Chapter 6
Petition and Summons

6.1 Overview

A juvenile delinquency proceeding is initiated by the filing of a petition with the clerk of superior court. The court obtains jurisdiction over the case through the petition. The court then obtains jurisdiction over the person by service of the summons and petition on the juvenile and on the juvenile's parent, guardian, or custodian.

6.2 Terminology Used in this Chapter

Complainant is the person who files a complaint with the juvenile court counselor. It is also the term used for the person who signs the petition that is filed with the clerk of superior court. The person who signs the petition can be someone other than the person who originally filed the complaint. In either instance it is not required that the alleged victim be the complainant.

Complaint is the report from a law enforcement officer or from a member of the community made to the juvenile court counselor's office alleging delinquent acts committed by a juvenile. The complaint is typically recorded on the Administrative Office of the Courts (AOC) juvenile petition form.

Petition is the document filed in the office of the clerk of superior court initiating a juvenile court proceeding. The petition is analogous to a pleading such as a warrant or indictment against an adult in criminal court. *See* AOC-J-310 through AOC-J-337 (juvenile delinquency petition forms).

Summons is the document issued by the clerk of superior court after the petition has been filed. The juvenile must be personally served with the summons and the petition for the court to obtain personal jurisdiction over the juvenile. The parent, guardian, or custodian of the juvenile must also be personally served unless they cannot be found through diligent effort, in which case the court may authorize summons by mail or publication. G.S. 7B-1806. In most jurisdictions the summons will include the name and telephone number of the attorney appointed to represent the juvenile. *See* AOC-J-340 (Juvenile Summons and Notice of Hearing (Undisciplined/Delinquent)) (May 2014).

6.3 Petition

A. Contents

The petition must contain the name, date of birth, and address of the juvenile, and the name and last known address of the juvenile's parent, guardian, or custodian. G.S. 7B-1802. There must be a plain and concise statement of the facts supporting each element of the criminal offense the juvenile is alleged to have committed. *Id*. The information in the petition must be sufficient to inform the juvenile of the alleged delinquent act. *See In re Gault*, 387 U.S. 1, 33 (1967) (Due Process requires that juvenile be notified in writing of the specific charge or factual allegations to be considered at hearing); *see also infra* § 6.3F, Defects and Variances.

B. Filing of the Petition

There are three ways a petition can be filed. First, and most often, the petition is filed by the juvenile court counselor. The court counselor must file a petition if the counselor finds reasonable grounds to believe the juvenile committed a nondivertible offense. G.S. 7B-1701. The court counselor also has discretion to file a petition if the complaint alleges a divertible offense. G.S. 7B-1702. However, the court counselor must first consider the criteria for diversion established by the Division of Adult Correction and Juvenile Justice and, if practicable, conduct interviews about the juvenile and the events giving rise to the complaint. *Id*. In either scenario, the petition must then be drafted by the juvenile court counselor or the clerk of superior court, signed by the complainant, and verified before an official authorized to administer oaths. G.S. 7B-1803(a). The petition also must include

the words "Approved for Filing" and be signed by the juvenile court counselor. G.S. 7B-1703(b).

Second, if the court counselor declines to file a petition, but the prosecutor believes a petition should be filed, the prosecutor prepares the petition. G.S. 7B-1803(b).

Third, a magistrate is allowed to draft, verify, and accept a petition for filing if the clerk's office is closed and the juvenile court counselor wants to file an emergency petition in order to request a secure custody order. G.S. 7B-1804(b).

C. Timeliness of Filing

According to G.S. 7B-1703(b), the juvenile court counselor must file the petition within 15 days of receipt of the complaint unless the chief court counselor grants an extension of up to 15 additional days. G.S. 7B-1703(b). In 2006, the Court of Appeals held that a petition filed outside of the time limits described in G.S. 7B-1703(b) deprived the trial court of jurisdiction over the case. *In re L.O.*, 178 N.C. App. 562 (2006) (unpublished). The Court of Appeals then issued several decisions with similar reasoning. *See In re J.B.*, 186 N.C. App. 301 (2007) (court lacked subject matter jurisdiction where petition filed more than 30 days after complaint received); *In re K.W.*, 191 N.C. App. 812 (2008) (court lacked subject matter jurisdiction where petition filed 16 days after complaint received and there was no evidence of an extension); *In re U.V.M.*, 195 N.C. App. 325 (2009) (unpublished) (same).

