



2024 Misdemeanor Defender Training

November 12-15, 2024 / Chapel Hill, NC

*Cosponsored by the UNC-Chapel Hill School of Government
& Office of Indigent Defense Services*

Tuesday, November 12

- | | |
|----------------|---|
| 12:30-12:45 pm | Welcome and Introductory Remarks |
| 12:45-2:00 pm | Basics of Driving While Impaired:
Elements, Sentencing, and Motions Practice (75 min.)
Belal Elrahal, Assistant Professor of Public Law and Government
UNC School of Government, Chapel Hill, NC |
| 2:00-2:15 pm | <i>Break</i> |
| 2:15-3:15 pm | Basics of Driving While Impaired, cont'd. (60 min.)
Belal Elrahal, Assistant Professor of Public Law and Government
UNC School of Government, Chapel Hill, NC |
| 3:15-3:30 pm | <i>Break</i> |
| 3:30-4:15 pm | IDS Policies and Procedures (45 min.)
Becky Whitaker, Defender Policy and Planning Attorney
Office of Indigent Defense Services, Durham, NC |
| 4:15-5:00 pm | Challenging Pleadings (45 min.)
Candace Washington, Assistant Appellate Defender
Jim Grant, Assistant Appellate Defender
North Carolina Office of the Appellate Defender, Durham, NC |
| 5:00 pm | <i>Adjourn</i> |



Wednesday, November 13

- 9:00-10:30 am **Introduction to Structured Sentencing** (90 min.)
Jamie Markham, Professor of Public Law and Government
UNC School of Government, Chapel Hill, NC
- 10:30-10:45 am *Break*
- 10:45-11:45 am **Probation Violations** (60 min.)
Jamie Markham, Professor of Public Law and Government
UNC School of Government, Chapel Hill, NC
- 11:45-12:45 pm *Lunch*
- 12:45-1:45 pm **Common Evidence Issues** (60 min.)
Danny Spiegel, Assistant Professor of Public Law and Government
UNC School of Government, Chapel Hill, NC
- 1:45-2:00 pm *Break*
- 2:00-3:00 pm **Ethical Issues in District Court (ETHICS)** (60 min.)
Whitney Fairbanks, Assistant Director & General Counsel
North Carolina Office of Indigent Defense Services, Durham, NC
- 3:00-3:15 pm *Break*
- 3:15-4:30 pm **Pretrial Release Advocacy** (75 min.)
Elana Fogel, Assistant Clinical Professor of Law & Director, Criminal Defense Clinic
Duke Law School, Durham, NC
- 4:30 pm *Adjourn*

Thursday, November 14

- 9:00-9:45 am **Negotiating Effectively** (45 min.)
Daniel Meier, Attorney
Meier Law Group, PLLC, Durham, NC
- 9:45-10:00 am *Break*
- 10:00-11:15 am **Negotiation Workshops** (75 min.)
- 11:15-11:30 am *Break*
- 11:30-12:45 pm **Suppressing Evidence in District Court** (75 min.)
Phil Dixon, Jr., Director of Public Defense Education
UNC School of Government, Chapel Hill, NC
- 12:45-1:45 pm *Lunch*
- 1:45-2:45 pm **Driving Records and Getting Your Client Back on the Road** (60 min.)
Mike Paduchowski, Attorney
Law Office of Matthew Charles Suczynski, Chapel Hill, NC
- 2:45-3:00 pm *Break*
- 3:00-4:00 pm **Client Interviewing and Rapport** (60 min.)
Tucker Charns, Chief Regional Defender
Office of Indigent Defense Services, Durham, NC
- 4:00-5:00 pm **Crimmigration** (60 min.)
Barbara Lagemann, Assistant Public Defender
Office of the Public Defender, Durham, NC
- 5:00 pm *Adjourn*



Friday, November 15

- 9:00-9:45 am **Theory of Defense/Emotional Themes** (45 min.)
Tucker Charns, Chief Regional Defender
Office of Indigent Defense Services, Durham, NC
- 9:45-10:15 am **Cross Examination** (30 min.)
Phil Dixon, Jr., Director of Public Defense Education
UNC School of Government, Chapel Hill, NC
- 10:15-10:30 am *Break*
- 10:30-12:00 pm **Cross Examination Workshops** (90 min.)
- 12:00-1:00 pm *Lunch*
- 1:00-2:00 pm **Litigating Ability to Pay** (60 min.)
Whitley Carpenter, Senior Criminal Justice Counsel & Policy Manager
Forward Justice, Durham, NC
Laura Webb, Director, Fair Chance Criminal Justice Project
North Carolina Justice Center
Danny Spiegel, Assistant Professor of Public Law and Government
UNC School of Government, Chapel Hill, NC
- 2:00-2:30 pm **Direct Examination** (30 min.)
Timothy Heinle, Assistant Teaching Professor
UNC School of Government, Chapel Hill, NC
- 2:30-2:45 pm *Break*
- 2:45-3:30 pm **Closing Arguments** (45 min.)
John Fitzpatrick, Attorney
The Law Office of John C. Fitzpatrick, Durham, NC
- 3:30-4:30 pm **Rules of Evidence in Practice** (60 min.)
Jonathan Broun, Senior Staff Attorney
NC Prisoner Legal Services, Raleigh, NC
- 4:30 pm *Final Wrap-Up and Adjourn*

CLE HOURS: 21.75

Includes 1 hour of ethics/professional responsibility

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DWI: From Charge to Sentencing

Belal Elrahal

November 2024

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Elements of DWI

G.S. 20-138.1

- Drive
- Vehicle
- Street, highway or public vehicular area
- While impaired
Appreciable impairment;
BAC of 0.08 or more at any a relevant time after driving, or
Any Schedule I controlled substance or its metabolites in his/her blood or urine

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The Charge

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3

I, the undersigned, find that there is probable cause to believe that on or about the date of the offense shown and in the county named above the defendant named above unlawfully and willfully did operate a motor vehicle on a street or highway while subject to an impairing substance. N.C.G.S. 20-138.1.

4

Is this pleading sufficient?

- Does it provide defendant enough notice to prepare a defense?
- Does it provide defendant enough notice to protect against double jeopardy?
- G.S. 20-138.1(c): "In any prosecution for impaired driving, the pleading is sufficient if it states the time and place of the alleged offense in the usual form and charges that the defendant drove a vehicle on a highway or public vehicular area while subject to an impairing substance."

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The Stop and the Arrest

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The officer pulled behind the vehicle at a stoplight at 3 a.m. The registration was expired. The officer turned on his lights. The defendant turned into a parking lot. The officer smelled an odor of alcohol coming from the defendant and saw that the defendant's eyes were red and glassy. The defendant's left foot was in a surgical boot. The officer performed an HGN test, noting 4 of 6 indicators of impairment. The defendant said he drank two beers at 6 p.m. The officer arrested the defendant for DWI.

7

Totality of the circumstances
including
Particularized and Objective observations
that
Raise a suspicion of (any) wrongdoing
=
Reasonable and Articulable Suspicion

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8

Evidence of drinking
+
Indicators of impairment from field sobriety tests
or
Unexplained faulty driving consistent with impairment
+
Remaining elements, and identity.
=
Probable cause

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9

G.S. 20-38.6

- Motions to suppress evidence or dismiss charges in an implied consent case must be made before trial
- Exceptions:
 - *Motions to dismiss for insufficient evidence*
 - *Motion based on facts not previously known*
- State must be given reasonable time to procure witnesses or evidence and conduct research

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Summary Rulings

- State stipulation
- Failure to move pretrial

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Preliminary Determination

- Hearing and findings of fact
- Written order
 - Findings of fact
 - Conclusions of law
 - Preliminary indication of granted or denied
- If indication is to DENY, judge may enter final order
- If indication is to GRANT, judge may not enter final ruling until State has opportunity to appeal

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The Testing

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This defendant was arrested and taken before a chemical analyst. The chemical analyst asked the defendant to submit to a breath test. He advised him orally and in writing of his implied consent rights. That advice of rights was given at 4:15 a.m. At 4:42 a.m., the chemical analyst requested that the defendant submit to testing. He did. The test results were a 0.08 and a 0.08.

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Law

After Advice Given

1. Breath | J | BR

1. You have been charged with an implied-consent offense. Under the implied-consent law, you can refuse any test, but your drivers license will be revoked for one year and could be revoked for a longer period of time under certain circumstances, and an officer can compel you to be tested under other laws.

2. The test results, or the fact of your refusal, will be admissible in evidence at trial.

3. Your driving privilege will be revoked immediately for at least 30 days if you refuse any test or the test result is 0.08 or more, 0.04 or more if you were driving a commercial vehicle, or 0.01 or more if you are under the age of 21.

4. After you are released, you may seek your own test in addition to this test.

5. You may call an attorney for advice and select a witness to view the testing procedures remaining after the witness arrives, but the testing may not be delayed for these purposes longer than 30 minutes from the time you are notified of these rights. You must take the test at the end of 30 minutes even if you have not contacted an attorney or your witness has not arrived.

