G.S. 15-144); forcible rape (G.S. 15-144.1(a)); statutory rape (G.S. 15-144.1(b)); forcible sex offense (G.S. 15-144.2(a)); and statutory sex offense (G.S. 15-144.2(b)). A short-form indictment does not allege the elements that elevate these offenses to the first-degree level. For example, where the State contends that the defendant committed first-degree murder, the indictment need not state that the murder was committed in the course of a felony, after premeditation and deliberation, or in any other manner that would increase the level of the offense. It is sufficient for the indictment to allege that the named defendant, with malice aforethought, murdered the victim. *See* Smith, *Criminal Indictment*, at 16–18, 29–32. Where an indictment for murder or attempted murder fails to allege that the defendant acted with malice, it is insufficient to charge murder but properly charges voluntary manslaughter. *State v. Wilson*, 236 N.C. App. 472 (2014).

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

Pleading rules for certain offenses. Certain offenses and certain elements of crimes have specific pleading requirements, either as a matter of statute or case law. Counsel should

review the pleading requirements for each offense charged. *See* Smith, *Criminal Indictment*, at 16–53.

D. Amendment of Indictments

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

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

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

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

State v. Tucker, 227 N.C. App. 627, 631–32 (2013) (trial court did not err by allowing State to amend embezzlement indictment, where indictment originally stated "the defendant . . . was the employee of MBM Moving Systems, LLC . . . ," to add the words "or agent" after the word "employee"; court rejected defendant's argument that the nature of his relationship to the victim was critical to the charge and held that the terms "employee" and "agent" "are essentially interchangeable" for purposes of this offense)

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

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

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

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

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

State v. Whitman, 179 N.C. App. 657 (2006) (State was entitled to amend the alleged dates for statutory rape and statutory sexual offense of a 13, 14, or 15-year-old from "January 1998 through June 1998" to "July 1998 through December 1998"; victim would have been fifteen under either version of indictment and defendant was on notice that if he wished to present an alibi defense, he was going to have to address all of 1998 because an incest indictment, which was not amended, alleged dates from "January 1998 through June 1999")

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

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

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

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

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

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

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

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

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

State v. Abbott, 217 N.C. App. 614 (2011) (error for State to amend owner of property in indictment alleging larceny by employee by striking the word "Incorporated" from "Cape Fear Carved Signs, Incorporated"; change from corporate entity to sole proprietorship was substantial alteration)

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

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

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

E. Habitual Offender Pleading Requirements

Generally. The following discussion focuses on the pleading requirements in habitual felon cases under G.S. 14-7.1 through G.S. 14-7.6. It does not discuss the substantive requirements for conviction as a habitual felon—for example, the timing of prior convictions. For a further discussion of habitual felon cases, see Jeff Welty, *North Carolina's Habitual Felon, Violent Habitual Felon, and Habitual Breaking and Entering Laws*, ADMINISTRATION OF JUSTICE BULLETIN No. 2013/07 (UNC School of Government, Aug. 2013) [hereinafter Welty, *Habitual Felon Laws*]; Robert L. Farb, *Habitual Offender Laws* (UNC School of Government, Feb. 2010); Jamie Markham, *Changes to the Habitual Felon Law*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Nov. 10, 2011).

Charging a person as a violent habitual felon is subject to similar pleading requirements. *See* G.S. 14-7.7 through G.S. 14-7.12. The charge of habitual breaking and entering,

enacted in 2011, is likewise subject to similar pleading requirements. *See* G.S. 14-7.25 through G.S. 14-7.31; Jamie Markham, *Habitual Breaking and Entering*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Nov. 22, 2011). The status of armed habitual felon, enacted in 2013 and applicable to a person who commits a firearm-related felony after having previously been convicted of a firearm-related felony as defined in the statutes, is subject to similar pleading requirements. *See* G.S. 14-7.35 through G.S. 14-7.41.

Other enhancements for prior convictions. In addition to the habitual offender cases described above, North Carolina law raises a number of offenses to a higher class, subject to increased punishment, based on the defendant's prior convictions. *See, e.g.*, 14-33.2 (habitual misdemeanor assault); G.S. 14-56.1; (breaking into a coin operated machine); G.S. 14-72(b)(6) (habitual misdemeanor larceny); G.S. 14-72.1 (shoplifting); G.S. 14-107 (worthless check); G.S. 90-95(a)(3) (possession of marijuana). Such offenses are subject to the pleading requirements in G.S. 15A-928, which requires that the pleading allege the prior convictions that subject the accused to the higher penalty. *See also* G.S. 15A-924(a)(5) (requiring that all essential elements of offense be alleged). *See also State v. Miller*, 237 N.C. 427 (1953) (reaching same result before adoption of G.S. Ch. 15A); *State v. Williams*, 21 N.C. App 70 (1974) (to same effect); G.S. 15A-924(a)(5) (requiring that all essential elements of offense be alleged).

For cases in superior court, the prior conviction should be alleged in a separate indictment or other pleading. G.S. 15A-928(b) (indictment and information); G.S. 15A-928(d) (superseding statement of charges for misdemeanors appealed for trial de novo). However, in *State v. Brice*, 370 N.C. 244 (2017), the North Carolina Supreme Court rejected the notion that failure to comply with the separate pleading requirement of G.S. 15A-928 deprived the court of jurisdiction. The defendant in *Brice* did not challenge the indictment at the trial level, and the court held that this type of defect could not be challenged on appeal for the first time. The court left open the possibility that appellate relief may have been forthcoming had the defendant properly preserved the objection. *See also State v. Stephens*, 188 N.C. App. 286 (2008) (charge against defendant was not substantially altered where State amended indictment for stalking by striking the allegation of the prior conviction, which was included in single count of indictment with current offense, and making allegation into separate count in indictment in compliance with the requirements of G.S. 15A-928).