In 2010, the Supreme Court considered the time limits under G.S. 7B-1703(b) and held that they were not jurisdictional. *In re D.S.*, 364 N.C. 184, 193 (2010). The Court of Appeals has expressed concern that the Supreme Court's interpretation of G.S. 7B-1703(b) disregards the best interests of juveniles, but has recognized that it is binding. *In re J.A.G.*, 206 N.C. App. 318, 322 (2010).

If the juvenile court counselor files a petition significantly outside the time limits in G.S. 7B-1703(b), counsel should still consider filing a motion to dismiss the petition. As part of the motion, counsel should describe any prejudice to the juvenile or the juvenile's defense from the delay. For example, if there is a considerable delay in filing the petition, the juvenile might not have an adequate memory of the events that gave rise to the petition and, thus, might be unable to assist counsel in defending the case. Counsel should assert in the motion to dismiss that proceeding with an adjudication hearing after the delay would violate the juvenile's right to due process under Article I, § 19 of the North Carolina Constitution and the Fourteenth Amendment to the United States Constitution. *See generally* 1 NORTH CAROLINA DEFENDER MANUAL §7.2A, Constitutional Basis of Right (2d ed. 2013).

D. Amendment of Petition

The petition may be amended with the permission of the court if the amendment does not change the nature of the offense alleged. If the court allows the amendment, it must give

the juvenile reasonable time to prepare a defense to the petition as amended. G.S. 7B-2400. The court should deny an amendment if it changes the nature of the offense. *In re Davis*, 114 N.C. App. 253, 255–56 (1994) (juvenile could not be adjudicated delinquent for burning *personal property* in a public building when petition alleged burning a *public building*; court improperly allowed amendment, even with consent of juvenile's counsel, because amended allegation constituted separate offense from that alleged in the petition); *State v. Moore*, 162 N.C. App. 268, 273 (2004) (motion to amend indictment alleging possession of drug paraphernalia described as "can designed as a smoking device" to "brown paper container" improperly granted). Counsel should move to dismiss when an amendment that would change the nature of the offense alleged is denied and the State is unable to prove the offense as alleged. *Moore*, 162 N.C. App. at 273. Counsel should also object to any amendment proposed by the State after the juvenile gives notice of appeal on the ground that the court has no jurisdiction to entertain such an amendment. *See In re B.D.W.*, 175 N.C. App. 760, 764–65 (2006) (order allowing amendment of petition at hearing regarding juvenile's continued detention after juvenile perfected appeal was a nullity as trial court lacked jurisdiction to amend petition).

Counsel should object to evidence that is not relevant to the specific offense alleged in the petition. This will prevent the court from hearing evidence involving conduct that is not described in the petition and that could prejudice the juvenile, both at adjudication and, if the case proceeds, disposition.

If the court denies a motion to amend the petition, the State might file a new petition concerning the offense that was the subject of the proposed amendment. Counsel should consider filing a motion to dismiss if the new petition is filed significantly outside of the statutory time limits for filing the petition. *See* G.S. 7B-1703(b); *see also supra* § 6.3C, Timeliness of Filing.

E. Pleading Defects: North Carolina Defender Manual

The North Carolina Defender Manual contains a comprehensive discussion of pleading defects under criminal law, which generally applies to juvenile court petitions. *See* 1 NORTH CAROLINA DEFENDER MANUAL § 8.2F, Common Pleading Defects in District Court, and § 8.5, Common Pleading Defects in Superior Court (2d ed. 2013); *see also* Jessica Smith, *The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment*, Administration of Justice Bulletin No. 2008/03 (July 2008).

F. Defects and Variances

Pleadings may be defective in two general ways. A facial defect is apparent on the face of the document. A variance is a defect that becomes apparent only after the State begins presenting evidence. These defects may be fatal, depriving the court of jurisdiction, or they may be non-fatal, allowing the court to proceed. This chapter primarily discusses fatal defects and variances.