Date _____

The defendant will _____

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Remedy for Violation of Statutory Implied Consent Rights

- *State v. Shadding*, 17 N.C. App. 279 (1973)
 - Failure to offer evidence that defendant was advised of implied consent rights renders breath test results inadmissible
 - Results of test admissible only if testing was delayed to give defendant opportunity to exercise rights
- *State v. Myers*, 118 N.C. App. 452 (1995); *State v. Hatley*, 190 N.C. App. 639 (2008); *State v. Buckheit*, 223 N.C. App. 269 (2012)
 - Denial of statutory right to have witness present during administration of breath test bars admission of results

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Implied Consent Testing

Advice of Rights



Test



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The Initial Appearance

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"I'm setting a \$1,000 bond, and I am ordering you held. Anyone who drives while impaired is dangerous. You'll need to call a parent to pick you up. I'm not letting you leave with anyone else."

MAGISTRATE

19

State v. Knoll, 322 N.C. 535 (1988)

- If the State violates a defendant's statutory right to pretrial release by impermissibly holding the defendant; **and**
- The defendant is—during the crucial time period following his or her arrest—denied access to witnesses;
- The defendant may be entitled to **dismissal** of the charges.

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G.S. 20-38.4

AOC-CR-271

- Magistrate: I informed the defendant in writing of the access procedures.

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The State's Case

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"The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration."

G.S. 20-138.1(a)(2); G.S. 20-139.1(b)

23

"The state of a person having his physical or mental faculties, or both, appreciably impaired by an impairing substance."

G.S. 20-4.01(48b) Under the Influence of an Impairing Substance

24

175

Stephen Strick
Juror #8

Does being on an impairing substance automatically make you impaired under the law?

State v. Shelton, 263 N.C.App. 681 (2019)

25

Dismissal/Reduction of Charges.

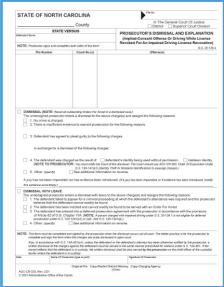
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G.S. 20-138.4

AOC-CR-339

- Must document dismissals and reductions



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Blood Draw Issues

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Withdrawal of blood from an unconscious defendant

SCENARIO

LEO responded to a single vehicle crash. The defendant was only person in his truck and was severely injured. He was unresponsive and smelled of alcohol. He was taken to the hospital.

The officer went to the hospital. There, she obtained a sample of the defendant's blood while the defendant remained unconscious. The officer did not seek or obtain a warrant authorizing the blood draw.

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"If a law enforcement officer has reasonable grounds to believe that a person has committed an implied-consent offense, and the person is unconscious or otherwise in a condition that makes the person incapable of refusal, the law enforcement officer may direct the taking of a blood sample or may direct the administration of any other chemical analysis that may be effectively performed. In this instance the notification of rights set out in subsection (a) and the request required by subsection (c) are not necessary."

G.S. 20-16.2(b)

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Mitchell v. Wisconsin, 588 U.S. ____, 139 S. Ct. 2525 (2019)

- When an officer has probable cause to believe a person has committed an impaired driving offense, and
- the person's unconsciousness or stupor requires him to be taken to the hospital before a breath test may be performed,
- the State may "almost always" order a warrantless blood test to measure the driver's blood alcohol concentration without offending the Fourth Amendment.

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Confrontation Clause

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This defendant's blood sample was analyzed by a local crime lab. The ADA has sent you a copy of the lab report along with notice that she intends to introduce the report without calling the analyst. May you insist that the analyst be present?

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Sixth Amendment Right to Confront Witnesses

01

Sworn forensic reports prepared by lab analysts for purposes of prosecution are testimonial.

02

Their authors – the analysts – are witnesses for purposes of the Sixth Amendment.

03

A defendant has the right to be confronted with such a witness at trial, unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness.

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Statute	Evidence	Proceedings	Time for State's Notice	Time for D's Objection or Demand	AOC Form
G.S. 20-139.1(c1)	Chemical analysis of blood or urine	Cases tried in district and superior court and adjudicatory hearings in juvenile court	No later than 15 business days after receiving report and at least 15 business days before the proceeding	At least 5 business days before the proceeding	AOC-CR-344
G.S. 20-139.1(c3)	Chain of custody statement for blood or urine	Cases tried in district and superior court and adjudicatory hearings in juvenile court	No later than 15 business days after receiving report and at least 15 business days before the proceeding	At least 5 business days before the proceeding	AOC-CR-344
G.S. 20-139.1(e1), (e2)	Chemical analyst affidavit	Hearing or trial in district court	No later than 15 business days after receiving report and at least 15 business days before the proceeding	At least 5 business days before the proceeding	AOC-CR-344

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Remote Testimony in District Court

G.S. 20-139.1(c6)

- Laboratory analyst may testify remotely if:
 - State has provided copy of report to defendant; and
 - State has notified defendant at least 15 business days before the proceeding of intent to offer remote testimony.

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Defenses

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Involuntary Intoxication?

SCENARIO

- Defendant testifies that he went to a party where he planned to stay overnight.
- He does not remember anything after having a few drinks until regaining consciousness at the jail.
- He says this may have resulted from combination of alcohol and prescribed Zanax.

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Automatism/Involuntary Intoxication

Automatism is a complete defense	Absence of consciousness precludes the existence of any specific mental state and the possibility of a voluntary act without which there can be no criminal liability
Does not apply if unconsciousness results from voluntary intoxication	The defense applies to cases of the unconsciousness of persons of sound mind such as somnambulists or persons suffering from the delirium of fever, epilepsy, a blow on the head or the involuntary taking of drugs or intoxicating liquor, and other cases in which there is no functioning of the conscious mind and the person's acts are controlled solely by the subconscious mind.

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What is Not Automatism/Involuntary Intoxication

01

State v. Clowers, 217 N.C. App. 520 (2011)

- No defense of automatism as no evidence demonstrated that the defendant's consumption of alcohol, resulting in an alcohol concentration of 0.25, was involuntary, despite possible side effect of Alprazolam, the defendant testified that his ingestion of the anxiety drug also was voluntary.

02

State v. Highsmith, 173 N.C. App. 600 (2005)

- No involuntary intoxication where defendant drove after voluntarily consuming prescription medication that he knew or should have known could impair him.

03

State v. Rose, 312 N.C. 441 (1984)

- Statute defining impaired driving based on a specified alcohol concentration is not void for vagueness, while people may not know when their blood alcohol concentration reaches the per se level, they do "know the line exists" and "that drinking enough alcohol before or during driving may cause them to cross it."

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Necessity

SCENARIO

After a bad break-up, Dan drives to a local bar, where he begins drinking. He plans to call an Uber if he drinks too much to drive.

Dan is on his seventh drink in two hours when a man storms through the front door of the bar, waving an assault rifle and threatening to shoot up the place.

Dan bolts for the nearest exit, jumps in his car, and drives away.

Less than a half-mile away from the bar, Dan runs through a red light and is stopped by a law enforcement officer. Dan is charged with driving while impaired.

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Necessity is an available defense for driving while impaired.

Evidence must permit the jury to reasonably infer that the defendant

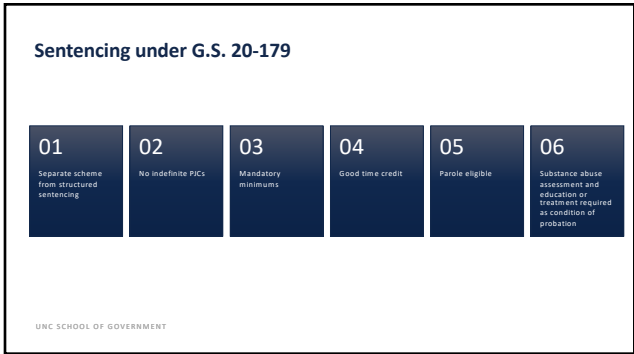
took reasonable action,	to protect the life, limb or health of a person, and	no other acceptable choice was available.
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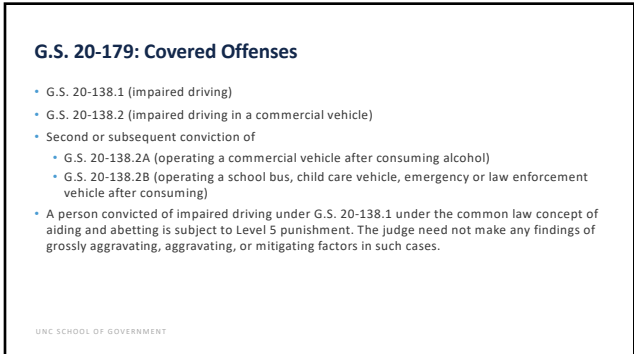
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Punishment Level	Controlling Statute	Imprisonment and Mandatory Probation Conditions	Fine
Aggravated Level One G.S. 20-179(f)		<ul style="list-style-type: none"> - 12 months minimum to 36 months maximum - If suspended <ul style="list-style-type: none"> - Imprisonment of at least 120 days as a condition of special probation - Requirement that defendant abstain from alcohol consumption for a minimum of 120 days to a maximum of the term of probation, as verified by continuous alcohol monitoring (CAM) system - Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6 	Up to \$10,000
Level One G.S. 20-179(g)		<ul style="list-style-type: none"> - 30 days minimum to 24 months maximum - If suspended <ul style="list-style-type: none"> - Special probation requiring (1) imprisonment of at least 30 days or (2) imprisonment of at least 10 days and alcohol abstinence and CAM for at least 120 days - Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6 	Up to \$4,000
Level Two G.S. 20-179(h)		<ul style="list-style-type: none"> - 7 days minimum to 12 months maximum - If suspended <ul style="list-style-type: none"> - Special probation requiring (1) imprisonment of at least 7 days or (2) alcohol abstinence and CAM for at least 90 days - If Level Two based on prior conviction or DWLR for an impaired driving revocation and prior conviction occurred within five years, sentence must require 240 hours of community service if no imprisonment imposed - Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6 	Up to \$2,000
Level Three G.S. 20-179(i)		<ul style="list-style-type: none"> - 48 hours minimum to 120 days maximum - If suspended <ul style="list-style-type: none"> - Must require one or both of the following <ul style="list-style-type: none"> o Imprisonment for 48 hours as a condition of special probation o Community service for a term of at least 72 hours - Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6 	Up to \$500
Level Four G.S. 20-179(j)		<ul style="list-style-type: none"> - 24 hours minimum to 60 days maximum - If suspended <ul style="list-style-type: none"> - Must require one or both of the following <ul style="list-style-type: none"> o Imprisonment for 24 hours as a condition of special probation o Community service for a term of 24 hours - Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6 	Up to \$200