Felon in possession of firearm. Possession of a firearm by a felon is a criminal offense in its own right. An indictment for possession of a firearm by a felon must be charged in a separate indictment from other charges. G.S. 14-415.1(c); *State v. Wilkins*, 225 N.C. App. 492 (2013) (indictment for felon in possession of a firearm was fatally defective because the charge was included as a separate count in a single indictment charging the defendant with assault with a deadly weapon). This pleading requirement does not necessarily preclude the jury from hearing about a defendant's prior felony conviction even if the defendant stipulates to the prior conviction. *See State v. Alston*, 233 N.C. App. 152 (2014) (holding that G.S. 15A-928, which precludes jury from hearing of prior conviction raising offense to higher grade when defendant stipulates to prior conviction, does not apply to prosecution for possession of firearm by felon); *see also supra* "Key factors" in

§ 6.1C, Severance of Joinable Offenses (discussing possibility of stipulation to prior felony conviction when charge of possession of firearm by felon is joined with other charges).

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

Timing of challenge in habitual felon cases. Counsel ordinarily should raise objections to habitual felon charging errors after the trial has commenced on the principal felony or at the commencement of the habitual felon proceedings. If the charging error is raised before attachment of jeopardy on at least the principal felony (when the jury is empaneled and sworn), the State conceivably could dismiss the case altogether and seek new indictments.

If the defendant is challenging the validity of a prior conviction, the basis of the challenge will determine whether the defendant may challenge the conviction in the current case or must file a motion for appropriate relief to vacate the conviction in the original proceeding. Except for a right to counsel violation, prior convictions may not be collaterally attacked in the current case; the proper procedure to challenge prior convictions supporting a habitual felon charge will typically be a motion for appropriate relief in the original case of conviction. *See* Welty, *Habitual Felon Laws*, at 25–26; *see also infra* § 12.2A, Suppressing Prior Uncounseled Conviction (2d ed. 2013).

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

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

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

First, the N.C. courts have held that being a habitual felon is not an offense—it is a status that elevates the punishment for the felony with which the defendant is charged. Consequently, habitual felon charges are necessarily ancillary to a felony charge and may not stand alone. *See State v. Cheek*, 339 N.C. 725, 727 (1995) (habitual felon law does not authorize "an independent proceeding to determine defendant's status as a habitual felon separate from the prosecution of a predicate substantive felony"). Thus, the State may not wait until the defendant is convicted and sentenced for a felony and then obtain a habitual felon indictment. *See State v. Allen*, 292 N.C. 431 (1977); *see also State v. Davis*, 123 N.C. App. 240 (1996) (trial court could not sentence defendant as habitual felon after arresting judgment on all principal felonies). The courts have not been picky, however, about which indictment is obtained first—the habitual felon indictment or the indictment for the principal felony—as long as there is a felony prosecution to which the habitual felon indictment may attach. *See State v. Ross*, 221 N.C. App. 185 (2012) (in reliance on *Flint* [discussed next], court vacates habitual felon plea and remands for sentencing on principal felony because habitual felon indictment was returned before commission of principal felony); *State v. Flint*, 199 N.C. App. 709 (2009) (habitual felon indictment may be returned before, after, or simultaneously with a principal felony indictment, but it is improper if issued before substantive felony occurred; there were other substantive felonies to which the habitual felon indictment attached, however); *State v. Bradley*, 175 N.C. App. 234 (2005) (trial court lacked jurisdiction to sentence defendant as habitual felon for subsequent charges absent new habitual felon indictment where defendant had already pled guilty to original charges to which habitual felon indictment attached, although sentencing was still pending for original charges); *State v. Blakney*, 156 N.C. App. 671 (2003) (habitual felon indictment that predated indictment for principal felony by two weeks was not void where notice and procedural requirements for habitual felon cases were satisfied); *State v. Murray*, 154 N.C. App. 631 (2002) (State obtained felony indictment, then habitual felon indictment, then superseding felony indictment for which defendant was ultimately convicted; court holds that State could proceed on habitual felon indictment even though it predated superseding felony indictment). In cases in which a habitual felon indictment was quashed for technical reasons (and therefore probably could have been amended), the courts have continued the proceedings without entering judgment and have allowed the State to obtain a superseding habitual felon indictment even after the defendant was convicted of the principal felony. *See* paragraph no. 4., below.

Second, the N.C. courts have held that the State may not obtain the initial habitual felon indictment, or obtain a superseding habitual felon indictment that makes substantive changes, once the defendant has entered a plea (guilty or not guilty) to the principal felony. The defendant has entered the plea in reliance on the charges then pending, on the likelihood of the State succeeding on those charges, and on the maximum punishment those charges permit. *See State v. Little*, 126 N.C. App. 262 (1997) (finding that initial habitual felon pleading was valid because it was returned before plea in principal felony case but that superseding habitual felon indictment, which was obtained after conviction of principal felony and alleged different prior convictions, was invalid); *see also* paragraph no. 4., below, regarding amendments. In

State v. Cogdell, 165 N.C. App. 368 (2004), the N.C. Court of Appeals limited the impact of *Little* by holding that *Little* refers to the entry of plea before trial, not to the entry of plea at arraignment. "[T]he critical event that forecloses substantive changes in an habitual felon indictment is the plea entered before the actual trial." *Id.* at 373.