G. Fatal Defects in Petitions

Lack of the complainant's signature. The petition must be signed by the complainant and verified before an official authorized to administer oaths. G.S. 7B-1803(a). A lack of signature or verification renders the petition defective and insufficient to vest jurisdiction with the court. *See In re T.R.P.*, 360 N.C. 588, 593 (2006) (court lacked subject matter jurisdiction where juvenile petition alleging neglect not signed and verified as required by statute). Any person with knowledge of the alleged offense may sign the complaint; it is not required that the alleged victim be the complainant. *See In re Stowe*, 118 N.C. App. 662, 665 (1995) (prosecutor with knowledge of allegations may be complainant).

Counsel should examine each petition to determine if it has been properly signed and verified. If not, counsel should consider moving to dismiss the petition for lack of jurisdiction pursuant to *In re Green*, 67 N.C. App. 501 (1984). *See infra* § 6.3H, Defects in Petition: Timing of Motion.

Lack of the court counselor's signature and the words "Approved for Filing." The petition must be signed by the court counselor and include the words "Approved for Filing." G.S. 7B-1703(b). In *In re T.K.*, ___ N.C. App. ___, 800 S.E.2d 463 (2017), the juvenile was adjudicated delinquent for disorderly conduct. The Court of Appeals vacated the adjudication order because the petition was not signed by the court counselor or marked as "Approved for Filing." The court declined to extend *In re D.S.*, 364 N.C. 184 (2010), which held that the timelines under G.S. 7B-1703(b) were non-jurisdictional, to the case. The court reasoned that applying *D.S.* to the case would conflict with one of the purposes of the Juvenile Code—"to provide an effective system of intake services for the screening and evaluation of complaints." G.S. 7B-1500(3). According to the court, the court counselor's role in signing and approving a petition for filing is the only indication on the face of a petition that a complaint has been properly screened and evaluated.

Insufficient allegations. The petition must set forth a "plain and concise statement . . . asserting facts supporting every element of a criminal offense. . . ." G.S. 7B-1802. The Court of Appeals has stated that juvenile petitions are "generally held to the standards of a criminal indictment" and that failure to allege each essential element of an offense renders the petition "inoperative" to invoke the jurisdiction of the court. *In re J.F.M.*, 168 N.C. App. 143, 150 (2005); *see also In re Griffin*, 162 N.C. App. 487, 493 (2004) (holding that a petition in juvenile delinquency case serves the same function as an indictment in apprising the defendant of the conduct for which he is being charged).

Petitions that do not meet these requirements are fatally defective and must be dismissed. In applying the standards required for criminal pleadings, the Court of Appeals has found the allegations of the juvenile petition to be deficient in several cases. *See In re B.D.W.*, 175 N.C. App. 760, 762 (2006) (petitions alleging second-degree kidnapping were fatally defective because of failure to allege one of the improper purposes of the confinement as required by statute); *In re R.P.M.*, 172 N.C. App. 782, 787-89 (2005) (petition alleging assault with deadly weapon *with intent to inflict* serious injury failed to allege offense under North Carolina statutes and did not give the juvenile proper notice of offense State

attempted to prove); *In re Jones*, 135 N.C. App. 400, 409 (1999) (petitions purporting to allege age-related first-degree sex offenses were fatally defective because they failed to allege ages of victim and juvenile respondent).

The Court of Appeals has also held that a petition, like an indictment, need only give sufficient notice of the allegations and "should not be subjected to hyper technical scrutiny with respect to form." *In re S.R.S.*, 180 N.C. App. 151, 153 (2006). Cases upholding petitions containing technical errors include: *In re S.R.S.*, 180 N.C. App. at 155 (petition that alleged offense of communicating threats was not fatally defective as it cited the correct statute and alleged facts supporting each element of offense; under the totality of the circumstances the juvenile had sufficient notice of offense charged and specific misconduct alleged); *In re J.F.M.*, 168 N.C. App. 143, 151 (2005) (petitions were sufficient to apprise juvenile of each element of assault on a public officer and resisting, delaying, and obstructing a public officer because they cited the correct statutes and alleged facts supporting each element of the offenses).