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Punishment Level	Controlling Statute	Imprisonment and Mandatory Probation Conditions	Fine
Level One G.S. 20-179(f)		<ul style="list-style-type: none"> - 12 months minimum to 36 months maximum - If suspended <ul style="list-style-type: none"> - Imprisonment of at least 120 days as a condition of special probation - Requirement that defendant abstain from alcohol consumption for a minimum of 120 days to a maximum of the term of probation, as verified by continuous alcohol monitoring (CAM) system - Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6 	Up to \$10,000
Level Two G.S. 20-179(g)		<ul style="list-style-type: none"> - 30 days minimum to 24 months maximum - If suspended <ul style="list-style-type: none"> - Special probation requiring (1) imprisonment of at least 30 days or (2) imprisonment of at least 10 days and alcohol abstinence and CAM for at least 120 days - Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6 	Up to \$4,000
Level Three G.S. 20-179(h)		<ul style="list-style-type: none"> - 7 days minimum to 12 months maximum - If suspended <ul style="list-style-type: none"> - Special probation requiring (1) imprisonment of at least 7 days or (2) alcohol abstinence and CAM for at least 90 days - If Level Two based on prior conviction or DWLR for an impaired driving revocation and prior conviction occurred within five years, sentence must require 240 hours of community service if no imprisonment imposed - Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6 	Up to \$2,000
Level Four G.S. 20-179(i)		<ul style="list-style-type: none"> - 48 hours minimum to 120 days maximum - If suspended <ul style="list-style-type: none"> - Must require one or both of the following <ul style="list-style-type: none"> o Imprisonment for 48 hours as a condition of special probation o Community service for a term of at least 72 hours - Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6 	Up to \$500
Level Five G.S. 20-179(j)		<ul style="list-style-type: none"> - 24 hours minimum to 60 days maximum - If suspended <ul style="list-style-type: none"> - Must require one or both of the following <ul style="list-style-type: none"> o Imprisonment for 24 hours as a condition of special probation o Community service for a term of 24 hours - Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6 	Up to \$200

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Level Three G.S. 20-179(k)		<ul style="list-style-type: none"> - 72 hours minimum to 6 months maximum - If suspended <ul style="list-style-type: none"> - Must require one or both of the following <ul style="list-style-type: none"> o Imprisonment for at least 72 hours as a condition of special probation o Community service for a term of at least 72 hours - Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6 	Up to \$1,000
Level Four G.S. 20-179(l)		<ul style="list-style-type: none"> - 48 hours minimum to 120 days maximum - If suspended <ul style="list-style-type: none"> - Must require one or both of the following <ul style="list-style-type: none"> o Imprisonment for 48 hours as a condition of special probation o Community service for a term of at least 72 hours - Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6 	Up to \$500
Level Five G.S. 20-179(m)		<ul style="list-style-type: none"> - 24 hours minimum to 60 days maximum - If suspended <ul style="list-style-type: none"> - Must require one or both of the following <ul style="list-style-type: none"> o Imprisonment for 24 hours as a condition of special probation o Community service for a term of 24 hours - Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6 	Up to \$200

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Duties of the Prosecutor

G.S. 20-179(a)(2)

- Obtain full record of traffic convictions and present to judge
- Present all other appropriate GAFs and Afs of which he or she is aware
- Present evidence of alcohol concentration from valid chemical analysis

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Grossly Aggravating Factors

G.S. 20-179(c)

- Prior conviction for offense involving impaired driving (within 7 years before instant offense; after instant offense and before/at sentencing)
- DWLR while license revoked for impaired driving revocation
- Serious injury to another person
- * Driving with any of the following in the vehicle
 - Child under 18, or
 - Person with mental development of child under 18, or
 - Person with disability barring unaided exit from vehicle

* Finding of this factor alone requires sentencing at Level One

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Notice of Aggravating Factors in Superior Court

G.S. 20-179(a1)(1)

- Notice must be provided no later than 10 days prior to trial
- AOC-CR-338

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AGGRAVATING FACTORS (ONE)
The evidence introduced at trial is sufficient to prove the existence of grossly aggravating factors under G.S. 20-179(c) if it is established that:

GROSSLY AGGRAVATING FACTORS - G.S. 20-179(c)

- The State proves to the satisfaction of the trier of fact:
 - That the defendant was convicted of a prior offense involving impaired driving which constituted actual or virtual injury 20 years before the date of the offense.
 - That the defendant was convicted of a prior offense involving impaired driving which constituted actual or virtual injury within the 7 years before the date of the offense.
 - That the defendant was convicted of a prior offense involving impaired driving which constituted actual or virtual injury within the 7 years before the date of the offense and the defendant was convicted of the offense of impaired driving within the 7 years before the date of the offense.
 - That the defendant was convicted of a prior offense involving impaired driving which constituted actual or virtual injury within the 7 years before the date of the offense and the defendant was convicted of the offense of impaired driving within the 7 years before the date of the offense.
 - That the defendant was convicted of a prior offense involving impaired driving which constituted actual or virtual injury within the 7 years before the date of the offense and the defendant was convicted of the offense of impaired driving within the 7 years before the date of the offense.
- The State proves to the satisfaction of the trier of fact:
 - That the defendant was convicted of a prior offense involving impaired driving which constituted actual or virtual injury within the 7 years before the date of the offense.
 - That the defendant was convicted of a prior offense involving impaired driving which constituted actual or virtual injury within the 7 years before the date of the offense.
 - That the defendant was convicted of a prior offense involving impaired driving which constituted actual or virtual injury within the 7 years before the date of the offense.
 - That the defendant was convicted of a prior offense involving impaired driving which constituted actual or virtual injury within the 7 years before the date of the offense.
 - That the defendant was convicted of a prior offense involving impaired driving which constituted actual or virtual injury within the 7 years before the date of the offense.

AGGRAVATING FACTORS - G.S. 20-179(b)

- The State proves to the satisfaction of the trier of fact:
 - That the defendant was convicted of a prior offense involving impaired driving which constituted actual or virtual injury within the 7 years before the date of the offense.
 - That the defendant was convicted of a prior offense involving impaired driving which constituted actual or virtual injury within the 7 years before the date of the offense.
 - That the defendant was convicted of a prior offense involving impaired driving which constituted actual or virtual injury within the 7 years before the date of the offense.
 - That the defendant was convicted of a prior offense involving impaired driving which constituted actual or virtual injury within the 7 years before the date of the offense.
 - That the defendant was convicted of a prior offense involving impaired driving which constituted actual or virtual injury within the 7 years before the date of the offense.

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Mitigating Factors

- (1) Slight impairment of the defendant's faculties, resulting solely from alcohol, and an alcohol concentration that did not exceed 0.09 at any relevant time after the driving.
- (2) Slight impairment of the defendant's faculties, resulting solely from alcohol, with no chemical analysis having been available to the defendant.
- (3) Driving that was safe and lawful except for the defendant's impairment.
- (4) A safe driving record.
- (5) Impairment caused primarily by a lawfully prescribed drug for an existing medical condition, and the amount of drug taken was within the prescribed dosage.
- (6) Voluntary submission to a substance abuse assessment and to treatment.
- (6a) Completion of a substance abuse assessment, compliance with its recommendations, and 60 days of continuous abstinence from alcohol consumption, as proven by a continuous alcohol monitoring (CAM) system.
- (7) Any other factor that mitigates the seriousness of the offense.

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Special Rules

G.S. 20-179

1. Judge may award credit against term of imprisonment for inpatient treatment obtained after commission of offense.
2. Judge may order special probation to be served in a treatment facility.
3. Good time credit is awarded against active sentences at all levels other than Level A1.
4. Good time credit does *not* reduce special probation sentence.
5. Imprisonment (both active and split) may be served in 48-hour intervals.
6. Level A1 sentences end 4 months before maximum to place defendant on post-release supervision.