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

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

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

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

4. *State may not make substantive amendments to habitual felon indictment; alleging additional or different prior convictions is an impermissible substantive amendment.* A habitual felon indictment may be amended if the amendment does not make a substantive change. Rather than amending the habitual felon indictment, some prosecutors will seek a superseding indictment to correct a defect. For example, in some cases in which the defendant has raised the defect after trial of the principal

felony, the State has asked the court to continue the proceedings while it obtained a superseding indictment. As long as the change, whether by amendment or superseding indictment, does not make a substantive change, either procedure is probably permissible. *See, e.g.*, *State v. Langley*, 371 N.C. 389 (2018) (habitual felon indictment that alleged greater offenses of armed robbery as defendant's prior charges, but the lesser-included offenses of common law robbery as the prior convictions, provided proper notice and was sufficient); *State v. May*, 159 N.C. App. 159, 163 (2003) ("The date of the felony offense accompanying a habitual felon indictment is not an essential element of establishing habitual felon status."); *State v. Coltrane*, 188 N.C. App. 498 (2008) (permissible for State to amend date and county of prior conviction); *State v. Lewis*, 162 N.C. App. 277 (2004) (amendment to correct dates of prior convictions was permissible; change was not substantial); *State v. Hargett*, 148 N.C. App. 688 (2002) (same); *State v. Mewborn*, 131 N.C. App. 495 (1998) (permitting superseding indictment after trial of principal felony that made technical changes only, to wit, identifying the state where the prior felonies were committed); *State v. Oakes*, 113 N.C. App. 332 (1994) (permitting superseding indictment after trial of principal felony that made technical changes only); *see also State v. Hodge*, ___ N.C. App. ___, 840 S.E.2d 285 (Feb 18, 2020) (where original habitual felon indictment was marked "no true bill," trial court did not err in continuing judgment following adjudication of underlying charges to allow the State to seek an additional habitual felon indictment).

In contrast, the State may not amend a habitual felon indictment that makes a substantive change. Thus, the State may not amend a habitual felon indictment to allege different prior felonies. It is reversible error for the trial judge to instruct the jury on a prior felony conviction in support of habitual status that was not alleged in the indictment. *State v. Jefferies*, 243 N.C. App. 455 (2015). The State may obtain a superseding habitual felon indictment alleging different prior felonies; however, under *State v. Little*, 126 N.C. App. 262 (1997) and *State v. Cogdell*, 165 N.C. App. 368 (2004), the State may not obtain a superseding indictment alleging different prior felonies after the defendant has entered a plea (*see* paragraph no. 2., above).

8.5 Common Pleading Defects in Superior Court

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

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

If your client is indicted in superior court, make sure that the pleading charges a felony or a misdemeanor that is within the original jurisdiction of the superior court. *See State v. Bell*, 121 N.C. App. 700 (1996) (indictment dismissed because superior court lacked

jurisdiction over case; indictment charged misdemeanor and failed to allege facts that would have elevated offense to felony); *see also State v. Wagner*, 356 N.C. 599 (2002) ("felony" possession of drug paraphernalia does not exist, and trial court never had jurisdiction over offense). In addition to subject matter jurisdiction, check for territorial jurisdiction. North Carolina courts have jurisdiction over a crime only if at least one of the essential acts of the crime took place in North Carolina. *See infra* § 10.2, Territorial Jurisdiction.

B. Pleading Does Not State Any Crime

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

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

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

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

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

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

C. Pleading Does Not State Required Elements of Crime

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

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

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

State v. Schalow ("Schalow I"), 251 N.C. App. 334 (2016) (short-form indictment for attempted first-degree murder that failed to allege malice was insufficient to charge attempted murder, though it sufficiently charged attempted voluntary manslaughter)

State v. Galloway, 226 N.C. App. 100 (2013) (trial court erred by instructing jury on offense of discharging a firearm into a vehicle that is in operation under G.S. 14-34.1(b) where indictment failed to allege vehicle was in operation)

State v. Justice, 219 N.C. App. 642 (2012) (indictment charging defendant with larceny from a merchant by removal of anti-theft device fatally defective where term "merchandise" in charging language was too general to identify the property allegedly taken; court also notes that indictment alleges only an attempted rather than completed larceny by stating the defendant "did remove a component of an anti-theft or inventory control device . . . in an effort to steal merchandise")

State v. Barnett, 223 N.C. App. 65 (2012) (indictment charging failing to notify sheriff's office of change of address by a registered sex offender under G.S. 14-208.9 was defective where it failed to allege that defendant was a person required to register)

State v. Harris, 219 N.C. App. 590 (2012) (sex offender unlawfully on premises indictment stated that defendant "did unlawfully, willfully, and feloniously on the premises of Winget Park Elementary School, located at . . . Charlotte North Carolina. A place intended primarily for the use, care, or supervision of minors and defendant is a registered sex offender"; court found grammatical errors did not render indictment insufficient and "willfully" alleged requisite "knowing" conduct; indictment defective, however, because it did not allege a conviction of a required, specific offense with the term "registered sex offender"); *accord State v. Herman*, 221 N.C. App. 204 (2012)

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

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

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

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

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

D. Failure to Identify Defendant

Every indictment must correctly name the defendant or contain a description of the defendant sufficient to identify him or her. *See* G.S. 15A-924(a)(1); *State v. Simpson*, 302 N.C. 613 (1981) (name of defendant, or sufficient description if his or her name is unknown, must be alleged in body of indictment); *State v. Powell*, 10 N.C. App. 443 (1971) (warrant fatally defective that gave defendant's last name as Smith when it actually was Powell). Misspelling of the defendant's name, or use of a nickname, does not necessarily invalidate an indictment. *See State v. Higgs*, 270 N.C. 111 (1967) (per curiam) (indictment valid where "Burford Murril Higgs" was spelled "Beauford Merrill Higgs"; court found that names were enough alike to come within doctrine of *idem sonans*, which means sounding the same); *State v. Spooner*, 28 N.C. App. 203 (1975) ("Mike" instead of "Michael" Spooner adequate). An incorrect allegation of the defendant's birthday or race is mere surplusage that does not invalidate an otherwise sufficient indictment. *State v. Stroud*, 259 N.C. App. 411 (2018).