In felony prosecutions, the State is permitted to use short-form indictments for homicides and some sex crimes. *See* G.S. 15-144, 15-144.1, and 15-144.2. Short-form indictments are "special instruments" that relax the requirements for criminal pleadings. *State v. Hunt*, 357 N.C. 257, 272 (2003). In some published decisions, the Court of Appeals has presumed that the State was permitted to use short-form petitions in juvenile delinquency cases. *See, e.g., In re K.R.B.*, 134 N.C. App. 328, 331–32 (1999) (upholding a first-degree murder petition couched in the language of G.S. 15-144, the short-form indictment statute for murder). In *In re K.H.*, 196 N.C. App. 176 (2009) (unpublished), the Court of Appeals specifically held that it was proper to apply G.S. 15-144.2 to a petition charging the juvenile with first-degree sex offense. However, there is no provision in the Juvenile Code that authorizes the use of short-form petitions. In addition, the Supreme Court has held that courts may not read into the Juvenile Code "provisions that were not included by the legislature." *In re D.L.H.*, 364 N.C. 214, 216 (2010) (refusing to apply the jail credit provisions of G.S. 15-196.1 to a juvenile delinquency case). If the State files a petition that follows the form set forth in G.S. 15-144, 15-144.1, or 15-144.2, counsel should consider filing a motion to dismiss asserting that a petition drafted according to short-form indictment standards is insufficient to confer jurisdiction on the juvenile court.

H. Defects in Petition: Timing of Motion

Jurisdictional defects. A motion to dismiss based on a jurisdictional defect in the pleadings may be made at any time in the proceeding. *In re S.R.S.*, 180 N.C. App. 151, 153 (2006) ("it is well established that fatal defects in an indictment or a juvenile petition are jurisdictional, and thus may be raised at any time"); *State v. Wallace*, 351 N.C. 481, 503 (2000). Dismissal of a petition for a jurisdictional defect, however, generally allows a corrected petition to be re-filed if it is not otherwise barred by time limits or other grounds.

A motion to dismiss is sometimes made at a first appearance, which may include other petitions in addition to the one that is the subject of the motion. Some attorneys move to

dismiss after adjudication has begun because the State has prepared the case for hearing and may be more amenable to a plea negotiation on all allegations. Although the issue may be raised at any time, the court may be more reluctant to grant a motion to dismiss after hearing a substantial amount of evidence against the juvenile.

Counsel should advise the juvenile of the possibility of a petition being re-filed before moving for a dismissal and explain the possible benefits and risks. Even if a new petition could be filed, dismissal could nevertheless benefit the juvenile. For example, in the interim the juvenile could increase chances for diversion or a more favorable disposition by making improvements in behavior or school performance or by making restitution. In addition, the State might simply decline to re-file the petition because of the sheer passage of time. The primary risk of dismissal is that the case will be re-filed and the juvenile may be in the same position as if the petition had not been dismissed.

If the juvenile court counselor files a new petition alleging the same offense or another offense related to the same incident and a significant amount of time has passed since the court counselor filed the original petition, counsel should consider filing a motion to dismiss for failure to meet the 30-day deadline following receipt of the complaint (*see supra* § 6.3C, Timeliness of Filing) and for failure to follow the stated purposes of the Juvenile Code in providing "swift, effective dispositions" and to proceed "with all possible speed in making and implementing determinations required . . ." G.S. 7B-1500(2)a. and (4).

Non-jurisdictional defects. If a pleading defect is not jurisdictional, failure to object before the State begins its case may constitute a waiver. *See generally* G.S. 15A-952 (certain challenges to indictment in criminal case must be made before arraignment or they are waived). Even if counsel objects to a non-jurisdictional defect, the defect may be considered technical and, therefore, subject to amendment. It may be difficult to determine whether a defect in a pleading is jurisdictional and justifies dismissal, or is merely technical and subject to amendment. *See generally* 1 NORTH CAROLINA DEFENDER MANUAL § 8.5J, Timing of Motions to Challenge Indictment Defects (2d ed. 2013).

Counsel should always carefully review the petition and identify any defects that might warrant dismissal.