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Special probation (split sentence) for DWI



Local Jail

Active sentence for DWI



Statewide Misdemeanant Confinement Program

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STATE OF NORTH CAROLINA

County _____

File No. _____

In The General Court Of Justice
 District Superior Court Division

Name Of Defendant: STATE VERSUS _____

**IMPAIRED DRIVING
 DETERMINATION OF SENTENCING FACTORS**
 (For Offenses Committed On Or After Dec. 1, 2011)
 G.S. 20-179

District Court: Based upon the evidence presented at the trial and sentencing hearing in District Court, the Court determines that (1) the State has proved the grossly aggravating factors and aggravating factors marked below beyond a reasonable doubt and (2) the defendant has proved the mitigating factors marked below by a preponderance of the evidence.

Superior Court: Based upon the evidence presented at the trial and sentencing hearing in Superior Court, (1) the trier of fact has determined that the State has proved the grossly aggravating factors and aggravating factors marked below beyond a reasonable doubt, or the defendant has admitted to these grossly aggravating factors and aggravating factors, and (2) the Court determines that the defendant has proved the mitigating factors marked below by a preponderance of the evidence. If grossly aggravating factor No. 1.a., 1.b., 1.c., 1.d., 1.e., or 1.f. is marked below, the Court determines that the State has proved that grossly aggravating factor beyond a reasonable doubt. If aggravating factor No. 8 or 9 is marked below, the Court determines that the State has proved that aggravating factor beyond a reasonable doubt.

I. GROSSLY AGGRAVATING FACTORS - G.S. 20-179(c)

(NOTE: Either Nos. 1 and 2 or No. 3 apply in each case except aiders and abettors. If No. 1 is checked, No. 2.a., 2.b., or 2.c. must also be checked.)

1. The defendant

a. has been convicted of a prior offense involving impaired driving which conviction occurred within seven (7) years before the date of this offense.

b. has two three or more convictions as described in No. 1.a.

c. has been convicted of an offense involving impaired driving which conviction occurred after the date of the offense for which the defendant is being sentenced but before or contemporaneously with the sentencing in this case.

d. has two three or more convictions as described in No. 1.c.

e. has a prior conviction in District Court for an offense involving impaired driving, the conviction was appealed to Superior Court, the appeal has been withdrawn or the case has been remanded back to District Court, and a new sentencing hearing for the case has not been held pursuant to G.S. 20-38.7.

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Sentencing Scenario 1

- Don is convicted of DWI. BAC is 0.08. He has a safe driving record under G.S. 20-179(e)(4). The State does not present aggravating factors. Dan demonstrates that he obtained a substance abuse assessment and attended ADETS, which was recommended.

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Suspended sentence?

- Must require
 - Imprisonment for 24 hours as a condition of special probation and/or
 - Community service for 24 hours
 - AND defendant must obtain substance abuse assessment and education or treatment required by G.S. 20-17.6

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Sentencing Scenario 2

- Danielle is convicted of DWI. She is 30. Her BAC was a 0.08. She has a safe driving record. Her 5-year-old daughter was in the car at the time of the offense. She has obtained a substance abuse assessment and has attended ADETS.

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Level One Sentencing Requirements

- 30 days minimum – 24 months maximum
- If suspended
 - Special probation requiring (1) imprisonment of at least 30 days or (2) imprisonment of at least 10 days and alcohol abstinence and CAM for at least 120 days
 - AND defendant must obtain substance abuse assessment and education or treatment required by G.S. 20-17.6

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Sentencing Scenario 3

- Darren is convicted of DWI – his third conviction. He was previously convicted of DWI five years ago and again two years ago. At the time of the current offense, committed on a city street, his license was revoked for the latest DWI conviction.

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Aggravated Level One Sentencing Requirements

- 12 months minimum – 36 months maximum
- If suspended
 - Special probation requiring imprisonment of at least 120 days;
 - Alcohol abstinence and CAM for at least 120 days; and
 - Defendant must obtain substance abuse assessment and education or treatment required by G.S. 20-17.6

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Resentencing After Appeal

G.S. 20-38.7(c)

- District court sentence is vacated when an appeal is withdrawn and a case remanded and the district court must hold a new sentencing hearing unless
 - Appeal is withdrawn and prosecutor certifies in writing that he/she has no new sentencing factors to offer

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AOC-CR-321B SIDE 2


STATE VERSUS		WITHDRAWAL OF APPEAL ORDER OF REMAND IMPLIED-CONSENT OFFENSES (For Appeals Filed On Or After Dec. 1, 2015)	
Name of Defendant		G.S. 22-22.1	
Address of Defendant		WITHDRAWAL AND REMAND	
<p>The defendant has withdrawn the appeal of this case for trial de novo in superior court (check one):</p> <p><input type="checkbox"/> within ten (10) days of entry of judgment under G.S. 15A-141(b), and the case is remanded to the district court. A new sentencing hearing shall be held in district court unless the State has executed certification no. 2, before</p> <p><input type="checkbox"/> prior to the calendar of the case for trial de novo under G.S. 15A-141(b), and the case is remanded to the district court. A new sentencing hearing shall be held in district court unless the State has executed certification no. 2, before</p> <p><input type="checkbox"/> after the calendar of the case for trial de novo under G.S. 15A-141(b), and the Court has consented to the withdrawal with the withdrawal of appellate court costs. The case is remanded to the district court. A new sentencing hearing shall be held in district court unless the State has executed certification no. 2, before. The additional appellate court costs that attached (check one):</p> <p><input type="checkbox"/> have been waived, the undersigned judge having found just cause to waive the costs as ordered on the attached AOC-CR-618 <input type="checkbox"/> Other _____</p> <p><input type="checkbox"/> have not been waived.</p>			
<p>The defendant is ordered to appear in court at the date, time, and location indicated below. The defendant must appear even if the State enters the certification below.</p> <p>Date: _____ Location of Court: _____</p> <p>Signature of Judge: _____</p>			
CERTIFICATION OF PROSECUTOR THAT NEW SENTENCING HEARING IS UNNECESSARY (IF APPLICABLE)			
<p>NOTE TO PROSECUTOR: Please see new sentencing factors as contemplated by the district court on remand, and refrain from a new sentencing hearing to minimize State's entire State. If there are no new sentencing factors to be considered and the case number may be remanded for resentencing of the district court judgment, attach the appropriate certification and sign below.</p> <p>The defendant has withdrawn the appeal of this case for trial de novo in superior court (check one):</p> <p><input type="checkbox"/> within ten (10) days of entry of judgment under G.S. 15A-141(b), and the State certifies that it has no new sentencing factors to offer the court on remand.</p> <p><input type="checkbox"/> prior to the calendar of the case for trial de novo under G.S. 15A-141(b), and the State certifies that it has no new sentencing factors to offer the court on remand.</p> <p><input type="checkbox"/> after the calendar of the case for trial de novo under G.S. 15A-141(b), and the State certifies that it consents to the withdrawal and remand, and has no new sentencing factors to offer the court on remand.</p>			
Signature of Prosecutor		Signature of Prosecutor	

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Takeaways

1. Permissive pleading rules
2. Pretrial motions required
3. Suppression is remedy for failure to advise/afford implied consent rights
4. Dismissal is remedy for violation of statutory right to pre-trial release that deprives defendant of access to witnesses
5. Chemical analysis results meet State's prima facie burden to show impairment




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Takeaways

6. Special rules govern the dismissal, reduction of charges
7. Fourth Amendment governs withdrawal of blood, which requires consent, a warrant, or exigent circumstances
8. A defendant may waive the right to confront a lab analyst by failing to object after receiving notice
9. Prosecutors have special duties to present evidence at sentencing
10. State must provide notice of GAFs and AFs in superior court



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QUESTIONS

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 919-962-7098

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DWI CHEAT SHEET

Levels: (§20-179(c-k)) AOC-CR-311

Agg 1= 3 or more Grossly Aggravating Factors

1= 2 Grossly Aggravating Factors, OR factor involving age/disability

2= 1 Grossly Aggravating Factor (other than factor involving age/disability)

3=Aggravating outweighs Mitigating	A>M
4=No Aggravating or Mitigating	Ø
Or Aggravating=Mitigating	A=M
5=Mitigating outweighs Aggravating	M>A

Sentencing: (§20-179(f)-(k)) AOC-CR-310 & 342

Level	Minimum	Maximum	Mandatory split IF suspended
Agg 1	12 months	36 months/\$10,000	120 days
IF suspended, MUST require a term of imprisonment of at least 120 days, abstain from alcohol for period of 120 days up to the full term of probation and require abuse asmt and treatment (§20-179 (f3))			
Level	Minimum	Maximum	Mandatory split IF suspended
1	30 days & \$4,000	24 months	30 days MAY reduce to 10 days if CAM for 120 (may apply up to 60 pretrial days) (g)
2	7 days & \$2,000	12 months	7 days MAY eliminate split if CAM for 90 (may apply up to 60 pretrial days) AND if prior w/in 5 years or DWLR, MUST perform 240 hours of CS (h) MAY require abstain from alcohol as verified by CAMS (§20-179 (h1) & (k2))
Level	Minimum	Maximum	MAY be suspended with these Probation Conditions
3	72 hrs	6 months \$1,000	72 hours jail (i) 72 hours C.S. Or any combination
4	48 hrs	120 days \$500	48 hours jail (j) 48 hours C.S. Or any combination
5	24 hrs	60 days \$200	24 hours jail (k) 24 hours C.S.

