

Chapter 8: Criminal Pleadings

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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 summons, citations, magistrate's orders, and statements of charges. In juvenile court, the juvenile petition is the pleading. In cases initially tried in superior court, the state must obtain an indictment or information.

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, 77 S.E.2d 917 (1938) (stating above purposes).

Proper pleadings protect important constitutional entitlements, such as the Sixth Amendment and Due Process right to fair notice of the charge and the 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); *see 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, 528 S.E.2d 326 (2000) (where an indictment is invalid on its face, it deprives the court of jurisdiction); *accord State v. Lawrence*, 352 N.C. 1, 530 S.E.2d 807 (2000). Thus, it is critical to examine the pleadings closely, to compare the allegations in the pleadings to the state's proof at trial, and to be prepared to raise timely objections to deficiencies in the pleadings where advantageous to your client.

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. Section 8.4 discusses the requirements for juvenile petitions in juvenile court. Sections 8.5 and 8.6

address pleading requirements and issues that arise in superior court. Section 8.7 addresses post-trial challenges involving pleadings, including double jeopardy and due process bars to successive prosecutions for the same offense. And, section 8.8 discusses the impact of recent U.S. Supreme Court cases on the need for the state to plead what were formerly characterized as sentencing factors.

C. References

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

ROBERT L. FARB, *ARREST WARRANT AND INDICTMENT FORMS* (4th ed. 1996, with 1997 and 2000 supplements) (contains form language for charging criminal offenses).

Robert L. Farb, *Blakely v. Washington and Its Impact on North Carolina's Sentencing Laws*, posted at <http://sog.unc.edu/programs/crimlaw/blakelyfarbmemo.pdf> (July 9, 2004). *See also infra* § 8.8 (discussing this topic).

Robert L. Farb, *Habitual Offender Laws*, <http://sog.unc.edu/programs/crimlaw/habitual.pdf> (last updated July 26, 2004) (discusses pleading and other requirements in prosecutions for habitual felon, violent habitual felon, habitual misdemeanor assault, and habitual impaired driving). *See also infra* § 8.5E (discussing habitual felon pleading requirements).

Robert L. Farb, *The "Or" Issue in Criminal Pleadings, Jury Instructions, and Verdicts*, <http://iog.unc.edu/programs/crimlaw/verdict.pdf> (last updated July 6, 2004) (discusses disjunctive pleadings and jury instructions). *See also infra* § 8.6G (discussing this topic).

Jessica Smith, *The Criminal Indictment: Fatal Defects, Fatal Variance, and Amendment*, Administration of Justice Bulletin No. 2004/03 (July 2004) (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.), posted at <http://iog.unc.edu/programs/crimlaw/aoj200403.pdf>.

8.2 Misdemeanors Tried in District Court

A. Process as Pleading

The criminal process issued to the defendant—that is, the citation, criminal summons, magistrate's order, or arrest warrant—usually doubles as the criminal pleading in a misdemeanor case in district court. *See* 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 for further discussion.

B. Requirements for Misdemeanor Pleadings

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

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

Courts may be more lenient in permitting amendments or tolerating technical mistakes in misdemeanor pleadings than in superior court pleadings. (For a discussion of application of these requirements in superior court, *see infra* § 8.5C.) Nevertheless, every pleading must be sufficient to serve the basic purposes listed at the beginning of this chapter.

Common errors in district court are addressed *infra* § 8.2F; errors in superior court are addressed *infra* § 8.6.

Pleading Rules for Certain Offenses. There are particular statutory requirements for pleading certain offenses, such as larceny, forgery, and receiving stolen goods. *See* G.S. 15-148 through -150. Some examples are discussed *infra* § 8.2F (district court), § 8.5C (superior court). Subsequent chapters of this manual will focus on specific offenses and will describe in more detail their pleading requirements.

C. Types of Misdemeanor Pleadings

Citation. A citation is a written charge issued by a law enforcement officer. The principal difference between a citation and other forms of process is that a law enforcement officer rather than a judicial official issues it. An officer may issue a citation for any misdemeanor or infraction for which the officer has probable cause. *See* G.S. 15A-302(b). An officer may arrest a person for a misdemeanor (if grounds exist for a warrantless arrest under G.S. 15A-401(b)), but has no authority to arrest for an infraction. *See* G.S. 15A-1113; ROBERT L. FARB, *ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA* 46 (Institute of Government, 3d ed. 2003). A person arrested without a warrant must be taken before a magistrate. If the magistrate finds probable cause that a crime has been committed, the magistrate may issue a magistrate's order, discussed below.

Under G.S. 15A-922(c), the defendant has the right to object to being tried on a citation. Upon the defendant's objection, the prosecution must prepare a separate pleading.

Usually the new pleading is a statement of charges, discussed below. (If a magistrate signs a citation, it becomes a magistrate's order, and it is no longer considered a citation and is not subject to this objection.) Objecting to trial on a citation may not be advisable because the objection gives the prosecution an opportunity before trial to correct errors or add new charges in a statement of charges. If the defendant wishes to object to being tried on a citation, he or she must do so in district court; the objection may not be raised for the first time in superior court on a trial de novo. *See State v. Monroe*, 57 N.C. App. 597, 292 S.E.2d 21 (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; instead, the court must issue a criminal summons. *See* G.S. 15A-1116(b) (so stating); *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). Amendments to G.S. 15A-305(a)(3) in the 2003 legislative session, however, permit 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 it 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 is already under arrest), the error is probably inconsequential. *See generally State v. Matthews*, 40 N.C. App. 41, 251 S.E.2d 897 (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. A summons may charge a felony, but it is typically used for misdemeanors only. If a judicial official issues a summons, the person is not taken into custody or placed under pretrial release conditions; he or she is only directed to appear in court.

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. The law expresses a preference for the use of a criminal summons, discussed above, but many counties continue to rely heavily on arrest warrants. *See* G.S. 15A-304(b); G.S. 15A-303 official commentary (expressing preference for summons when circumstances do not necessitate taking person into custody).

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

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

Before arraignment in district court, a prosecutor may file a statement of charges adding new charges or amending charges that are insufficient. *See* G.S. 15A-922(d); *State v. Madry*, 140 N.C. App. 600, 537 S.E.2d. 827 (2000). If a prosecutor files a statement of charges before arraignment in district court, the defendant is entitled to a continuance of at least three working days unless the judge finds that the statement of charges does not materially change the pleadings and that no additional time is necessary. *See* G.S. 15A-922(b)(2).

After arraignment in district court, the prosecutor may file a statement of charges only if it does not change the nature of the offense. *See* G.S. 15A-922(e). If the judge finds that the original warrant or other pleading is insufficient and that a statement of charges would not impermissibly change the offense, the judge may permit the prosecutor to correct the pleading by filing a statement of charges. However, the judge's order must set a time limit on filing—ordinarily, three working days. The order also must provide that if the statement of charges is not filed within the time allowed, the charges must be dismissed. *See* G.S. 15A-922(b)(3). If the prosecutor files a statement of charges, the defendant is entitled to a continuance of at least three working days unless the judge finds that a continuance is not required under G.S. 15A-922(b)(2).