I. Fatal Variance between Allegations and Proof

Generally. A fatal variance occurs when a petition alleges all the necessary elements of an offense but the State proves an offense not alleged in the petition. Even though the State proves all of the elements of a criminal offense, the petition must be dismissed if it does not allege each element of the proven offense. *In re Griffin*, 162 N.C. App. 487, 494–95 (2004) (juvenile improperly adjudicated delinquent of first-degree sex offense based on respective ages of juvenile and victim, but petition alleged sex offense by force against victim's will and failed to allege either victim's age or difference in age between juvenile and victim); *State v. Loudner*, 77 N.C. App. 453, 454 (1985) (fatal variance

existed where indictment alleged sex offense of "performing oral sex" on person in defendant's custody, but evidence showed defendant placed finger in vagina).

A fatal variance also exists if the State presents evidence of every element of the offense alleged, but the evidence does not conform to the allegations in the petition. *See State v. Call*, 349 N.C. 382, 424 (1998) (indictment charging assault on "Gabriel Hernandez Gervacio" constituted fatal variance where evidence showed victim was "Gabriel Gonzalez"); *State v. Eppley*, 282 N.C. 249, 259 (1972) (fatal variance exists where evidence shows stolen property is not owned by person alleged as owner in indictment). There can be some variation between the pleading and proof, however, without the variance being fatal. *See State v. Pickens*, 346 N.C. 628, 646 (1997) (variance involving description of a gun did not warrant reversal of discharging a weapon into occupied property conviction).

There is no fatal variance if the State proves all the essential elements of a lesser-included offense of the offense alleged in the petition. *In re J.H.*, 177 N.C. App. 776 (2006) (petition alleged felonious possession of stolen goods, but State proved all elements of misdemeanor possession of stolen goods; remanded for entry of adjudication on lesser charge); *In re B.D.W.*, 175 N.C. App. 760, 764 (2006) (petition alleged second-degree kidnapping, but State proved all elements of false imprisonment; case remanded for entry of adjudication on lesser charge).

Timing of variance argument. The proper time to raise a variance argument is when counsel moves to dismiss the petition at the end of the State's evidence. *State v. Bell*, 270 N.C. 25, 29 (1967). If counsel then presents evidence, counsel must renew the motion to dismiss, including the variance argument, at the end of all the evidence. *State v. Broome*, 136 N.C. App. 82, 85 (1999). If counsel fails to raise a variance argument at the end of the State's evidence or at the end of all the evidence, the argument will be deemed waived on appeal. *State v. Curry*, 203 N.C. App. 375, 385 (2010).

When moving to dismiss, counsel should specifically allege a fatal variance between the allegations in the petition and the proof to alert the judge to the nature of the problem. For example, if the petition charges assault on an officer, and the proof shows resisting an officer but not an assault, counsel should move to dismiss for insufficient evidence of assault and for fatal variance between the offense alleged in the petition and the State's evidence. In adult criminal actions in superior court, the failure to specifically assert fatal variance when moving to dismiss has been found to waive 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).

6.4 Summons

A. Issuance of Summons

Upon the filing of a delinquency petition, the clerk of superior court must issue a summons to the juvenile and to the juvenile's parent, guardian, or custodian requiring them to appear for a hearing at a stated place and time. G.S. 7B-1805(a). A copy of the juvenile petition must be attached to each summons. *Id*. Counsel should review the juvenile court file to ensure that the summons contains the correct information, that it was properly issued, and that the "Return of Service" reflects proper and timely service on both the juvenile and the juvenile's parents, particularly if the juvenile or parent is not present.