SECOND or subsequent off. requires interlock on all vehicles owned or operated
 SECOND or subsequent off. requires at least 30 days of CS OR 5 days in jail
 THIRD or subsequent off. requires at least 60 days of CS OR 10 days in jail
 IF suspended, MUST require substance abuse asmt and treatment (§20-179(i-k))
 MAY require abstain from alcohol as verified by CAMS (§20-179 (k2))
 No Jail Credit for First 24 Hours (§20-179 (p)(1))
 Hour for Hour service/Weekends/Report in Sober Condition (§20-179(s))
 Credit for Inpatient Treatment (§20-179 (k1))
 Can't consolidate multiple DWIs. Can consolidate w/ higher charge (§20-179(f2))
 Aiding and Abetting conviction is always LEVEL 5 (§20-179 (f1))
 MUST serve active sentence in local jail unless second DWI (§20-176(c1))

Limited Driving Privilege Eligibility: (§20-179.3) AOC-CR-312

Valid license or license that had been expired for less than 1 year

No prior impaired driving convictions w/in 7 years of offense date

Level Three, Four, or Five was imposed and Not a refusal

After offense, not been convicted of or have unresolved DWI charge

Obtained and filed with the court a substance abuse assessment NEED

- Letter on letterhead for nonstandard working hours (STD hours 6:00 A.M. to 8:00 P.M. Mon through Fri)
- DL-123 or DL-123A from Ins. Co. (Only good for 30 days)
- \$100 filing fee

Allows maintenance of household only during standard hours

Allows for work, edu & religious worship during standard and listed times

CS, asmt and treatment as directed; Medical anytime

Refusal Privilege: (§20-16.2 (e1) & §20-179.3) AOC-CR-313

Same as above but also; No prior refusals w/in 7 years

No death or critical injury

Final dispo AND Revoked at least 6 months AND no unresolved DWI charges

Completed with at least one condition of suspended sentence

Completed training or treatment per assessment

Allows work, edu & religious worship same. If < .15 medical anytime, maint std & CS as directed If ≥ .15 not allowed for medical, maint or CS

Interlock: (§20-179.3 (g5)) required when 0.15 or more AOC-CR-340

§20-179.3 (e1) requires 45 day waiting period for LDP

Does not allow maint, medical or CS / allows work, edu. & tmt at listed times

THIS BELONGS TO AN EXCELLENT ASSISTANT PUBLIC DEFENDER IN 2015
 Effective for LDP on or after October 1, 2015

Interlock info: www.monitechnc.com 800-521-4246

Interlock info: www.smartstartinc.com 800-880-3394

DWI Regs: 10A N.C.A.C. 41B .0101 - 41B .0503

Preventive Maintenance and Permits (§20-139.1 (b2), (b6))

www.ncpublichealth.com/chronicdiseaseandinjury/fta/history.htm

Pre-Trial Motion Practice (§20-38.6)

Checking Stations and Roadblocks (§20-16.3A)

Blood Test Chain of Custody (§20-139.1 (c3))

Expert Testimony Fee under §20-139.1 \$600 (§7A-304(a)(11) & (12))
 (fees assessed on or after 8-1-13)

BLAKELY CURE in District Court (§20-179(a)(1) & (2), (c))

State must prove Grossly Aggravating or Aggravating Factors beyond a reasonable doubt at sentencing hearing or may use evidence from trial

BLAKELY CURE in Superior Court (§20-179(a1), (a2) & (c))

For notice, see AOC-CR-338

10 year look back period on Habitual DWI (§20-138.5 (a)) (on or after 12-1-06)

MELENDEZ-DIAZ CURE (20-139.1(c1), (c3), (e1) & (e2))

(on or after 10-1-09) AOC-CR-344

Appeals and Withdrawal/Remand (§20-38.7) (appeals on or after 12-1-15)

GROSSLY AGGRAVATING FACTORS (§20-179 (c))

- A conviction for an offense involving impaired driving within seven years of the date of this offense (See §20-179 (c) re: rebutting priors)
- Each prior conviction is a separate grossly aggravating factor
- District court conviction that is appealed and either withdrawn or remanded BUT not yet resentenced
- The defendant's driver's license was revoked for an impaired driving offense at the time of this offense
- Serious injury to another person caused by the defendant's impaired driving at the time of this offense
- A child under the age of 18, mental development of a child under 18, or physical disability preventing unaided exit was in the vehicle at the time of this offense (Super Aggravating Factor that bumps to Level 1)

AGGRAVATING FACTORS (§20-179 (d))

- Gross impairment of 0.15 or more
- Especially reckless or dangerous driving
- Negligent driving that led to a reportable accident
- Driving by the defendant while his driver's license was revoked under §20-28(a1) for an impaired driving revocation under §20-28.2(a)
- Two or more prior convictions of a motor vehicle offense for which at least three points are assigned occurring within five years of the date of this offense OR one or more prior convictions of an offense involving impaired driving that occurred more than seven years before the date of this offense
- Conviction of speeding while fleeing or attempting to elude apprehension
- Conviction of speeding by the defendant by at least 30 miles per hour over the legal limit
- Passing a stopped school bus
- Any other factor that aggravates the seriousness of the offense

MITIGATING FACTORS (§20-179 (e))

- Slight impairment solely from alcohol and the alcohol concentration did not exceed 0.09
- Slight impairment resulting solely from alcohol, with no chemical analysis having been available to the defendant
- Driving at the time of the offense that was safe and lawful except for the impairment
- A safe driving record, having no convictions for any motor vehicle offense for which at least four points are assigned within five years of the date of this offense
- Impairment caused primarily by a lawfully prescribed drug for an existing medical condition, and the amount of the drug taken was within the prescribed dosage
- Voluntary submission to a mental health facility for assessment after being charged with the impaired driving offense and, if recommended by the facility, voluntary participation in the recommended treatment
- Assessment, compliance with recommendations and maintaining 60 days of continuous abstinence, as proven by DOC approved device
- Any other factor that mitigates the seriousness of the offense

Effective for offenses on or after 12-1-15

Class A1

- Assault by Pointing Gun (14-34)
- Assault Inflicting Serious Injury (14-33)(c)(1)
- Assault on a Child Under 12 (14-33)(c)(3)
- Assault on a Female (14-33)(c)(2)
- Assault on Gov. Off. (14-33)(c)(4) F
- * Assault on Handicapped Person (14-32 1)
- Assault on School Pers (14-33)(c)(6) F
- Assault with a Deadly Weapon (14-33)(c)(1)
- Assault and pers rel in presence of minor (14-33 (d))
- Child Abuse (14-318 2) F
- Death by Vehicle (20-141 4)
- E- Liquid Container Violations (14-401 18A)
- Food Stamp Fraud \$100-\$500 (108A-53 1)
- Ind Lib by School Personnel, not Teacher (14-202 4) F
- Interfering with Emergency Comm (14-286 2)
- Patient Abuse (14-32 2) F
- P Patronizing a Prostitute (14-205 2) F
- @ Secret Peeping #2 or w/ photo device (14-202) F
- Sex with Student by School, not Teacher (14-27 7) F
- @ & * Sexual Battery (14-27 5A)
- * Stalking (14-277 3) Felony if prior or while 50B/C
- Trespass, 1st Degree at Utility Facility (14-159 12(c)) F
- Trespass, 1st Degree at Agricultural Center (14-159 12(c)) F
- Unfair Trade of Cigarettes (14-401 18)
- Unmanned Aircraft Image Dissemination (14-401 25) F
- Violation of 50B Order (50B-4 1) F

Class 1

- Alcohol offense, not otherwise specified (18B-102)(b)
- Alcohol Powder Offenses (18B-102(a)(7))
- Altering Serial Number (14-160 1)
- Breaking or Entering (14-54) F
- B&E Coin Operated Machine (14-56 1) F
- Communicating Threats (14-277 1)
- Concealed Weapon Prohibited or Alcohol (14-415 21)
- Contrib to Delinq of Juvenile (14-316 1)
- Criminal Domestic Trespass (14-134 3) F
- Damaging Computers < \$100 (14-455) F
- Death by Vehicle (20-141 4) F Prior to 12-1-09
- Disorderly Conduct #2 (14-288 4) F
- DWLR ONLY if Impaired Driving revocation (20-28)
- Escape by Misdemeanor (148-45) F
- ESC Violation (96-18)

HIV testing if DAC, effective 7-1-13
 P= May order testing for Sexually Transmitted Disease, effective 10-1-13 (14-205 4)
 M = possible misd. enhancement (review statute)
 F = possible felony enhancement (review statute)
 * Subject to DNA sample (15A-266 4)
 @ Potential Sex Offender Registry (14-208 7)
 DV / knowing female is pregnant is 1 class higher. If A1, becomes class I felony (14-18 2)
 Hab Misd Assault Class H Felony (14-33 2)
 14-33 & physical inj or 14-34; & 2 or > assault conv
 Assault by strangulation Class H felony (14-32 4)
 Committed because of race, color, religion, nationality or country of origin
 Class 2 or 3 becomes Class 1, Class A1 or 1 becomes Class H Felony (14-3)