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 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 when an indictment has been obtained. The order for arrest itself is not a pleading, however, and does not charge a crime.

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* § 8.5D (discussing restrictions on amendments to superior court indictments). 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, 537 S.E.2d. 827 (2000). Any amendment must be in writing; otherwise, it is not effective. *See State v. Powell*, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

A prosecutor may obtain a statement of charges that changes the nature of the offense alleged in a warrant or other process, but only before arraignment. *See supra* § 8.2C.

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) that the

pleading fails to charge an offense properly—in other words, that the pleading is fatally defective; and (2) that the proof supports an offense that was not charged—in other words, that 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. 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, 343 S.E.2d 553 (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), -954(c); *see also State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (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”).

Defense counsel generally will want to move to dismiss for a defective pleading at or after arraignment in district court. 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.

If the pleading error involves “duplicity”—that is, the pleading alleges more than one offense in a single count—counsel should make a motion to require the state to elect (in effect, a motion to require the state to dismiss all but one of the offenses alleged in the particular count). *See infra* § 8.2F.

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, 336 S.E.2d 649, 652 (1985); *see also State v. Miller*, 137 N.C. App. 450, 528 S.E.2d 626 (2000) (Due Process precludes convicting defendant of offense not alleged in warrant or indictment); *State v. Bruce*, 90 N.C. App. 547, 550, 369 S.E.2d 95, 97 (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. 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.

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, 572 S.E.2d 223 (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, 309 S.E.2d 488 (1983). In some instances, however, jeopardy may be a bar. *See, e.g., State v. Moses, supra* (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* § 8.7A.

When the court dismisses a charge on the ground that there was a fatal variance between pleading and proof—that is, there was insufficient evidence to support the charged offense—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, 139 S.E.2d 558 (1965); *State v. Wall*, 96 N.C. App. 45, 384 S.E.2d 581 (1989). Jeopardy may bar a subsequent prosecution, however, if the new charge is a greater offense of the charge that was properly pled. *See infra* § 8.7 (discussing impact of double jeopardy on trial of greater offenses).

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* NC Defender Manual, Vol. 1, § 7.1A. When the misdemeanor pleading is defective, or the offense proven at trial was not the offense alleged in the pleading, the statute of limitations is not tolled. It continues to run. *See State v. Hundley*, 272 N.C. 491, 158 S.E.2d 582 (1967) (statute of limitations not tolled by issuance of void warrant). Thus, if a defendant successfully moves to dismiss, and the statute of limitations has run on the offense the state wishes to charge, the state cannot refile the charges.

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* § 8.6. As discussed in the preceding section, if the pleading is defective you should file a motion to dismiss on or after arraignment or after trial has commenced. If the problem is a variance, move to dismiss at the close of the state’s evidence and at the close of all the evidence.

Failure to Charge Offense or Element of Offense. Like other pleadings, misdemeanor pleadings must state all of the essential elements of the crime. *See* G.S. 15A-924(a)(5); *State v. Palmer*, 293 N.C. 633, 239 S.E.2d 406 (1977) (both indictments and warrants must “allege lucidly and accurately all the essential elements of the offense endeavored to

be charged”); *State v. Camp*, 59 N.C. App. 38, 295 S.E.2d 766 (1982) (stating these requirements for warrants); *see also State v. Cook*, 272 N.C. 728, 158 S.E.2d 820 (1968) (reference to statute allegedly violated insufficient to cure failure of warrant to allege elements of offense).

If an essential element is missing, or if the charging language is too vague to identify an offense clearly, the defendant may move to dismiss. Any attempt to revise the charge (either by amendment of the pleading or, after arraignment, by statement of charges) may constitute a change in the nature of the offense and therefore be impermissible. *See State v. Moore*, ___ N.C. App. ___, 592 S.E.2d 562 (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, 537 S.E.2d. 827 (2000) (warrant that charged “taking bears with bait” too vague to charge offense; statute prohibited possessing, selling, buying, or transporting bears); *State v. Wallace*, 49 N.C. App. 475, 271 S.E.2d 760 (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. Wells*, 59 N.C. App. 682, 298 S.E.2d 73 (1982) (citation that charged resisting arrest was fatally defective for omission of duty officer was performing); *State v. Powell*, 10 N.C. App. 443, 179 S.E.2d 153 (1971) (the words “resist arrest” in citation were insufficient to charge offense).

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, 179 S.E.2d 153 (1971) (failure to name officer who was victim of assault on officer rendered warrant invalid); *State v. Banks*, 263 N.C. 784, 140 S.E.2d 318 (1965) (warrant charging peeping into room occupied by female was fatally defective because it failed to name female). Sometimes the pleading will identify 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, 508 S.E.2d 496 (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, 451 S.E.2d 131 (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 of 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. Isom*, 65 N.C. App. 223, 309 S.E.2d 283 (1984) (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).

Allegation of Ownership of Property for Larceny and Related Offenses. A pleading for theft offenses must correctly name the owner of the stolen property. *See State v.*

Greene, 289 N.C. 578, 223 S.E.2d 365 (1976) (indictment in larceny case must allege person who has property interest in property stolen, and state must prove that alleged person is owner). The failure to identify the owner, or identify an owner capable of owning property, makes the pleading defective and subject to dismissal. *See, e.g., State v. Woody*, 132 N.C. App. 788, 513 S.E.2d 801 (1999) (indictment alleging conversion was fatally defective and could not support conviction because it failed to allege that victim, P & R unlimited, was legal entity capable of owning property). 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, 192 S.E.2d 441 (1972) (fatal variance when person named in indictment as owner of shotgun testified that gun was property of his father); *State v. Hughes*, 118 N.C. App. 573, 455 S.E.2d 912 (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 cf. State v. Jones*, 151 N.C. App. 317, 566 S.E.2d 112 (2002) (not necessary to allege name of owner in prosecution for possession of stolen goods).

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, 302 S.E.2d 658 (1983) (if defendant is not prejudiced, state may amend warrant in superior court to change name of owner of property under G.S. 15-24.1).

Misidentification of Defendant. All criminal pleadings must name or otherwise identify the defendant. *See* G.S. 15A-924(a). Omission of the defendant's name constitutes grounds to dismiss. *See State v. Simpson*, 302 N.C. 613, 276 S.E.2d 361 (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, 220 S.E.2d 213 (1975) (pleading that named Michael Spooner as "Mike Spooner" acceptable); *State v. Taylor*, 61 N.C. App. 589, 300 S.E.2d 890 (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, 283 S.E.2d 812, *aff'd*, 305 N.C. 391, 289 S.E.2d 374 (1982) (in superior court, defendant waived objection to misnomer regarding his name by entering plea and going to trial without making objection).

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. 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 State v. Everett*, 328 N.C. 72, 399 S.E.2d 305 (1991) (child sex offense indictment where date could have been February or March was not too vague to support conviction). Our 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, 524 S.E.2d 75 (2000) (allowing amendment of indictment to change address of dwelling where controlled substance was used); *State v. Campbell*, 133 N.C. App. 531, 515 S.E.2d 732 (1999) (allowing amendment of dates

alleged in indictment). However, variance between the state's proof as to the date or time of an offense and the date and time alleged in the pleading is material, and grounds for dismissal of the charge, when it deprives the defendant of an opportunity to present his or her defense, such as when the defendant relies on an "alibi" defense. *See State v. Christopher*, 307 N.C. 645, 300 S.E.2d 381 (1983).