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

E. Lack of Identification, or Misidentification, of Victim

An indictment or information must correctly name the victim against whom the defendant allegedly committed the crime. The omission of the victim's name, or incorrect identification of the victim, is fatal. If the State's proof of the identity of the victim varies from the allegation in the pleading, the variance constitutes grounds to dismiss the

charge. A misspelling or incorrect order in the victim's name, if it does not mislead the defendant as to the identity of the victim, will not provide grounds for dismissal.

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

F. Two Crimes in One Count (Duplicity)

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

G. Disjunctive Pleadings

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

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

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

Also, although the indictment alleges the alternatives in the conjunctive, the court may instruct the jury of the alleged alternatives in the disjunctive. The reason given by the

courts is that the jury does not need to be unanimous on the method of committing a single crime. *See, e.g., State v. Garnett*, 209 N.C. App. 537 (2011) (not error for trial court to instruct jury that State must prove defendant maintained a dwelling house for "keeping *or* selling marijuana" where indictment charged defendant with maintaining a dwelling house for "keeping *and* selling a controlled substance"); *State v. Petty*, 132 N.C. App. 453 (1999) (in first-degree sex offense case, disjunctive instructions on whether sex act was cunnilingus or penetration not error because offense could be committed in either of two ways).

Reversal on appeal may still be required, however, if the judge instructs the jury on alternative ways of committing the offense, there is insufficient evidence to support one of those theories, and the record does not indicate on which theory the jury relied. *See, e.g., State v. Pakulski*, 319 N.C. 562 (1987) (error to instruct jury on felony murder based on felonious breaking or entering and armed robbery where breaking was without a deadly weapon, so that felony would not be a predicate to a felony murder charge; new trial ordered because uncertain whether jury relied on improper theory to support murder verdict); *State v. Moore*, 315 N.C. 738 (1986) (insufficient evidence to support one of three purposes submitted to jury in support of first-degree kidnapping). In *State v. Malachi*, 371 N.C. 719 (2018), the court clarified that a jury instruction on a theory unsupported by the evidence was not per se reversible error; rather, the defendant must demonstrate prejudice resulting from the erroneous instruction.

If the State alleges only one of the alternative ways of committing an offense, the State may be bound by the theory it has alleged and precluded from obtaining a conviction based on alternative theories. *See, e.g., State v. Yarborough***,** 198 N.C. App. 22 (2009) (while State is not required to allege the felony that was the purpose of a kidnapping, if it does so, the State must prove the particular felony or fatal variance may result); *see also infra* § 8.5I, Variance Between Pleading and Proof (discussing variance issues).

For further discussion of these issues, see Jeff Welty, *Pleading in the Conjunctive*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Feb. 5, 2013); Shea Denning, *What Happens When the Jury Is Instructed on the Wrong Theory?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Dec. 12, 2018) (discussing *Malachi* decision).

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

924(e), the defendant's remedy appears to be a motion to require the State to elect one of the offenses. *See supra* § 8.5F, Two Crimes in One Count (Duplicity).

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

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

This rule can be hard to apply. In situations where the law is unclear, be careful what you ask for. An objection to a pleading on the ground that it is disjunctive may result in the State re-indicting the defendant separately for each alternative and punishing the defendant separately for each.

For more cases on this issue, see Robert L. Farb, *The "Or" Issue in Criminal Pleadings, Jury Instructions, and Verdicts; Unanimity in Jury Verdict* (UNC School of Government, Feb. 2010).

H. One Crime in Multiple Counts (Multiplicity)

The Double Jeopardy Clause of the Fifth Amendment regulates multiple punishments for the same offense in the same proceeding. (Double Jeopardy imposes stricter requirements on prosecution of the same offense in successive proceedings. *See infra* § 8.6A, Double Jeopardy.) The State may indict and try a defendant for crimes that are the "same" for Double Jeopardy purposes, but the defendant may only be punished for one of the offenses unless the legislature has made it clear that it intended for there to be multiple punishments. *See Missouri v. Hunter*, 459 U.S. 359 (1983); *State v. Gardner*, 315 N.C.

444 (1986). For example, if two counts of an indictment separately charge your client with larceny and robbery of the same property, the State may proceed to trial on both charges. However, if the defendant is convicted of both, judgment on one of the two must be arrested to avoid multiple punishment. *See State v. Jaynes*, 342 N.C. 249 (1995) (where defendant was separately indicted for and convicted of robbery and larceny of vehicle from same victim in same taking, larceny was lesser included offense of robbery and judgment for larceny had to be arrested).

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

I. Variance Between Pleading and Proof

General rule. A defendant may be convicted only of the offense alleged in the indictment. *See State v. Faircloth*, 297 N.C. 100 (1979); *State v. Cooper*, 275 N.C. 283 (1969); *State v. Jackson*, 218 N.C. 373 (1940). Not only must the *proof* conform to the indictment, the *instructions* to the jury must also be tailored to the offense alleged in the pleadings. It has been held to be plain error to instruct the jury on an offense not charged in the indictment. *See, e.g.*, *State v. Williams*, 318 N.C. 624 (1986) (where indictment alleged forcible rape and state's proof was of statutory rape because victim was under twelve years old, indictment would not support conviction); *State v. Rahaman*, 202 N.C. App. 36 (2010) (proper to arrest judgment where jury was instructed on the crime of felony possession of a stolen motor vehicle, but defendant was never indicted on that crime; however, retrial of that charge not barred because dismissal was not based on insufficient evidence and therefore did not amount to acquittal); *State v. Langley*, 173 N.C. App. 194 (2005) (finding fatal variance in possession of firearm by felon case where State alleged in indictment that defendant possessed handgun but evidence at trial showed defendant possessed sawed-off shotgun; "handgun" was a material and essential element of offense); *cf. State v. Rogers*, 227 N.C. App. 617 (2013) (error, but not plain error where first-degree burglary indictment alleged that defendant entered dwelling with intent to commit larceny, but trial court instructed jury it could find defendant guilty if at the time of the breaking and entering he intended to commit robbery with a dangerous weapon; defendant was not prejudiced because instruction benefited defendant by requiring State to prove an additional element).