Issuance and service of a summons involve the court's personal jurisdiction over the juvenile. *In re K.J.L.*, 363 N.C. 343, 347 (2009). Errors on the face of a summons or in the service of a summons "are examples of insufficiency of process and insufficiency of service of process," which can be waived by the juvenile. *In re J.T.*, 363 N.C. 1, 4 (2009); *see also In re D.S.B.*, 179 N.C. App. 577, 579 (2006) (juvenile could not challenge summons on appeal because juvenile, through counsel, made general appearance in the case and never objected to the summons). If there is a defect in the summons or in the service of the summons, counsel should consider asserting that the court lacks personal jurisdiction over the juvenile. A challenge to the court's personal jurisdiction must be made in the first motion or pleading that counsel files or during the first appearance in court. *Swenson v. Thibaut*, 39 N.C. App. 77, 89 (1978). If counsel files a pleading or makes an appearance in court without contesting the court's personal jurisdiction over the juvenile, the juvenile will be deemed to have made a general appearance, which waives any objection to the lack of personal jurisdiction. *Id*. However, if counsel includes a challenge to the court's personal jurisdiction in the first pleading or asserts the lack of personal jurisdiction before raising any other argument during the first appearance, the issue of personal jurisdiction will be preserved. *Draughon v. Harnett County Bd. of Educ.*, 166 N.C. App. 449, 452 (2004). As courts are "very liberal" in construing statements of counsel as a general appearance, *In re Hodge*, 153 N.C. App. 102, 106 (2002), the better practice is to file a written motion asserting the lack of personal jurisdiction over the juvenile. *Hall v. Hall*, 65 N.C. App. 797, 799 (1984) (defendant's initial action was filing motion to dismiss for lack of personal jurisdiction; nothing else appearing, subsequent general appearance would not have waived right to challenge personal jurisdiction).

B. Requirements for Summons

A summons must be printed on the form prepared by the Administrative Office of the Courts. G.S. 7B-1805(b); *see* Form AOC-J-340 (Juvenile Summons and Notice of Hearing (undisciplined/delinquent)) (May 2014). Pursuant to G.S. 7B-1805(b)(1)–(5), the juvenile summons must include notice of the following:

- nature of the proceeding and the purpose of the scheduled hearing;
- right to counsel and information on how to have counsel appointed before the hearing;
- that if the court finds at the hearing that the allegations are true, the court will hold a dispositional hearing with the authority to enter orders affecting substantial rights of the juvenile and the juvenile's parent, guardian, or custodian;
- that the parent, guardian, or custodian is required to attend scheduled hearings and that failure to attend without reasonable cause may result in proceedings for contempt of court; and
- that the parent, guardian, or custodian must bring the juvenile to court for all scheduled hearings and that failure to do so without reasonable cause may result in proceedings for contempt of court.

The summons must also notify the juvenile and the juvenile's parent, guardian, or custodian that dispositional orders affecting substantial rights may include those that affect the juvenile's custody; impose conditions on the juvenile; require that the juvenile receive medical, psychiatric, psychological, or other treatment and that the parent participate in the treatment; require the parent to undergo psychiatric, psychological, or other treatment or counseling; order the parent to pay for treatment that is ordered for the juvenile or the parent; order the parent to pay support for the juvenile for any period the juvenile does not reside with the parent; and order the parent to pay attorney's fees or other fees or expenses as determined by the court. G.S. 7B-1805(b)(3)a.–f.

Counsel should check the summons to make sure that the statutory information is included and the appropriate boxes on the form have been checked. If the summons is not in proper form, counsel should consider filing a motion to dismiss based on lack of personal jurisdiction over the juvenile.

C. Service

The juvenile and the parent, guardian, or custodian must be personally served with the summons and petition not less than five days before the date of a scheduled hearing. G.S. 7B-1806. The court has discretion to waive the time requirements for service; however, the statute provides no criteria for exercising that discretion. *Id.* A law enforcement officer is responsible for service of the summons and petition. G.S. 15A-301(c). If the officer fails to serve the summons and petition, the officer must return them to the clerk within 30 days with a reason for the failure of service. G.S. 7B-1806, G.S. 15A-301(d)(2). If the officer cannot find the parent, guardian, or custodian through diligent effort, the court may authorize service of the summons by mail or publication. G.S. 7B-1806. The court may also issue a show cause order to a parent, guardian, or custodian who is personally served, but fails without reasonable cause to appear and bring the juvenile to the scheduled hearing. *Id.*

Counsel should examine the court file to determine whether the summons was properly served. If there was a defect in the service of the summons, counsel should consider filing a motion to dismiss based on the lack of personal jurisdiction over the juvenile.

6.5 Notice of Hearing

The clerk must give all parties, including both parents, the juvenile's guardian or custodian, and any other person standing in loco parentis five days written notice of the date and time of all scheduled hearings. G.S. 7B-1807. Written notice is required unless the parties receive notice in open court or the court orders otherwise. *Id*. In some districts it is customary for court counselors to give oral notice of hearing. Counsel should consider objecting as this notice does not satisfy the requirements of G.S. 7B-1807.