Ordinance Violations. Generally, the failure to cite the statute violated is not grounds for dismissal. *See* G.S. 15A-924(a)(6) (error not grounds for dismissal). For violations of city or county ordinances, however, the rule appears to be different. *See* G.S. 160A-79 (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, 198 S.E.2d 433, 438 (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, 234 S.E.2d 639 (1977) (motion to quash juvenile petition granted where pleading did not allege caption of ordinance or set forth ordinance itself).

Assault on Officer/Resist, Obstruct, or Delay. *See, e.g., State v. Wells*, 59 N.C. App. 682, 298 S.E.2d 73 (1982) (citation that charged resisting arrest was fatally defective for omission of duty officer was performing); *State v. Powell*, 10 N.C. App. 443, 179 S.E.2d 153 (1971) (the words "resist arrest" in citation were insufficient to charge offense; the words "assault on officer" also were insufficient because the victim, that is, the officer allegedly assaulted, was not identified); *State v. Thomas*, 153 N.C. App. 326, 570 S.E.2d 142 (2002) (indictment did not need to allege that defendant knew or had reasonable grounds to believe that victim was officer); *State v. Bethea*, 71 N.C. App. 125, 321 S.E.2d 520 (1984) (unnecessary in prosecution for assault on officer, unlike in prosecution for resisting arrest, to allege specific duty being performed by officer at time of assault).

Other Assaults. *See, e.g., State v. Palmer*, 293 N.C. 633, 239 S.E.2d 406 (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, 572 S.E.2d 223 (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, 553 S.E.2d 914 (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).

Duplicity. Each separate offense charged against a defendant must be pled in a separate pleading or a separate count within a single pleading. 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); *but see State v. Rogers*, 68 N.C. App. 358, 315 S.E.2d 492 (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, 188 S.E.2d 576 (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 (AOC-CR-500). (Sometimes a magistrate will sign the citation, converting it to a magistrate's order). A Uniform Citation contains two counts *only*. The first count (numbers 1 through 15 on the citation) may be used to charge one offense only; and the second count (number 16) likewise may charge one offense only. If the citation charges more than one offense in either count, the defendant may move to require the state to elect a single offense alleged in the particular count.

In district court, the defendant may make this motion at the commencement of trial. To be safe, counsel may want to raise the motion before the defendant enters a plea. *See* G.S. 15A-924(b) (duplicity motion must be "timely"); G.S. 15A-953 (motions in district court ordinarily should be made upon arraignment or during trial); *compare* 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, 108 S.E.2d 443 (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).

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

- the charge in superior court is the same as, or a lesser offense of, the charge alleged in the pleading in district court, *and*
- 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, 314 S.E.2d 592 (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, 300 S.E.2d 257 (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, 275 S.E.2d 222 (1981) (allowing amendment in superior court that did not change nature of offense).

The superior court 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, 257 S.E.2d 426 (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, 205 S.E.2d 322 (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 or initiate a misdemeanor prosecution by presentment in superior court. (Presentments are discussed *infra* § 8.5B.)

Requirement of Conviction. To confer appellate jurisdiction on the superior court it is not enough that a defendant was charged with an offense in district court; the defendant must have been convicted of that offense. *See State v. Phillips*, 127 N.C. App. 391, 489 S.E.2d 890 (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); *State v. Guffey*, 283 N.C. 94, 194 S.E.2d 827 (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); *see also State v. Joyner* 33 N.C. App. 361, 235 S.E.2d 107 (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, 193 S.E.2d 425 (1972) (sufficient evidence of conviction where district court judge entered oral judgment and sentence and set superior court bond, even though judgment sheet was incorrectly marked).

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, 203 S.E.2d 401 (1974) (on appeal of impaired driving conviction, superior court accepted plea to reckless driving; assuming that 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).

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, 453 S.E.2d 195 (1995) (information or indictment not required on appeal of misdemeanor). 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* § 8.2). *See also State v. Jones*, 157 N.C. App. 472, 579 S.E.2d 408 (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. Madry*, 140 N.C. App. 600, 537 S.E.2d 827 (2000) (motion to dismiss for failure to charge an offense was permissible in superior court on appeal for trial de novo).

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, 265 S.E.2d 456 (1980) (stating rule); *see also State v. Killian*, 61 N.C. App. 155, 300 S.E.2d 257 (1983) (prosecution may not file statement of charges in superior court unless defendant objects to sufficiency of pleading); *State v. Clement*, 51 N.C. App. 113, 275 S.E.2d 222 (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.

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); or (2) the earlier dismissal was with leave under G.S. 15A-932 (allowing reinstatement 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* § 8.7D.

8.4 Juvenile Pleadings

The Juvenile Court has exclusive, original jurisdiction over all cases involving persons who are alleged to be delinquent for acts committed while they were at least six and not yet sixteen years of age. *See* G.S. 7B-1601. A “delinquent juvenile” is defined as a child who commits a crime or infraction under state law or local ordinance. *See* G.S. 7B-1501(7). No act, other than the commission of a crime or infraction, can serve as the basis for an adjudication of delinquency.

When a juvenile is alleged to be delinquent, the Juvenile Code establishes a three-step process for initiating an action in juvenile court. First, any complaint against a juvenile must be referred to a juvenile court counselor for screening and evaluation. The court counselor must determine: (i) whether there are reasonable grounds to believe the facts alleged in the complaint are true; (ii) whether the facts alleged constitute a delinquent act; and (iii) whether the case is sufficiently serious to warrant court action. *See* G.S. 7B-1700, -1701, -1803. If a complainant is dissatisfied with a court counselor’s decision not to approve the filing of a petition, the complainant may seek review of that decision by the prosecutor, who may either affirm the decision or direct that a petition be filed. *See* G.S. 7B-1704, -1705.

Second, if the court counselor or reviewing prosecutor determines that court action is warranted, the complaint is filed as a petition. The petition is the official pleading in a juvenile case, and like an indictment or warrant in a criminal case, confers jurisdiction on the court and gives notice to the juvenile and his or her family of the alleged offense. *See In re Davis*, 114 N.C. App. 253, 441 S.E.2d 696 (1994); *In re Green*, 67 N.C. App. 501, 313 S.E.2d 193 (1984). The petition must allege facts supporting every element of the offense allegedly committed by the juvenile. *See* G.S. 7B-1802; *see also In re Gault*, 387 U.S. 1, 33 (1967) (Due Process requires that a juvenile be notified in writing of the specific charge or factual allegations to be considered at hearing).

All juvenile petitions must be signed by a complainant and verified. *See* G.S. 7B-1803. Failure to sign or verify the petition strips the court of jurisdiction. *See In re Green, supra*. The signing complainant need not be the victim; any person with knowledge of the alleged offense, including a prosecutor, may sign the petition. *See In re Stowe*, 118 N.C. App. 662, 456 S.E.2d 336 (1995) (prosecutor may sign as long as intake counselor follows statutory procedures before signing and prosecutor does not encroach on intake counselor’s role).