- Ethnic Intimidation (14-401 14) F (See 14-3)
- Failure to Stop for School Bus (20-217)
- Failure to Yield Emerg Veh w/Damage (20-156, 57) F
- False Imprisonment (Common Law)
- Food Stamp Fraud < \$100 (108A-53) F
- Forgery (Common Law)
- Fracking Violations (113-380)
- Going Armed to the Terror (Common Law)
- Graffiti Vandalism (14-127.1) Min \$500 & CS if suspended sentence F
- Hit and Run Property Damage (20-166) F
- Inciting a Riot (14-288 2) F
- Injury to Personal Property >200 (14-160(b))
- Injury to Real Property (14-127)
- Injury to Trees, Crops, Lands (14-128)
- Interfering with Meter Lines (14-151) F
- Larceny (14-72) F Habitual Misd Lar F (14-72(b)(6))
- Metal Theft (14-159 4) F
- Metal Sales Regulation Violation (66-424) F
- Misuse of 911 (14-111 4) all types of Misuse of 911
- Move Over Law >500 damage or injury (20-157(h)) F
- Obstruction of Justice (Common Law)
- Passing Stopped School Bus (20-217) min \$500 fine F
- Picketing Churches (14-225 1)
- Possession Weapon on School Grounds (14-269 2) F
- Possession of Drug Paraphernalia (90-113 22) (90-95) Except MJJ [BUT SEE PDP admission immunity for needles/sharp obj]
- Possession of MJJ > ½ oz (90-95) (90-96 discharge) F
- Possession Stolen Goods (14-72) F
- Prearranged Racing (20-141 3)
- P Prostitution (14-204) Conditional Discharge 1st Off.
- Receiving Stolen Goods (14-72) F
- Secret Peeping (14-202) F
- Shoplifting #3 win 5 Yrs (14-72 1) F
- Speeding to Elude (20-141 5) F
- P Soliciting for Prostitution (14-205 1) F
- Toxic Fumes Violations (90-113 10- 13)
- Unauthorized Use of Motor Vehicle (14-72 2) F
- Unlawful Assembly (Common Law)
- Unmanned Aircraft Fishing or Hunting (14-401 25)
- Welfare Fraud (108A-39) F
- Worthless Check \$2000 or Less 4th Conv (14-107) F
- Worthless Check/Closed Account (14-107(d)(4)) F

Class 2

- Adult Establishment Viol #2 (14-202 11- 12)
- Carrying Concealed Weapon (14-269 & 14-415 21) F
- Concealed Weapon Permit Most Violations (14-415 21) M
- Cyberbullying School Employee (14-458 2)
- Cyberstalking (14-196 3)
- Defacing Public Property (14-132)
- Defrauding Innkeeper (14-110)
- Disorderly Conduct (14-288 4) F
- Driving After Consuming <21 (20-138 3)
- Driving w/ Open Cont Alcoh in System #2 (20-138 7)
- Failure to Disperse (14-288 5)
- Failure to Work after Being Paid (14-104)
- Failure to Yield/Stop Emerg Veh (20-156, 57) F
- Filing False Police Report (14-225)
- Financial Card Fraud <500 w/in 6 mos. (14-113 13) F
- Fornication / Adultery (14-184)
- Furnishing False Information (20-29)
- Gambling (14-291-292)
- Harassing Phone Calls (14-196)

- Hit and Run Failure to Notify (20-166 1) M F
- Indecent Exposure (14-190 9) F
- Injury to Personal Property \$200 or Less M (14-160(a))
- Lottery Viol (14-289-291)
- Moped Registration and Plate Violation (20-53 4)
- Motor Vehicle Law, not otherwise specified (20-35 & 20-176)
- Move Over Law (20-157(a)) F
- Open Container 2nd or > Off (20-138 7(a))
- Possession of Handgun by Minor (14-269 7)
- Reckless Driving (20-140)
- Resisting/Obstructing Officer (14-223)
- Scalping (14-344)
- Setting Fire to Woods (14-137)
- Shoplifting #2 win 3 Yrs (14-72 1) F
- Simple Assault/Battery/Atfay (14-33) M
- Soliciting for CAN (Common Law)
- Tampering with MV (20-107)
- Trespass, 1st Degree (14-159 12) M
- Willful Racing (20-141)

Class 3

Offenses on or after 12-1-13, unless otherwise specified if less than 4 prior convictions, fine ONLY (max \$200)

- Adult Establishment Viol (14-202 11, 12) M
- Concealed Weapon w/out Permit or disclosure (14-15 21) M
- Conversion by Bailor \$400 or Less (14-168 1) F
- Driving Commercial Vehicle after Cons (20-138 2A)
- Driving w/ Open Cont Alcohol in System (20-138 7)
- DWLR IF NOT Impaired Driving revocation (20-28) M
- Expired License (20-7(f) & 20-35(a2))
- Failure to Notify DMV of Address Change (20-7 1)
- Failure to Possess License (20-7(a) & 20-35(a2))
- Failure to Return Rental Property (14-167) F
- Failure to Return Rental Property Purchase Option (14-168 4)
- Fishing Without License (133-271)
- Hunting Without License (133-270 2)
- Intoxicated and Disruptive (14-444)
- Littering (14-399(a)) M F
- NOL (20-7(a) & 20-35)
- Obtaining Property by WIC (14-106)
- Open Container 1st Offense (20-138 7(a)) M
- Permitting Bitch at Large (67-2)
- Possession of MJJ Drug Paraphernalia (90-113 22A)
- Possession of MJJ ≤ ½ oz (90-95) (90-96) M F
- Shoplifting (14-72 1) M F
- Speeding >15 MPH over OR >80 MPH (20-141(j))
- Trespass, 2nd Degree (14-159 13) M
- Unsealed Wine/Liquor in Passenger Area (18B-401(a))
- Using Profane Language on Roadway (14-197)
- Violation of City or County Ord (14-4)
- Window tinting violation (20-127(d))
- Worthless Check \$2000 or Less (14-107) M F

Infraction

- Concealed Weapon w/out Permit or disclosure (14-15 21) M
- Cell Phone <18 (20-137 3)
- Littering (14-399(a)) M F
- MV Law, Parts 9, 10, 10A & 11, if not otherwise specified (20-176)
- Move Over Law (20-157(g)) M F
- Open Container Passenger (20-138 7(a)) M
- Seatbelt Violations (20-135 2A(e)) fine & cost limits
- Speedometer Violations (20-123 2)
- Violation of Ord re: operation of vehicles (14-4)(b))

Multiple Prior Convictions §15A-1340.21(d) [I]f an offender is convicted of more than one offense in a single session of district court, or in a single week of superior court of a court in another jurisdiction, only one of the convictions may be used to determine the prior conviction level.

Multiple Convictions §15A-1340.22(a) If the court elects to impose consecutive sentences for two or more misdemeanors and the most serious misdemeanor is classified in Class A1, Class 1, or Class 2, the cumulative length of the sentences of imprisonment shall not exceed twice the maximum sentence authorized for the class and prior conviction level of the most serious offense. Consecutive sentences shall not be imposed if all convictions are for Class 3 misdemeanors.

Concurrent and Consecutive Terms §15A-1354(a) Unless specified or required by statute to run consecutively, sentences shall run concurrently.

Prior Record Level for Felony Sentencing §15A-1340.14(b)(5) Prior Record Level for Felony Sentencing --For each prior misdemeanor conviction as defined in subsection, 1 point. For purposes of this subsection, misdemeanor is defined as any Class A1 and Class 1 nontraffic misdemeanor offense, impaired driving (G.S. 20-138 impaired driving in a commercial vehicle (G.S. 20-138.2), and misdemeanor death by vehicle (G.S. 20-141.4(a2)), but not any other misdemeanor traffic offense under Chapter of the General Statutes.

Sentences of Imprisonment §15A-1351(a) Split sentence may not exceed one fourth the maximum sentence of imprisonment imposed for the offense. "[T]he judge credit any time spent committed or confined, as a result of the charge, to either the suspended sentence or to the imprisonment required for special probation."

Restitution Statutes §15A-1340.34 - 38 Basis, Determination, Defendant's Ability to Pay, Partial Restitution and Enforcement.

Standard Probation Lengths §15A-1343.2 Community Punishment 6-18 months / Intermediate Punishment 12-24 months.

Probation Hearing/Probable Cause Hearing §15A-1345(c) must be held within seven working days of an arrest. Otherwise, must be released.