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

Motion to dismiss. A challenge to a variance between pleading and proof should be raised by a motion to dismiss for insufficient evidence *and* for fatal variance at the close of the State's evidence and at the close of all of the evidence. *See State v. Bell*, 270 N.C. 25 (1967) (variance properly raised by motion for nonsuit); *State v. Pulliam*, 78 N.C. App. 129 (1985) (variance properly raised by motion to dismiss for insufficient evidence). Recent cases have required that defendants specifically assert fatal variance to preserve the issue for appeal. *State v. Mason*, 222 N.C. App. 223 (2012) (by failing to assert fatal variance as a basis for his motion to dismiss, defendant did not preserve the argument for appellate review); *accord Hester*, 224 N.C. App. 353 (2012). Until recently, counsel was advised to use the following "magic words" to ensure preservation.

> "Your Honor, the defense moves to dismiss each charge on the ground that the evidence is insufficient as a matter of law on every element of each charge to support submission of the charge to the jury and that submission to the jury would therefore violate the Fourteenth Amendment of the U.S. Constitution and article I, § 19 of the N.C. Constitution.
>
> Further, the defense moves to dismiss each charge on the ground that, as to each charge, there is a variance between the crime alleged in the indictment and any crime for which the State's evidence may have been sufficient to warrant submission to the jury and that submission to the jury would therefore violate the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution and article I, § 19 of the N.C. Constitution.
>
> [Lay out specific insufficiency arguments and specific variance arguments, if any.]

> [If you made specific insufficiency or variance arguments, then repeat motion to dismiss: "Therefore, Your Honor, the defense moves to dismiss each charge on the ground that . . . .]"

The language was drafted in response to a line of cases finding that where the defendant argues the insufficiency of evidence as to one element of the offense in a motion to dismiss at the close of the State's evidence and not another, the appellate court will only review the sufficiency of the challenged element, and claims of insufficiency as to any other elements will be waived. *See, e.g.*, *State v. Walker*, 252 N.C. App. 409 (2017). In *State v. Golder*, 374 N.C. 238 (2020), the N.C. Supreme Court overruled this line of cases and held that a properly timed motion to dismiss preserves all sufficiency issues. Thus, the language suggested for sufficiency motions above is no longer necessary to preserve review of sufficiency issues. However, in cases involving more than one offense, defense counsel should continue to make a motion to dismiss as to all offenses (at least until the scope of *Golder* is clear). Further, *Golder* did not specifically address variance motions, and defenders should continue to rely on the suggested language above regarding motions to dismiss for fatal variance in order to preserve that issue for appellate review. For more information on these principles, see Phil Dixon, *Preserving Motions to Dismiss for Insufficient Evidence*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Apr. 21, 2020).

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

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

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

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

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

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

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

State v. Hill, 247 N.C. App. 342 (2016) (indictment charged larceny from Tutti Frutti, LLC, but proof showed property belonged to the son of the owner and no evidence indicated that the store had lawful possession or custody of the property)

State v. Sergakis, 223 N.C. App. 510 (2012) (trial court committed plain error by instructing jury it could find defendant guilty of conspiracy if defendant conspired to commit felony breaking and entering or felony larceny where indictment alleged only a conspiracy to commit felony breaking or entering); *see also State v. Pringle*, 204 N.C. App. 562, 566–67 (2010) ("where an indictment charging a defendant with conspiracy names specific individuals with whom the defendant is alleged to have conspired and the evidence at trial shows the defendant may have conspired with persons other than those named in the indictment, it is error for the trial court to instruct the jury that it may find the defendant guilty of conspiracy based upon an agreement with persons not named in the indictment"; no error in this case where indictment alleged that defendant conspired to commit robbery with a dangerous weapon with "Jimon Dollard and another unidentified male," evidence at trial did not vary from allegation in indictment, and trial court instructed jury that it could find defendant guilty if the jury found the defendant conspired with "at least one other person," which court found was in accord with material allegations in indictment and evidence at trial)

State v. Khouri, 214 N.C. App. 389 (2011) (fatal variance existed where indictment stated sexual offense occurred sometime between March 30, 2000 and December 31, 2000, but testimony showed the offense occurred in spring 2001)

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

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

State v. Custis, 162 N.C. App. 715 (2004) (fatal variance existed between dates alleged in sex offense and indecent liberties indictment and evidence introduced at trial; the indictment alleged that the defendant committed the offenses on or about June 15, 2001; at trial there was no evidence of sexual acts or indecent liberties occurring on or about that date; evidence at trial suggested sexual encounters over a period of years some time before the date listed in the indictment; and defendant relied on the date alleged in the indictment to prepare alibi defense for the weekend of June 15)

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

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

State v. Washington, 54 N.C. App. 683 (1981) (indictment charged prison escape under G.S. 148-45(b) while evidence showed failure to return from work release program in violation of G.S. 148-45(g)(1))

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

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

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

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

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

State v. McNair, 253 N.C. App. 178 (2017) (no fatal variance where indictment named specific tools in prosecution for possession of burglary tools; essential element of offense is possession of housebreaking tools and specific tools named in indictment were surplusage)

State v. Bacon, 254 N.C. App. 463 (2017) (where the indictment alleged all of the stolen property belonged to the home owner and the proof showed some of the items belonged to the owner's daughter and the daughter's friend, a variance existed but did not require dismissal; allegations of property not belonging to the owner treated as surplusage)

State v. Jefferies, 243 N.C. App. 455 (2015) (no fatal variance where indictment alleged setting fire to the victim's bed, jewelry, and clothing but proof showed only burning of the bed; jewelry and clothing allegations were surplusage; no material variance between allegation of "bed" in indictment and jury instruction of "bedding")

State v. Seelig, 226 N.C. App. 147 (2013) (no fatal variance between indictment alleging that defendant obtained value from victim and evidence showed that he obtained value from victim's husband; indictment for obtaining property by false pretenses need not allege ownership of the thing of value obtained; thus allegation was surplusage)

State v. Mason, 222 N.C. App. 223 (2012) (no fatal variance where name of victim was "You Xing Lin" in indictment but Lin You Xing testified at trial; court finds defendant not surprised or disadvantaged by different order of name)

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

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

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

Other cases. For additional cases addressing fatal variance, see Smith, *Criminal Indictment*.