Third, after a petition is filed, the clerk must issue a summons, and a copy of the petition and the summons must be served personally on the juvenile and on the juvenile’s parent, guardian, or custodian. Other forms of service (mail, publication) may be used only with court approval after diligent efforts to locate the person to be served have been unsuccessful. *See* G.S. 7B-1806. The summons must notify the juvenile of the date, nature, and scope of the initial hearing; inform him or her of the right to counsel; and inform the juvenile and his or her parents, among other things, that substantial rights may be affected by an adjudication of delinquency. *See* G.S. 7B-1805.

Once a petition is filed, it may not be amended to change the nature of the offense alleged. *See* G.S. 7B-2400; *In re Griffin*, ___ N.C. App. ___, 592 S.E.2d 12 (2004) (fatal variance where juvenile petition alleged forcible sexual offense and evidence at adjudicatory hearing showed statutory sex offense without force); *In re Davis, supra* (vacating adjudication for burning personal property where petition had alleged burning a building). Amendments to the petition that do not change the nature of the offense charged are permissible as long as the juvenile has a reasonable opportunity to prepare a defense to the amended allegations. *See* G.S. 7B-2400.

8.5 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. A presentment, described below, is not a formal charging document, and a bill of particulars supplements but does not replace an indictment or information.

Indictment. An indictment is a written accusation by a grand jury stating that it has found probable cause to believe that the defendant committed a specific crime. A prosecution in superior court must be by an indictment, although a noncapital defendant may waive the right to an indictment and be tried on an information. Indictments typically charge felonies. Misdemeanors may be charged in an indictment only if the charge is initiated by presentment or if the offense is joined with a charged felony. *See* G.S. 15A-923(a); 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. *See* AOC-CR-123 (form information). An information may be filed only if the defendant waives indictment. Defendants who are unrepresented or who are charged with capital crimes may not waive indictment. *See* G.S. 15A-642(b). A defendant might agree to waive indictment and proceed on an information to permit immediate disposition of the case. For example, a plea bargain may involve a defendant pleading guilty to an offense for which he or she has not been indicted, thus requiring a waiver of indictment and filing of an information if the case is to be resolved promptly.

Presentment. A presentment is a written accusation by the grand jury, filed in superior court, charging a defendant with one or more crimes. A presentment is initiated by the grand jury. It does not commence a criminal proceeding and is not a pleading. The district attorney is statutorily required to investigate the allegations in a presentment and to submit a bill of indictment to the grand jury if appropriate. A misdemeanor prosecution that is not joined to a related felony may not be commenced in superior court except by presentment. *See* G.S. 7A-271(a)(2); G.S. 15A-641(c), -644, -922(g), -923(a).

Bill of Particulars. A bill of particulars is prepared by the prosecutor and filed with the court. It is not a pleading, but it supplements an indictment or information by providing the defendant with additional information. *See* G.S. 15A-925. To obtain a bill of particulars, the defendant must file a motion requesting specific information and alleging that the defendant cannot adequately prepare or conduct his or her defense without such information. *See* G.S. 15A-925(b); *State v. Garcia*, ___ N.C. ___, 597 S.E.2d 724 (2004) (trial court did not abuse discretion in denying bill of particulars specifying underlying felony in felony murder prosecution; concurrence finds no error but observes that North Carolina law regarding bill of particulars contains more promise than substance; dissent would have found error); *State v. Randolph*, 312 N.C. 198, 321 S.E.2d 864 (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, 432 S.E.2d 331 (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). G.S. 15A-952 requires that a motion for a bill of particulars be made before arraignment.

A bill of particulars does not cure defects or omissions in an indictment or information. *See infra* § 8.5C. 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 prior to 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, 419 S.E.2d 586 (1992).

C. Sufficiency of Pleadings

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

1. a plain and concise factual statement supporting every element of the offense charged;
2. a separate count addressed to each offense charged;
3. a reference to the statute or other provision of law allegedly violated;

4. the name or other identification of the defendant;
5. the county where the offense took place; and
6. the date on which, or time period during which, the offense took place.

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, 167 S.E.2d 775 (1969) (allegations in warrant may not cure defects in indictment); *State v. Stokes*, 274 N.C. 409, 163 S.E.2d 770 (1968) (allegations in bill of particulars do not cure defects in indictment); *accord State v. Banks*, 263 N.C. 784, 140 S.E.2d 318 (1965).

Some pleading errors may be subject to amendment or not be of consequence. *See, e.g., State v. Jones*, 110 N.C. App. 289, 429 S.E.2d 410 (1993) (incorrect statutory reference was not fatal defect where indictment properly charged elements of offense); *but see State v. Blakney*, 156 N.C. App. 671, 577 S.E.2d 387 (2003) (in prosecution for felony, pleading must charge that defendant acted “feloniously” or allege statutory section indicating felonious nature of charge).

Pleading errors that may affect the ability of the state to proceed are discussed *infra* § 8.6. Generally, if a case is dismissed because the indictment is fatally defective, the state is not barred from refileing the charges in an appropriately-worded pleading. In some circumstances, however, refileing may be barred. *See supra* § 8.2E (effect of dismissal on subsequent charges); *see also infra* § 8.7 (discussing double jeopardy and other limits on successive prosecution).

Short-Form Indictment. The North Carolina legislature 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.

North Carolina courts have often upheld the adequacy of short-form indictments against constitutional challenges. *See, e.g., State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326 (2000) (upholding short-form indictment for rape and murder); *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985). However, recent United States Supreme Court decisions have called into question the constitutionality of this practice. *See Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) (under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt); *Apprendi v.*

New Jersey, 530 U.S. 466 (2000) (Fourteenth Amendment commands same rule in case involving state statute); *accord Davis v. United States*, 184 F.3d 366 (4th Cir. 1999). In light of these precedents, there is a possibility that the United States Supreme Court will agree to hear a North Carolina case and will hold our short-form indictment practice to be unconstitutional. To ensure that your client benefits from any such ruling, if your client is indicted for rape, sex offense, or murder, be sure to preserve the issue in the record. To do so you should file: (i) a motion to dismiss the indictment for failure to allege every element of the offense, as required by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; and (ii) a motion for a bill of particulars, requesting the theory of first-degree murder, rape, or sex offense on which the state intends to proceed. For a discussion of the impact of *Apprendi* on pleading of sentencing factors, *see infra* § 8.8.

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. Some examples of these special requirements are described below. Subsequent chapters of this manual will deal with specific offenses and will describe in more detail their pleading requirements.