[P]rovided that probation may not be revoked solely for conviction of a Class 3 misdemeanor, §15A-1344(d)

Conspiracy & Attempt (§14-2.5) = 1 lower **Solicitation** (§14-2.6) = class 3 misdemeanor (unless specified) **Aid and Abet & Acting in Concert** = same punish

Class	PRIOR CONVICTION LEVELS		
	Ø Priors	1 to 4 Priors	5 or > Priors
	I	II	III
A1	1-60 days C/IIA	1-75 days C/IIA	1-150 days C/IIA
1	1-45 days C	1-45 days C/IIA	1-120 days C/IIA
2	1-30 days C	1-45 days C/I	1-60 days C/IIA
3	1-10 days C Fine ONLY*	1-15 days	
		1 to 3 Priors C Fine ONLY*	4 Priors C/I
			1-20 days C/IIA

* Fine ONLY, unless otherwise provided, effective on or after 12-1-13 per §15A-1340 23(d)
 THIS BELONGS TO AN EXCELLENT ASSISTANT PUBLIC DEFENDER IN 2015
 Effective for offenses on or after 12-1-15 Effective for offenses on or after 6-19-15: 7-1-15

COMMUNITY	INTERMEDIATE	DELEGATION TO PROBATION
§15A-1340 11(2) Does NOT include ACTIVE OR Drug C OR Special Prob / Split under §15A-1351(a) MAY be unsupervised or supervised MAY include 1 or > under §15A-1343(a)(1) House Arrest with EM Community Service Confinement of 2/3 days (<6 days per month) during 3 separate months Substance Abuse Asmt, Monitoring or TmtEdu or Vocational Skills Development Program Satellite-based Monitoring (if covered under §14-208 40(a)(2)) Daily fee and \$90 install	§15A-1340 11(6) Must be Supervised Probation MAY include: Drug Treatment Court Special Prob / Split §15A-1351(a) CP conditions under §15A-1343(a)(1) ACTIVE §15A-1340 11(1) Any time within the range Also see §15A-1340 20 (c1) for time served when active not otherwise authorized FINES §15A-1340 23(b) Unless specified by offense: Class A1 = discretion of court Class 1 = discretion of court Class 2 = \$1,000 Class 3 = \$200 MV Infraction = \$100 §20-176(b) Local Ordinance §500/§50 14-4	UNLESS SPECIFIC FINDING TO INAPPROPRIATE §15A-1343 2(c) Probation may require: 20/50 hours of Community Service + Report to Probation more frequent Substance Abuse Asmt, Monitoring + House Arrest with Electronic Monitor Confinement of 2/3 days (<6 days month) during 3 separate month Curfew with Electronic Monitoring I Edu or Vocational Skills Development Program
		REQUIRES Admin Review and Approval by Ch MAY FILE MOTION to revoke UNLESS signed a WAIVER

INDIGENT DEFENSE SERVICES
POLICIES AND PROCEDURES
MISDEMEANOR DEFENDER TRAINING

TUESDAY, NOVEMBER 12, 2024

1

GETTING TO KNOW IDS

2

PUBLIC DEFENSE IN NC

In 1963 the US Supreme Court decided that the States must provide attorneys to criminal defendants (*Gideon v. Wainwright*)

1. charged with serious crimes and
2. cannot afford to hire an attorney

In North Carolina

- The NC IDS Commission sets the policies and rules for the public defense system
- The IDS Office implements the policies and rules and manages the State public defense appropriation
- A vast network of state-employed and private attorneys provide the public defense

3

PUBLIC DEFENSE IN NC

Our Mission

- ⇒ Enhance oversight,
- ⇒ Improve the quality,
- ⇒ Standardize policies and procedures,
- ⇒ Generate reliable evaluation, and
- ⇒ Deliver efficient and cost-effective public defense without sacrificing quality representation.

Our Goals

- ⇒ Recruit the best and brightest North Carolina attorneys to represent indigent clients,
- ⇒ Ensure that every attorney representing indigent clients has the qualifications, training, support, resources, and consultation services they need to be effective advocates,
- ⇒ Create a system that will eliminate the many recognized problems and conflicts caused by judges appointing and compensating public defense attorneys,
- ⇒ Manage the state's indigent defense fund in a more efficient and equitable manner.



4

COVERED PEOPLE

Anyone who is financially unable to secure legal representation and to provide all other necessary expenses of representation in a specified proceeding



5

COVERED CASES

- Adult Criminal
- Juvenile
- Civil Commitment
- Parent Representation
- Child Support Contempt
- Innocence Inquiry Cases
- Inmate Access to the Courts



6

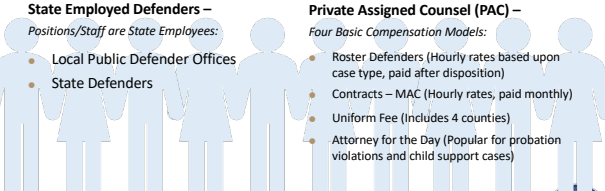

PUBLIC DEFENSE IN NC - A MIX OF DELIVERY SYSTEMS

State Employed Defenders –
Positions/Staff are State Employees:

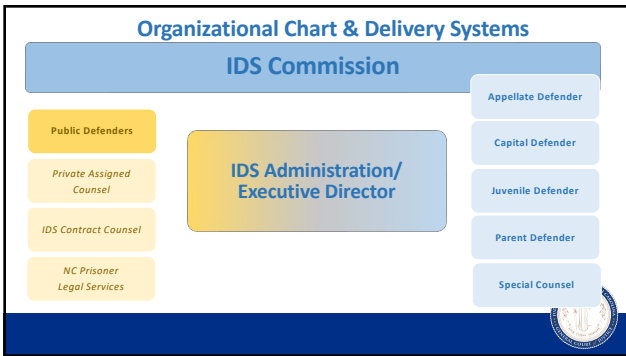
- Local Public Defender Offices
- State Defenders

Private Assigned Counsel (PAC) –
Four Basic Compensation Models:

- Roster Defenders (Hourly rates based upon case type, paid after disposition)
- Contracts – MAC (Hourly rates, paid monthly)
- Uniform Fee (Includes 4 counties)
- Attorney for the Day (Popular for probation violations and child support cases)

7



8

IDS COMMISSION

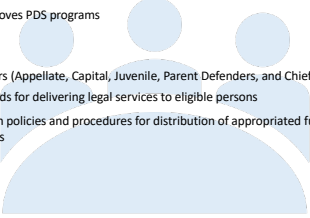

- 13 volunteer members**
 - Significant experience in criminal or other cases subject to this Article or...
 - Demonstrated commitment to quality representation in public defense cases
- Appointed by a range of stakeholders**
 - General Assembly Leadership
 - Professional organizations
 - Commission
- Limitations**
 - No DAs, LEOs, or PDs
 - 2 Judges
 - Term limits




9

IDS COMMISSION

- Develops and improves PDS programs
- Directly appoints
 - IDS Director
 - State Defenders (Appellate, Capital, Juvenile, Parent Defenders, and Chief Special Counsel)
- Determines methods for delivering legal services to eligible persons
- Establishes uniform policies and procedures for distribution of appropriated funds, including compensation rates

10

IDS OFFICE

Oversight


- Uniform policies for billing practices
- Improved data collection and analysis for informed decision making and responsible use of taxpayer funds

Service Delivery

- Timely, efficient, and accurate processing of fees for services
- Specialized statewide rosters of attorneys
- Assessing existing service delivery systems and, in collaboration with local actors, implementing or recommending changes where appropriate

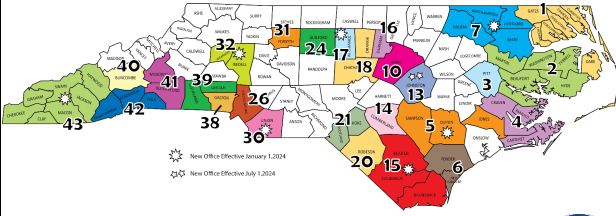
Support



- Training, manuals, performance guidelines, checklists, and other resources




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PUBLIC DEFENDER DISTRICTS



 New Office Effective January 1, 2024
 New Office Effective July 1, 2024



12

IDS – STATEWIDE DEFENDER OFFICES



Rob Sharpe
Capital Defender



Wendy Sotolongo
Parent Defender



Glenn Gerding
Appellate Defender



Chad Perry
Chief Special Counsel




Eric Zogry
Juvenile Defender



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CLIENT/REPRESENTATION RELATED
POLICIES AND PROCEDURES



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CLIENT/REPRESENTATION RELATED
POLICIES AND PROCEDURES

- Scope of Representation
- Class 3 Misdemeanors
- Immigration consults
- Interpreter services



15

SCOPE OF REPRESENTATION REMINDERS

- Deferred prosecution or diversion (including GS 90-96)
 - Ensure that the case is dismissed if deferral or diversion is successful
 - Defend client against charge if deferral or diversion fails
- If client FTA, attorney will continue to represent on original charge and any FTA until
 - Dismissed w/leave; or
 - After 6 months after FTA, attorney may file a motion to withdraw.
- DWI – Obligation to seek limited driver's privilege
- Seized Property – Obligation to file petition for return of property, upon request of client
- DWLR
 - Address underlying issues if in same county
 - Give limited advice and guidance for underlying issues in other counties



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SCOPE OF REPRESENTATION REMINDERS

- Prior convictions (in NC state court) that are subject to challenge (e.g., guilty plea w/out counsel) that may impact trial/sentencing in the assigned case
 - Same county – Challenge the prior conviction, including filing for MAR
 - Different county – Write Chief Dist. Court Judge or Sr. Resident Superior Court Judge in county of prior conviction(s), ask court to appoint local counsel to investigate OR potentially file MAR



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CLASS 3 MISDEMEANORS

- Defendant charged w Class 3 Misdemeanor ("C3M") shall not be exposed to active or suspended term of imprisonment unless the court finds defendant has 4 or more prior convictions.
- If <4 prior convictions and the defendant is not in custody, the Court should not appoint counsel regardless of the defendant's indigency and the case should proceed.
- If the Court finds evidence of four or more prior convictions at a later stage in the proceedings, the Court should either appoint counsel if the defendant is indigent and give counsel an appropriate amount of time to prepare a defense OR find that the defendant will not receive an active or suspended term of imprisonment.