J. Timing of Motions to Challenge Indictment Defects

There are two somewhat inconsistent rules governing the timing of challenges to indictments. G.S. 15A-952 states that challenges to indictments must be made before arraignment or they are waived. On the other hand, if the defect in the indictment is jurisdictional, then the error is not waivable and may be raised at any time, even post-conviction. *See State v. Wallace*, 351 N.C. 481, 503 (2000) ("where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time"); G.S. 15A-952(d) (motion concerning jurisdiction of court or failure of pleading to charge offense may be made at any time).

It is not always easy to determine whether a defect in a pleading is jurisdictional. The first three subsections of this § 8.5, Common Pleading Defects in Superior Court—covering failure to allege a crime within the jurisdiction of the superior court, failure to allege a crime at all, and failure to set forth all essential elements of the crime—describe jurisdictional errors. *See Wallace*, 351 N.C at 503–04 (allegation that indictment failed to include all elements of crime was jurisdictional in nature). Failing to identify the victim, or misidentifying the victim, likely is also fatal. However, if a mistake concerning the

identity of the victim appears technical, and did not mislead the defendant, the error may be waivable.

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

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

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

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

8.6 Limits on Successive Prosecution

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

A. Double Jeopardy

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

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

See North Carolina v. Pearce, 395 U.S. 711 (1969); *State v. Brunson*, 327 N.C. 244 (1990) (article 1, section 19 of the N.C. Constitution affords defendants same protections). This section discusses Double Jeopardy restrictions on successive prosecutions. For further discussion of double jeopardy, see *infra* § 13.4B, Motion to Dismiss on Double Jeopardy Grounds (2d ed. 2013).

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

Lesser offenses. Under the same-elements test of double jeopardy, a lesser offense is considered the "same" as the greater offense. *See Brown v. Ohio*, 432 U.S. 161 (1977). For example, conviction or acquittal of misdemeanor assault with a deadly weapon ordinarily would bar a later prosecution of felony assault with a deadly weapon with intent to kill based on the same act. The double jeopardy bar does not apply simply because the offenses involve the same act; the offenses must meet the same-elements test (although other doctrines, discussed below, may bar successive prosecutions based on the same incident). Thus, conviction of misdemeanor assault with a deadly weapon would not bar, on double jeopardy grounds, a felony prosecution for shooting into occupied property based on the same act.

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

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

Where the State elects not to proceed on an offense by announcing the intention to proceed on other charges only and proceeds to trial on only the other charges, that choice is binding on the State and acts as an acquittal of the offense that the State elected not to pursue. This is known as the State's election rule. *See State v. Jones*, 317 N.C. 487 (1986). In this circumstance, double jeopardy prohibits trying the defendant for the untried offense. Similarly, where the State elects to dismiss a charge following a mistrial, double jeopardy bars re-prosecution of the dismissed charge. *State v. Courtney*, 372 N.C. 458, 475 (2019) (voluntary dismissal following a mistrial "was tantamount to, or the functional equivalent of, an acquittal" for double jeopardy purposes).

Attachment of jeopardy. In district court, jeopardy attaches once the court begins to hear evidence. *See State v. Brunson*, 327 N.C. 244 (1990). In superior court, jeopardy attaches when the jury is empaneled and sworn. *See State v. Bell*, 205 N.C. 225 (1933). For guilty pleas in either level of court, jeopardy generally attaches when the court accepts the plea. *See State v. Wallace*, 345 N.C. 462 (1997) (jeopardy did not attach where judge rejected guilty plea); *State v. Ross*, 173 N.C. App. 569 (2005) (jeopardy did not attach where record insufficient to show whether guilty plea tendered or accepted), *aff'd per curiam*, 360 N.C. 355 (2006); *see also* 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 25.1(d), at 766–85 (4th ed. 2015).

Waiver and guilty pleas. If the defendant pleads guilty in superior court, he or she ordinarily will be unable to raise a double jeopardy claim on appeal. *See State v. Hopkins*, 279 N.C. 473 (1971); *see also State v. McKenzie*, 292 N.C. 170 (1977) (defendant waived double jeopardy claim by failing to raise claim at trial level). *But see United States v. Broce*, 488 U.S. 563 (1989) (plea of guilty does not waive claim that charge, judged on its face, is one that State may not constitutionally prosecute); *Thomas v. Kerby*, 44 F.3d 884 (10th Cir. 1995) (recognizing exception created by *Broce*).

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

is prejudiced by any ruling upon, or a failure to make timely motion on, the subject in district court").

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

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

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

- In *Ohio v. Johnson*, 467 U.S. 493 (1984), the defendant pled guilty to one count of a multi-count indictment. The plea did not bar continued prosecution of the other counts. *See also State v. Hamrick*, 110 N.C. App. 60 (1993) (applying *Ohio v. Johnson* and finding no bar to prosecution of death by vehicle charge where charges for misdemeanor death by vehicle and driving left of center infraction were filed simultaneously and defendant voluntarily appeared before magistrate and entered plea of responsible to infraction).
- If the defendant successfully moves to sever offenses or opposes joinder, and then pleads guilty to one of the offenses, double jeopardy would not bar prosecution of the remaining offenses. *See Jeffers v. United States*, 432 U.S. 137 (1977) (defendant was solely responsible for severing offenses and so could not raise double jeopardy as bar); *accord Currier v. Virginia*, ___ U.S. ___, 138 S. Ct. 2144 (2018) (defendant who voluntarily sought and obtained severance of related charges consents to separate trials and loses any jeopardy objection).