- Case law establishes that it is necessary for an indictment for theft or embezzlement to allege the rightful owner of the stolen property. *See, e.g., State v. Greene*, 289 N.C. 578, 223 S.E.2d 365 (1976) (indictment in larceny case must allege a person who has property interest in property stolen, and state must prove that alleged person is owner); *see also supra* § 8.2F (discussing similar issue for misdemeanor pleadings). G.S. 15-148 states that where the property is owned by more than one person, it is sufficient for the indictment to identify one owner of the property and to refer to the joint owners as “another or others.”
- Case law holds that it is not necessary for an indictment to describe the size, weight, or particular use of a potentially deadly weapon, but an indictment must (i) name the weapon and (ii) state that the weapon was used as a “deadly weapon” or allege facts demonstrating the deadly character of weapon. *See State v. Palmer*, 293 N.C. 633, 239 S.E.2d 406 (1977); *see also State v. Moses*, 154 N.C. App. 332, 572 S.E.2d 223 (2002) (indictment failed to allege assault inflicting serious injury with deadly weapon because it did not name weapon).
- G.S. 15-149 and -150 state that to charge larceny or embezzlement of money, it is not necessary to describe the specific denominations of bills or coinage taken.
- The pleading requirements for perjury and subordination of perjury are set out in G.S. 15-145 and -146, respectively.
- In an indictment for forgery, it is not necessary to state that the perpetrator intended to defraud the United States government. *See* G.S. 15-151.

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, 313 S.E.2d 556 (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. However, amendments that change the name of the defendant, the identity of the victim, or the nature of the offense have not been allowed. *See also infra* § 8.6J (discussing effect of challenges to pleading defects).

Case Summaries on Amendments to Pleadings. 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. Subsequent chapters of this manual will focus on specific offenses and will describe in more detail their pleading requirements.

In the following cases, the court permitted amendment of the indictment:

State v. Grady, 136 N.C. App. 394, 524 S.E.2d 75 (2000) (permissible to amend address of dwelling in prosecution for maintaining dwelling for use of controlled substance)

State v. Campbell, 133 N.C. App. 531, 515 S.E.2d 732 (1999) (permissible to amend dates alleged in indictment)

State v. Hyder, 100 N.C. App. 270, 396 S.E.2d 86 (1990) (permissible to change name of county in indictment)

State v. Marshall, 92 N.C. App. 398, 374 S.E.2d 874 (1988) (permissible to amend name of victim where three of indictments stated victim’s name correctly and victim’s last name had been inadvertently left off fourth indictment)

In the following cases the court found that amendment of the indictment was not permissible:

State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (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. Hughes, 118 N.C. App. 573, 455 S.E.2d 912 (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, 441 S.E.2d 696 (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 Felon Pleading Requirements

Generally. The following discussion focuses on the pleading requirements in habitual felon cases under G.S. 14-7.1 through -7.6. It does not discuss the substantive requirements for conviction as a habitual felon—for example, the timing of prior convictions. For a more complete discussion of habitual felon cases, *see* habitual felon training materials posted at www.ncids.org under Defender Training: New Felony Defender Training; *see also* Robert L. Farb, *Habitual Offender Laws*, posted at <http://sog.unc.edu/programs/crimlaw/habitual.pdf> (last updated July 26, 2004) (discussing habitual felon, violent habitual felon, habitual DWI, and habitual misdemeanor assault).

Charging a person as a violent habitual felon is subject to similar pleading requirements. *See* G.S. 14-7.7 through -7.12.

North Carolina law also raises a number of offenses to a higher class, subject to increased punishment, based on the defendant's prior convictions—for example, habitual misdemeanor assault under G.S. 14-33.2 and breaking into a coin-operated machine under G.S. 14-56.1. Such offenses are subject to the pleading requirements in G.S. 15A-928.

Timing of Challenge. Counsel ordinarily should raise objections to habitual felon charging errors at the commencement of the habitual felon proceedings. The reason is that the case law is clear that once the defendant is convicted of the principal felony, the state may not make substantive changes to the habitual felon charges. Our courts have set an earlier bar, holding that after entry of a plea to the principal felony the state may not obtain a superseding habitual felon indictment that makes substantive changes. But, if the charging error is raised after a not guilty plea but before the commencement of trial and attachment of jeopardy on at least the principal felony, the state conceivably could dismiss the case altogether and seek new indictments. In most instances, therefore, the safest course is to wait until the habitual felon phase of the proceedings.

Pleading Requirements. 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 ordinarily 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, 466 S.E.2d 708 (1996); *but see State v. Young*, 120 N.C. App. 456, 462 S.E.2d 683 (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, supra.*
2. *State must obtain timely habitual felon indictment.* Three principles limit the timing of a habitual felon indictment. First, our 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, 453 S.E.2d 862 (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, 233 S.E.2d 585 (1977); *see also State v. Davis*, 123 N.C. App. 240, 472 S.E.2d 392 (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. Murray*, 154 N.C. App. 631, 572 S.E.2d 845 (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); *State v. Blakney*, 156 N.C. App. 671, 577 S.E.2d 387 (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). Also, 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* 4., below.

Second, our 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 reason is that 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, 484 S.E.2d 835 (1997) (finding that initial habitual felon pleading was valid because it was returned prior to 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* 4., below, regarding amendments. Note, however, that in *State v. Cogdell*, ___ N.C. App. ___, ___ S.E.2d ___ (July 20, 2004), the court of appeals sought to limit the impact of *Little* by holding that *Little* refers to the entry of plea before trial, not to the entry of plea at arraignment.

Third, the defendant may not be tried on a habitual felon indictment less than 20 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, 336 S.E.2d 721 (1985).

3. *State must properly plead habitual felon charge.* A habitual felon indictment must state: (i) the dates of the prior offenses that constitute the basis of the recidivist

charge; (ii) the 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. Briggs*, 137 N.C. App. 125, 526 S.E.2d 678 (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* 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, 453 S.E.2d 862 (1995). 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, 535 S.E.2d 870 (2000); *cf. State v. Lee*, 150 N.C. App. 701, 564 S.E.2d 597 (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, 336 S.E.2d 721 (1985).

4. *State may not make substantive amendments to habitual felon indictment.* A habitual felon indictment may be amended if the amendment does not make a substantive change. Rather than amending the habitual felon indictment, some prosecutors will seek a superseding indictment to correct a defect. For example, in some cases in which the defendant has raised the defect after trial of the principal felony, the state has asked the court to continue the proceedings while it obtained a superseding indictment. As long as the change, whether by amendment or superseding indictment, does not make a substantive change, either procedure is probably permissible. *See, e.g., State v. Hargett*, 148 N.C. App. 688, 559 S.E.2d 282 (2002) (amendment to correct dates of prior convictions was permissible; change was not substantial); *State v. Oakes*, 113 N.C. App. 332, 438 S.E.2d 477 (1994) (permitting superseding indictment after trial of principal felony that made technical changes only).

In contrast, the state may not amend a habitual felon indictment that makes a substantive change. Thus, the state may not amend a habitual felon indictment to allege different prior felonies. The state may obtain a superseding habitual felon indictment alleging different prior felonies, but subject to certain time limits. Under *Little* and *Cogdell*, *supra*, the state may not obtain a superseding indictment alleging different prior felonies after the defendant has entered a plea (*see* 2., above).

8.6 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 (discussing

defects in district court pleadings). The timing of challenges to these problems is discussed *infra* § 8.6J. *See also* NC Defender Manual, Vol. 1, § 9.4 (challenges to defects in 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, 468 S.E.2d 484 (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, 572 S.E.2d 777 (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* NC Defender Manual, Vol. 1, § 10.2 (discussing 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 superceded 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. Holman, 36 N.C. App. 569, 244 S.E.2d 491 (1978) (indictment alleged common-law kidnapping, which had been superseded by statutory kidnapping; conviction vacated for failure of indictment to state a crime)

State v. Hanson, 57 N.C. App. 595, 291 S.E.2d 912 (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. McGaha, 306 N.C. 699, 295 S.E.2d 449, 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. Wallace, 49 N.C. App. 475, 271 S.E.2d 760 (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)

C. Indictment Does Not State Required Elements of Crime

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. Westbrook, 345 N.C. 43, 478 S.E.2d 483 (1996); *State v. Hare*, 243 N.C. 262, 90 S.E.2d 550 (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.

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

State v. Brunson, 51 N.C. App. 413, 276 S.E.2d 455 (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, 381 S.E.2d 879 (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, 94 S.E.2d 569 (1956) (indictment for refusing to pay child support invalid where indictment left out term “willfully,” and willful refusal to support was element of crime)

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 State v. Simpson*, 302 N.C. 613, 276 S.E.2d 361 (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, 179 S.E.2d 153 (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, 153 S.E.2d 781 (1967) (indictment valid where “Burford Higgs” was spelled “Beauford 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, 220 S.E.2d 213 (1975) (Mike instead of Michael Spooner adequate). A pleading may identify the defendant by an alias if it is done in good faith. *See State v. Young*, 54 N.C. App. 366, 283 S.E.2d 812, *aff’d*, 305 N.C. 391, 289 S.E.2d 374 (1982) (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).

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. *See State v. Powell*, 10 N.C. App. 443, 179 S.E.2d 153, (1971) (failure to name victim on resisting arrest and assault rendered warrant

invalid; because name was absent, defendant was not protected from being placed in jeopardy twice); *State v. Abraham*, 338 N.C. 315, 451 S.E.2d 131 (1994) (indictment that incorrectly named victim insufficient to support conviction; trial court dismissed charge against defendant with leave for prosecutor to obtain proper indictment). A technical error, such as a misspelling of the victim's name if not misleading to the defendant, will not invalidate a pleading. *See State v. Ison*, 65 N.C. App. 223, 309 S.E.2d 283 (1983) (under *idem sonans* doctrine, indictment adequate that named victim as "Eldred Allison" when actual name was "Elton Allison"); *State v. Williams*, 269 N.C. 376, 152 S.E.2d 478 (1967) (indictment sufficient where victim's name "Madeleine" was stated in indictment as "Mateleane").

F. Two Crimes in One Count (Duplicity)

Each count in an indictment may charge only one offense. Where a count charges more than one offense, the defendant may require the state to elect which offense it will pursue at trial; a count may be dismissed if the state fails to make a selection. *See* G.S. 15A-924(b); *see also supra* § 8.2F (duplicity in misdemeanor pleadings).

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 statute states alternative means of committing an offense, and the state plans to prove more than one of those ways, a proper indictment should link the alternatives conjunctively, by the word "and." *See State v. Swaney*, 277 N.C. 602, 178 S.E.2d 399 (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); *State v. Pigott*, 331 N.C. 199, 415 S.E.2d 555 (1992) (kidnapping indictment proper that listed two different purposes for kidnapping as conjunctive alternatives). The rationale 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, 417 S.E.2d at 405. 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, 326 S.E.2d 24 (1985).

The state is not bound to prove all of the alternatives it alleges, even though the indictment alleges them in the conjunctive. *See State v. Birdsong*, 325 N.C. 418, 384 S.E.2d 5 (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. Petty*, 132 N.C. App. 453, 512 S.E.2d 428 (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, 356 S.E.2d 319 (1987) (insufficient evidence to support one of two felonies submitted to jury in support of felony murder); *State v. Moore*, 315 N.C. 738, 340 S.E.2d 401 (1986) (insufficient evidence to support one of three purposes submitted to jury in support of first-degree kidnapping).

If the state alleges only one of the alternative ways of committing an offense, the state may be bound by the theory it has alleged and precluded from obtaining a conviction based on alternative theories. *See, e.g., State v. Lucas*, 353 N.C. 568, 548 S.E.2d 712 (2001) (trial judge may only instruct jury on theory of kidnapping alleged in indictment); *see also infra* § 8.6I (discussing variance issues).

Single Statute Creates More than One Crime. If a single statute creates more than one crime—that is, the statute creates separate offenses for which a defendant could be separately punished—only one of those crimes should be charged in each count. *See State v. Thompson*, 257 N.C. 452, 456, 126 S.E.2d 58, 61 (1962) (pleading “should contain a separate count, complete within itself, as to each criminal offense”); *State v. Albarty*, 238 N.C. 130, 76 S.E.2d 381 (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* § 8.6F (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, 412 S.E.2d 308 (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, 346 S.E.2d 488 (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. Our Supreme Court has stated that where the disjunctive alternatives go to the “gravaman” of the offense then separate offenses were intended, and otherwise not. *See State v. Creason*, 313 N.C. 122, 326 S.E.2d 24 (1985) (possession with intent to sell or deliver creates one offense with separate means of committing it; possession is gravaman of offense); *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990) (indecent liberties with child by touching child or compelling child to touch defendant creates alternative means of committing same offense; gravaman 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*, <http://iog.unc.edu/programs/crimlaw/verdict.pdf> (last updated July 6, 2004).

H. One Crime in Multiple Counts (Multiplicity)

The Double Jeopardy Clause 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* § 8.7A.) 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, 340 S.E.2d 701 (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, 464 S.E.2d 448 (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, 582 S.E.2d 679 (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).

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, 253 S.E.2d 890 (1979); *State v. Cooper*, 275 N.C. 283, 167 S.E.2d 266 (1969); *State v. Jackson*, 218 N.C. 373, 11 S.E.2d 149 (1940). Not only must the proof conform to the indictment, the instructions to the jury must also be tailored to the offense or theory alleged in the pleadings. It has been held to be plain error to instruct the jury on a theory or offense not charged in the indictment. *See State v. Williams*, 318 N.C. 624, 350 S.E.2d 353 (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. Brown*, 312 N.C. 237, 321 S.E.2d 856 (1984); *State v. Rhome*, 120 N.C. App. 278, 462 S.E.2d 656 (1995).

If the indictment alleges a particular theory of a crime, the state is bound to prove that theory. *See, e.g., State v. Loudner*, 77 N.C. App. 453, 335 S.E.2d 78 (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, 488 S.E.2d 162 (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. Westbrook*, 345 N.C. 43, 478 S.E.2d 483 (1996) (allegations in indictment for murder that defendant was actor in concert was surplusage; state free to prove that defendant was accessory before fact). 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. An objection to variance between indictment and proof is properly raised by a motion to dismiss for insufficient evidence (nonsuit). *See State v. Bell*, 270 N.C. 25, 153 S.E.2d 741 (1967); *State v. Pulliam*, 78 N.C. App. 129, 336 S.E.2d 649 (1985). A motion to dismiss is made at the end of the state's evidence and renewed at the end of all the evidence.