In contrast, if the State schedules two offenses for different court dates, and the defendant is not responsible for severing the offenses, a defendant's guilty plea to the first-scheduled offense should bar a later prosecution for the same offense. *See* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 17.4(b), at 101 (4th ed. 2015).

B. Collateral Estoppel

Double jeopardy includes a collateral estoppel component. A defendant who is *acquitted* in a first trial may be able to rely on the constitutional doctrine of collateral estoppel to bar a second trial on a factually related crime. Collateral estoppel bars the State from relitigating an issue of fact that has previously been determined against it. For example, in *Ashe v. Swenson*, 397 U.S. 436 (1970), the defendant was acquitted of the robbery of "A" in a case in which the only issue of fact was the defendant's presence at the scene. The Court held that the State was collaterally estopped from a subsequent prosecution of the defendant for the robbery of "B" because the issue of his presence had already been

decided adversely against the State. *See also State v. McKenzie*, 292 N.C. 170 (1977) (acquittal of DWI precludes State from relitigating issue at defendant's subsequent involuntary manslaughter trial); *State v. Parsons*, 92 N.C. App. 175 (1988) (trial court dismisses indictment for manslaughter of fetus on basis that unborn child is not "person" within meaning of statute and thus indictment did not state crime; State barred by collateral estoppel from bringing second indictment changing term "fetus" to "unborn child" because issue had already been litigated); G.S. 15A-954(a)(7) (codifying constitutional requirement, statute provides that court must dismiss charge if "issue of fact or law essential to a successful prosecution has been previously adjudicated in favor of the defendant in a prior action between the parties").

The term "acquittal" includes a not guilty verdict or dismissal for insufficient evidence. Even a dismissal for insufficient evidence that is based on a mistaken and erroneous interpretation of law acts as an acquittal, prohibiting retrial. *Evans v. Michigan*, 568 U.S. 313 (2013). For double jeopardy purposes, an acquittal also includes an implied acquittal of a greater offense. For example, if the defendant is charged with assault with a deadly weapon with intent to kill and is convicted of assault with a deadly weapon, the defendant is deemed to be acquitted of the greater offense. *See Green v. United States*, 355 U.S. 184 (1957); *State v. McKenzie*, 292 N.C. 170 (1977); *State v. Broome*, 269 N.C. 661 (1967).

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

In *Currier v. Virginia*, ___ U.S. ___, 138 S. Ct. 2144 (2018), a plurality of the Court indicated a willingness to overrule *Ashe* and no longer apply issue preclusion principles to criminal cases, raising questions about the continued viability of collateral estoppel under the federal constitution. Because North Carolina allows collateral estoppel in criminal cases by statute, these protections are unlikely to be affected even if any change to federal constitutional law occurs. *See* G.S. 15A-954(a)(7).

C. Failure to Join

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

dismissal of a later larceny charge that the prosecution could have joined with the earlier offense.

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

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

In *State v. Schalow* ("*Schalow II*"), ___ N.C. App. ___, 837 S.E.2d 593, *disc. rev. allowed*, ___ N.C. ___, 839 S.E.2d 340 (2020), the Court of Appeals, for the first time, applied *Warren* to find a violation of the defendant's statutory right to joinder of offenses. Following a mistrial and retrial (resulting in a conviction later vacated for a double jeopardy violation), the State prosecuted the defendant for a third time on charges related to those in the original prosecution but on which the defendant had not previously been tried. In pretrial proceedings, the State represented to the trial court that there was no new evidence in support of the new set of charges and that the evidence would effectively be the same as in the original prosecution. The State offered no explanation for withholding the offenses and not prosecuting them in the defendant's initial prosecution. In these circumstances, the Court of Appeals found a purposeful circumvention of the defendant's joinder rights by the State and reversed the trial court's denial of the motion to dismiss. *Schalow II* thus breathes new life into the statutory joinder rights. While the State sometimes may be justified in bringing joinable offenses following a trial based on new evidence or some other compelling reason, *Schalow II* prohibits the State from doing so for no reason or for an improper reason (such as in retaliation for the defendant's acquittal in the first trial or where the State could have joined the offenses but simply neglected to do so). For more information on this issue, see Phil Dixon, *Schalow II and Dismissal for Failure to Join Offenses*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Mar. 30, 2020).

D. Due Process

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

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

If the defendant appeals from a plea of guilty in district court, offenses that were dismissed as part of any plea agreement, including felonies, may be charged in superior court. *See State v. Fox*, 34 N.C. App. 576 (1977) (State may indict defendant on felony

breaking and entering and felony larceny where defendant was initially charged with those offenses but pled guilty to misdemeanor breaking and entering pursuant to a plea agreement in district court and then appealed to superior court for trial de novo). If, however, the defendant is charged with a misdemeanor, pleads guilty in district court without any plea agreement, and then appeals, *Blackledge* bars the State from initiating felony charges based on the same conduct.

The State is not barred on appeal of a misdemeanor for a trial de novo from seeking a greater sentence for that misdemeanor than the district court imposed. *See Colten v. Kentucky*, 407 U.S. 104 (1972); *State v. Burbank*, 59 N.C. App. 543 (1982); *cf.* G.S. 15A-1335 (when conviction or sentence in superior court is set aside on direct review or collateral attack, court may not impose more severe sentence for same offense or for different offense based on same conduct; following amendment in 2013, provision does not apply to guilty plea cases); Jessica Smith, *Limitations on a Judge's Authority to Impose a More Severe Sentence After a Defendant's Successful Appeal or Collateral Attack*, ADMINISTRATION OF JUSTICE BULLETIN No. 2003/03 (UNC School of Government, July 2003).