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 reason is that 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, 384 S.E.2d 581 (1989); *State v. Loudner*, 77 N.C. App. 453, 335 S.E.2d 78 (1985); *State v. Ingram*, 20 N.C. App. 464, 201 S.E.2d 532 (1974). Reindictment may be barred in some instances, however. *See supra* § 8.2E (effect of dismissal on subsequent charges); *see also infra* § 8.7 (discussing double jeopardy and other limits on successive prosecution).

Cases Finding Fatal Variance. In the following cases, a motion to dismiss at the end of the evidence was granted on the grounds of variance between the pleading and proof.

State v. Christopher, 307 N.C. 645, 300 S.E.2d 381 (1982) (where state presented evidence that offense occurred on date specified in indictment and defendant presented alibi evidence, fatal variance from indictment for state to present rebuttal evidence that

offense occurred on different date)

State v. Bell, 270 N.C. 25, 153 S.E.2d 741 (1967) (indictment charged robbery of Jean Rogers, while proof showed robbery of Susan Rogers)

State v. Faircloth, 297 N.C. 100, 253 S.E.2d 890 (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, 233 S.E.2d 544 (1977) (doctor who prescribed drugs wrongly charged with sale or delivery of drugs)

State v. Bruce, 90 N.C. App. 547, 369 S.E.2d 95 (1988) (different sex act with child than that alleged in indictment)

State v. McClain, 86 N.C. App. 219, 356 S.E.2d 826 (1987) (indictment alleged kidnapping to facilitate rape and terrorize victim, but court instructed jury it could convict if defendant kidnapped to inflict serious injury)

State v. Washington, 54 N.C. App. 683, 284 S.E.2d 330 (1981) (indictment charged prison escape under G.S. 148-45(b), but proof was of failure to return from work release program in violation of G.S. 148-45(g)(1))

State v. Trollinger, 11 N.C. App. 400, 181 S.E.2d 212 (1971) (defendant charged with armed robbery, but evidence was that he obtained items from trash can)

Cases Where Variance Not Shown. In the following cases, convictions were upheld.

State v. Pickens, 346 N.C. 628, 488 S.E.2d 162 (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. Westbrook, 345 N.C. 43, 478 S.E.2d 483 (1996) (no fatal variance where indictment alleged that 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)

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 prior to arraignment or they are waived. On the other hand, if the defect in the indictment is jurisdictional, then the error is unwaivable and may be raised at any time. *See State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000) (“where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to

the 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 categories described above—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—are jurisdictional errors. *See State v. Wallace, supra* (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, 283 S.E.2d 812 (1981), *aff’d*, 305 N.C. 391, 289 S.E.2d 379 (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, 313 S.E.2d 556 (1984) (permissible to amend indictment to change date of offense from date victim died to date victim was shot). Duplicity and multiplicity in the pleadings are not jurisdictional defects (although jury instructions that are disjunctive may invalidate a conviction for lack of a unanimous jury verdict, and multiple punishments for overlapping offenses may be barred).

If you are dealing with an indictment that contains a jurisdictional defect, it may be advantageous to wait until during trial (after jeopardy has attached) 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. 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 (multiplicity) is to move to arrest judgment on one offense after conviction.

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

8.7 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* § 8.6H).

See North Carolina v. Pearce, 395 U.S. 711 (1969); *State v. Brunson*, 327 N.C. 244, 393 S.E.2d 860 (1990) (Article 1, § 19 of state constitution affords defendants same protections). This section discusses Double Jeopardy restrictions on successive prosecutions. For further discussion of double jeopardy, *see* NC Defender Manual, Vol. 1, § 13.4B.

General Test. The test currently 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, 428 S.E.2d 830 (1993) (so holding); *State v. Griffin*, 51 N.C. App. 564, 277 S.E.2d 77 (1981) (to same effect).

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, 532 S.E.2d 574 (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, 522 S.E.2d 111 (1999) (criminal contempt proceeding for violation of domestic violence protective order barred later prosecution for assault on female but not prosecution for domestic criminal trespass, misdemeanor breaking and entering, and kidnapping).

Attachment of Jeopardy. In district court, jeopardy attaches once the court begins to hear evidence. *See State v. Brunson*, 327 N.C. 244, 393 S.E.2d 860 (1990). In superior court, jeopardy attaches when the jury is empaneled and sworn. *See State v. Bell*, 205 N.C. 225, 171 S.E. 50 (1933). For guilty pleas in either level of court, jeopardy attaches when the court accepts the plea. *See* 5 WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 25.1(d), at 642–43 (2d ed. 1999).

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, 183 S.E.2d 657 (1971); *see also State v. McKenzie*, 292 N.C. 170, 232 S.E.2d 424 (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. 499 173 S.E.2d 897 (1970) (defendant convicted in district court is 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 (“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, 158 S.E.2d 638 (1968); *but see State v. Griffin*, 51 N.C. App. 564, 277 S.E.2d 77 (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, 428 S.E.2d 830 (1993) (applying *Ohio v. Johnson* to misdemeanor case).
- 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).
- But, 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* 4 WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 17.4(b), at 657 (2d ed. 1999).

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, 232 S.E.2d 424 (1977) (acquittal of DWI precludes state from relitigating issue at defendant's subsequent involuntary manslaughter trial); *State v. Parsons*, 92 N.C. App. 175, 374 S.E.2d 123 (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 successful prosecution has been previously adjudicated in favor of the defendant in a prior action between the parties").

The term "acquittal" obviously includes a not guilty verdict or dismissal for insufficient evidence. An acquittal also includes for double jeopardy purposes 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, 232 S.E.2d 424 (1977); *State v. Broome*, 269 N.C. 661, 153 S.E.2d 384 (1967).

The application of collateral estoppel is contingent upon 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, 310 S.E.2d 610 (1984) (acquittal of larceny charge no bar to prosecution for breaking or entering with intent to commit larceny).

C. Failure to Join

G.S. 15A-926(c) provides that a defendant who has been tried for an offense may move to dismiss a successor charge of any joinable offense, and this motion to dismiss must be granted. *See also* G.S. 15A-926 official commentary (statute was intended to bar successive trials of offenses, absent some reason for separate trials); 2 ABA STANDARDS FOR CRIMINAL JUSTICE § 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) (so stating). Third, the court may deny a motion to dismiss if it 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, 328 S.E.2d 256 (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).

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. Bisette*, 142 N.C. App. 669, 544 S.E.2d 266 (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, 230 S.E.2d 563 (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 n.6. What other circumstances, if any, would be sufficient to rebut the presumption is unclear.

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); *compare* G.S. 15A-1335 (when conviction or sentence in superior court is set aside on direct review or collateral attack, court may not impose more severe sentence for same offense or for different offense based on same conduct); Jessica Smith, *Limitations on a Judge's Authority to Impose a More Severe Sentence After a Defendant's Successful Appeal or Collateral Attack*, Administration of Justice Bulletin 2003/03 (July 2003), <http://iog.unc.edu/programs/crimlaw/aoj200303.pdf>.

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 (district court); §§ 8.5, 8.6 (superior court).