E. Timing of Challenge

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

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

If the case is in superior court, the following time limits apply: (1) the motions do not appear to be subject to G.S. 15A-952(b), which requires that certain motions be filed before arraignment; (2) if the motion to dismiss is for lack of joinder, G.S. 15A-926(c)(2) requires that it be filed before trial; (3) if the motion to dismiss is based on constitutional grounds, G.S. 15A-954(c) provides that it may be raised at any time; however, such motions may be waived by the failure to raise them at the trial level. *See State v. Frogge*, 351 N.C. 576 (2000) (defendant argued that prosecution was vindictive and moved to dismiss indictment; court finds that defendant waived motion by failing to make motion in trial court). For more on timing of motions, see *infra* Chapter 13, Motions Practice (2d ed. 2013); *see also* PHIL DIXON, DEFENSE MOTIONS AND NOTICES IN SUPERIOR COURT (UNC School of Government, Dec. 2017).

8.7 *Apprendi* and *Blakely* Issues

A. The Decisions

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

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

For a further analysis of the impact of *Blakely* on determining and weighing aggravating factors and prior record points, see *infra* § 24.1E, Right to Jury Verdict on Every Element of Offense, Including "Sentencing" Factors; Jessica Smith, *North Carolina Sentencing after* Blakely v. Washington *and the* Blakely *Bill* (UNC School of Government, Sept. 2005).

B. Notice and Pleading Requirements after *Blakely*

Aggravating factors and prior record points for structured sentencing felonies. In addition to the other pleading requirements, the Blakely Bill requires that every indictment (or information if an indictment is waived) allege any "catch all" aggravating factors under G.S. 15A-1340.16(d)(20) that it intends to use. The State does not need to allege in the indictment the aggravating factors specifically enumerated in G.S. 15A-

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

1340.16(d)(1) through (19) except the aggravating factor in G.S. 15A-1340.16(d)(9) (offense directly related to public office or employment held by defendant). *See* G.S. 15A-1340.16(f) (requiring that indictment allege this aggravating factor); *see also* 2012 N.C. Sess. Laws Ch. 193 (H 153) (amending several statutes to require forfeiture of retirement benefits on conviction with this aggravating factor).

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

Similarly, the State need not allege in the indictment, but must provide 30-days' notice in writing of its intent to prove, the prior record level point in G.S. 15A-1340.14(b)(7) (defendant committed the offense while on probation, parole, or post-release supervision, while serving a sentence of imprisonment, or while on escape from a correctional facility during a sentence of imprisonment); *State v. Crook*, 247 N.C. App. 784 (2016) (prior record level worksheet included in discovery did not satisfy notice requirement). The applicable statutes do not require the State to provide written notice (or allege in the indictment) either prior convictions or the prior record point in G.S. 15A-1340.14(b)(6) (all elements of present offense are included in a prior offense for which defendant convicted).

Firearm and Other Enhancements. North Carolina's firearms enhancement statute increases the defendant's sentence beyond the statutory maximum, and the facts supporting the enhancement must be alleged in the indictment or information. *See* G.S. 15A-1340.16A(d) (requiring that indictment include this allegation); *see also State v. Lucas*, 353 N.C. 568 (2001), *overruled on other grounds*, *State v. Allen*, 359 N.C. 425 (2005), *opinion withdrawn on other grounds*, 360 N.C. 569 (2006). This procedure also applies to the sex offender enhancement in G.S. 15A-1340.16B, the bullet-proof vest enhancement in G.S. 15A-1340.16C, and the enhancements for certain methamphetamine offenses in G.S. 15A-1340.16D.

In 2008, the General Assembly added the offenses of rape and sexual offense by an adult involving a child under age 13, now codified in G.S. 14-27.23 and G.S. 14-27.28. These statutes establish a mandatory sentence of 300 months but allow a judge, on determining "egregious aggravation," to impose a sentence of up to life without parole. This procedure violates *Blakely* and is unenforceable. *See State v. Singletary*, 247 N.C. App. 368 (2016); Jamie Markham, *Egregious Aggravation Is Unconstitutional*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (May 12, 2016).

Misdemeanors, including impaired driving offenses. The Blakely Bill applies to structured sentencing for felonies in both district and superior court. It does not apply to structured sentencing for misdemeanors, which was not affected by the *Apprendi* and

Blakely decisions. The Blakely Bill also does not apply to offenses not subject to structured sentencing, such as impaired driving. However, in *State v. Speight*, 359 N.C. 602 (2005), *vacated on other grounds*, 548 U.S. 923 (2006), the court addressed the application of *Blakely* to misdemeanor impaired driving and held that for impaired driving offenses tried in superior court (either when the offense is the subject of a misdemeanor appeal or is joined with a felony for trial initially in superior court), aggravating factors other than prior convictions must be found by a jury beyond a reasonable doubt or admitted by the defendant.

The General Assembly thereafter amended G.S. 20-179 to require that aggravating factors in impaired driving cases be proved beyond a reasonable doubt. As revised, the statute also requires in superior court that the State provide notice of its intent to prove aggravating factors at least 10 days before trial. *See* G.S 20-179(a1)(1); *see also* Shea Denning, *What's Blakely got to do with it? Sentencing in Impaired Driving Cases after Melendez-Diaz*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 24, 2009) (discussing applicability of Confrontation Clause to evidence of aggravating factors in impaired driving cases). The provisions of G.S. 20-179 also apply to other implied consent offenses. *See* G.S. 20-179(a) (statute applicable to impaired driving in a commercial vehicle; second or subsequent violations for operating a commercial vehicle after consuming alcohol; or second or subsequent violations for operating a school bus, school activity bus, or child care vehicle after consuming alcohol).