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

If the case is in superior court, the following time limits apply: (1) the motions do not appear to be subject to G.S. 15A-952(b), which requires that certain motions be filed before arraignment; the motions described above are not among them; (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, 528 S.E.2d 893 (2000) (defendant argued that prosecution was vindictive and moved to dismiss indictment; court finds that defendant waived motion by failing to make motion to trial court). For more on timing of motions, *see supra* NC Defender Manual Vol. 1, Ch. 13.

8.8 Potential *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 (so stating).¹ In *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531 (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.* (emphasis in original). *Apprendi* and *Blakely* call into question North Carolina’s current sentencing scheme, which among other things does not require the state to allege in the charging instrument all factors that increase the defendant’s maximum sentence. *See also supra* § 8.5C (discussing impact of *Apprendi* on short-form indictments).

B. Felonies

Firearm Enhancement. The North Carolina courts have previously recognized that the firearm enhancement statute (G.S. 15A-1340.16A), which adds 60 months to the defendant’s sentence, increases the defendant’s sentence beyond the statutory maximum; therefore, the facts supporting the enhancement must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt. *See State v. Lucas*, 353 N.C. 568, 548 S.E.2d 712 (2001). This reasoning also applies to the sex offender enhancement in G.S. 15A-1340.16B and the bullet-proof vest enhancement in G.S. 15A-1340.16C. All three statutes have been amended by the legislature to meet these requirements. *See JOHN RUBIN & BEN F. LOEB, JR., PUNISHMENTS FOR NORTH CAROLINA CRIMES AND MOTOR VEHICLE OFFENSES* (forthcoming 2004) (discussing changes).

Structured Sentencing. *Blakely* potentially has a broad impact on felony structured sentencing. In light of *Blakely*, the top of the presumptive range appears to represent the statutory maximum within each prior record level. Therefore, for a court to sentence in the aggravated range, the state would appear to be required to allege any aggravating factors in the indictment or information.

A court likewise may be restricted in sentencing a defendant above prior record level one. In light of *Blakely*, each prior record level appears to represent a separate statutory maximum. The U.S. Supreme Court has so far exempted prior convictions, which provide the principal grounds for sentencing a defendant above prior record level 1 under

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 State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593 (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).

structured sentencing, from the *Apprendi/Blakely* requirements. See *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Therefore, it may be unnecessary for the state to allege the defendant's prior convictions in an indictment or information. However, the five-member majority of the court that decided *Apprendi* questioned whether prior convictions increasing a sentence beyond the statutory maximum should continue to be exempt, and the same five-member majority decided *Blakely*. At the least, allegations supporting other prior record level points, such as the commission of an offense while the defendant was on probation, would appear to be subject to the *Apprendi/Blakely* requirements.²

C. Misdemeanors

The principal misdemeanor offenses in North Carolina that potentially may run afoul of *Apprendi* and *Blakely* are those subject to impaired driving sentencing rules—namely, impaired driving, commercial impaired driving, and a second or subsequent offense of the zero tolerance offenses applicable to commercial, school bus, and child care drivers. In light of *Blakely*, each of the five sentencing levels for these offenses would appear to establish a separate statutory maximum.³ Consequently, for the state to use aggravating factors (including possibly prior convictions) to obtain a sentence above level five, it would have to comply with the *Apprendi/Blakely* requirements regarding pleading, proof beyond a reasonable doubt, and where the defendant has a jury trial right, jury determination. The state may be able to satisfy the pleading requirement in impaired driving cases without specifically alleging statutory aggravating factors. Compare G.S. 20-138.1(c), -138.2(c) (setting forth pleading requirements for impaired driving and impaired driving in commercial vehicle) with *State v. Hunt*, 357 U.S. 257 (2003) (upholding statute authorizing short-form murder indictment). At the least, the state should not be able to rely on non-statutory aggravators without specifically alleging them in the pleading. If the state is required to allege in the pleading potential aggravators, and fails to do so in district court, the state likely would be barred from amending the pleadings to allege them on a trial de novo in superior court. See *supra* § 8.3 (discussing limits on superior court jurisdiction for trial de novo).

Another argument is that for misdemeanors subject to structured sentencing the judge may not increase a sentence above level one if the prosecution has failed to allege the defendant's prior convictions in the pleadings. Under *Blakely*, each level would appear to represent a separate maximum punishment. The determinative question, then, is whether prior convictions, which are the only basis for moving above level one for misdemeanors, must be alleged in the pleading. The U.S. Supreme Court has so far excepted prior

2. *Lucas, supra*, is no longer good law to the extent it held that the statutory maximum under structured sentencing for felonies is the top of the aggravated range of the highest prior record level (level six).

3. Prior North Carolina cases holding that the statutory maximum for DWI is two years, not the maximum sentence for each DWI level, would no longer appear to be good law. See *State v. Santon*, 101 N.C. App. 710, 401 S.E.2d 117 (1991) (for purpose of determining whether prior impaired driving conviction was punishable by more than sixty days imprisonment and therefore constituted aggravating factor under Fair Sentencing Act, court holds that impaired driving should be considered offense punishable by maximum of two years; therefore, conviction for impaired driving at level five, which could result in no more than sixty days imprisonment, still constituted aggravating factor).

convictions from the *Apprendi/Blakely* requirements, but a majority of the Court has questioned the continued validity of that exception. *See supra* § 8.8B.

D. Juvenile Proceedings

Consistent with the discussion above, it may be necessary under *Blakely* for the pleading in delinquency proceedings to allege factors that increase the judge's dispositional discretion. *See* G.S. 7B-2507 (delinquency history levels), -2508 (dispositional limits).

E. Procedural Issues

The current statutes do not set forth a procedure for trying the defendant on what previously were considered sentencing factors. The courts therefore could decide that they are not empowered to craft their own scheme for using such factors to increase the sentence for an offense beyond its statutory maximum, regardless of whether the factors are alleged in the pleading, proven beyond a reasonable doubt, and decided by a jury. (The court in *Lucas*, discussed *supra* § 8.8B, adopted procedures for imposing the firearm enhancement notwithstanding defects in the statutory procedures; *Blakely*, however, raises more complicated issues, arguably requiring greater legislative direction.) If the courts are empowered without further legislative action to try a defendant on sentencing factors, there are several procedural issues that have to be addressed, including how such factors should be pled, when the fact finder should be informed of the allegations, what evidence rules to apply, etc. *See* Robert L. Farb, *Blakely v. Washington and Its Impact on North Carolina's Sentencing Laws*, posted at <http://sog.unc.edu/programs/crimlaw/blakelyfarbmemo.pdf> (July 9, 2004).

F. Preservation

Because factors that increase a defendant's sentence beyond the statutory maximum appear to be elements of an aggravated form of the offense with which the defendant is charged, the failure of the state to allege those factors in the pleading may be a jurisdictional defect, which may be raised at any time. However, this is a developing area of law, and to be safe counsel should preserve all *Apprendi/Blakely* issues (pleading defects, improper standard of proof, and lack of jurisdiction). Contest aggravating factors, prior convictions, and other prior record points that improperly increase the defendant's sentence beyond the statutory maximum.