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C3M EXCEPTIONS – STATUTORY

- If GS provide that a Class 3 misdemeanor charge against a defendant who has three or fewer prior convictions is punishable by an active or suspended term of imprisonment.
- If GS provide that an offense that would otherwise be a Class 3 misdemeanor under some circumstances is a higher class of misdemeanor under other circumstances
- G.S. 14-72.1 – Shoplifting
 - Shoplifting by concealment of goods, is a class 3 misdemeanor on first conviction but is (on first conviction) punishable by imprisonment (“term of imprisonment may be suspended only on condition that defendant perform community service for a term of at least 24 hours”).



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C3M EXCEPTIONS – LIMITED APPEARANCE

- Defendant is **in custody** at the time the Court determines entitlement to counsel
 - Court should consider modifying the pretrial detainee’s conditions of release to allow them to be released pending trial without posting a secured bond, such as by imposing one of the conditions set forth in G.S. 15A-534(a)(1) through (a)(3)
 - Or, if the defendant is indigent, appoint counsel to represent the pretrial detainee during the period of pretrial confinement on the Class 3 misdemeanor charge to ensure that he or she has meaningful access to the courts.
- Constitutes *limited appearance* pursuant to G.S. 15A-141(3) and G.S. 15A-143
 - Appointed attorney may represent the defendant for purposes of modifying the conditions of release and in the underlying Class 3 misdemeanor case but only until release from custody.



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C3M – NO RIGHT TO APPOINTED COUNSEL

- If the Court appoints an attorney to represent a defendant who is charged with a Class 3 misdemeanor, and the Court has *not* found that the defendant has four or more prior convictions and defendant is not in pretrial custody

Then

- The attorney **When in doubt, contact IDS!** is authorized by North Carolina law and/or file a motion to withdraw.

If the Court appoints a private attorney in violation of this policy, IDS shall not compensate that attorney for the case. If the Court appoints a public defender office in violation of this policy, IDS shall not award dispositional credit for the case.



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C3M FEE APPLICATION REQUIREMENTS

- Fee application for C3M must establish that client was entitled to appointed counsel.
- Attach a valid form CR-224 (Order of Assignment or Denial of Counsel) if submitting a fee app where the most serious charge is a C3M, including traffic.

The image shows a sample of the 'ORDER OF ASSIGNMENT OR DENIAL OF COUNSEL' form (CR-224) from the State of Indiana. The form includes fields for the State of Indiana, County, and the name of the court. It also contains sections for the 'COMPLAINT' and 'ORDER OF ASSIGNMENT OR DENIAL OF COUNSEL'.



22

IMMIGRATION CONSULT

- The United States Supreme Court, in *Padilla v. Kentucky*, 559 U.S. 356 (2010), held that the effective assistance of counsel may require advice about potential immigration consequences faced by a client.
- When in doubt, request an immigration consultation!



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INTERPRETERS

- The Office of Language Access Services provides spoken foreign language court interpreters for all Limited English Proficient (LEP) parties in interest in most court proceedings, child custody mediation, child planning conferences, and out-of-court communications on behalf of public defenders, assigned/appointed counsel, district attorneys and the GAL Program.
- To request in-court interpreter:
 - Complete online form if Language Other Than Spanish (LOTS)
- To request out-of-court interpreter:
 - For Spanish: contact interpreter directly from the Registry
 - For LOTS: complete online form



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INTERPRETERS, CONT.

- To request American Sign Language (ASL) interpreter or CART captioning:
 - Complete online form through AOC Disability Access Accommodation Form
- Note: Disability Access Accommodation Form can be used to request other accommodations as well



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INTERNAL POLICIES AND PROCEDURES



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INTERNAL POLICIES AND PROCEDURES

- Mileage and travel reimbursements
- Training, publications, and resources
- OASIS
- Contacts



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TRAVEL AND EXPENSE REIMBURSEMENT: PDS

1

2

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TRAVEL AND EXPENSE REIMBURSEMENT: PAC/MAC

FINAL FEES ONLY: Disposition Date Check here if you were appointed to represent this defendant in another case(s) at the time of the appointment to this case(s) and you already submitted a fee application for that case(s) in which the attorney appointment fee was charged.

COMPLETE FOR THIS FEE: Beginning Date Fee Request Ending Date Fee Request Date First Substantive Client Interview Prior Total Fees And Expenses Allowed \$

Name Of Judge / Siding Fee	Type In Court	State In Court / Making	Date Out Of Court	Total Time Claimed This Fee
Travel	(no. of miles)	Copying (if in-house, no. of copies)	Other (attach receipts if > \$ 25)	Total Expenses

NOTE: It is important to complete this statement in relation to your appointment to represent a defendant in another case(s) at the time of the appointment to this case(s) and you already submitted a fee application for that case(s) in which the attorney appointment fee was charged.

Name of Applicant: _____ Applicant Bar No.: _____ Address: _____

Payee (see Note): _____

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TRAVEL AND EXPENSE REIMBURSEMENT

Lodging/Meals: For all travel completed on or after July 1, 2023, the following list details the various rates of subsistence per day. Please keep in mind that the reimbursement for hotels/lodging is the actual room rate up to the allowance shown plus actual taxes. Hotel receipts are required. Meals are reimbursed at one per diem per overnight stay. Meal receipts are not required.

Mileage: The mileage reimbursement rate is \$.625 per mile effective September 01, 2022.

Effective July 1, 2023	In-State	Out-of-State
Meal		
Breakfast	\$10.00	\$10.00
Lunch	\$13.00	\$13.00
Dinner	\$24.00	\$24.00
Total	\$46.50	\$46.50
Lodging (actual, up to)	\$89.00 + tax	\$105.20 + tax

Other: Any other travel-related expenses (e.g., parking) must be supported by receipts.

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TRAINING, PUBLICATIONS AND RESOURCES

- Non-Capital Criminal and Non-Criminal Cases at Trial Level – Compensation
- IDS Motions Bank (Adult Criminal)
- UNC SOG Defender Training Resources
- IDS and UNC SOG Training and CLE Resources



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TRAINING, PUBLICATIONS AND RESOURCES

IDS

MEMBERSHIP

1. IDS Membership Through Public Subscription

2. Initial or Renewal Court Order, Order of Payment Issued

3. How to Renew Membership Through Public Subscription

4. How to Renew Membership Through the Trial Court

5. How to Renew Membership Through the Trial Court

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TRAINING, PUBLICATIONS AND RESOURCES

Motions Bank

MOTIONS BANK DISCLAIMER

The Motions Bank provided by Indigent Defense Members (IDM) is composed of motions and briefs submitted by attorneys. While we strive to ensure accuracy, completeness, and applicability, IDM makes no guarantee regarding the accuracy or reliability of the motions contained in the bank. Users should exercise their professional judgment and verify the relevance of any motion before relying on it. Feedback is possible through the user interface, any issues with the content.

Adult Criminal Motions

Capital Motions



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TRAINING, PUBLICATIONS AND RESOURCES

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TRAINING, PUBLICATIONS AND RESOURCES

Title	Date
Indigent Defense Manual Series	8/2022

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TRAINING, PUBLICATIONS AND RESOURCES

Trainings and CLE

The following CLE courses are offered in partnership with the UNC School of Government. Dates are subject to change.

Course	Available Dates
Boarding Conference for Approved DMAs	Thursday, January 26, 2024
2024 Compliance Conference	Friday, January 27, 2024
Executive Boarding Conference	Thursday and Friday, March 7 - 8, 2024

- 2024 Training
- Mental Health and Stress Resilience for Attorneys
- Strengthening the Gap VII Mitigation Conference 2024
- 2024 Whitepaper: Substantive Training

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ONLINE ATTORNEY STATE INVOICE SYSTEM (OASIS)



Online
Attorney
State
Invoice
System

- Simple website for PAC (Private Assigned Counsel) to electronically invoice IDS promptly after their fee apps are loaded into the eCourts File & Serve platform and accepted by the clerk.
- Designed to modernize operations and speed up payments. OASIS will allow IDS to pay PAC attorneys in a more timely manner.
- OASIS can be used only for non-capital, adult criminal cases at the trial level and only in eCourts counties.
- Designed to work in tandem with eCourts. OASIS will not rollout on the same schedule as eCourts. IDS will keep you apprised as we revise and implement the OASIS roll-out schedule.



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ONLINE ATTORNEY STATE INVOICE SYSTEM (OASIS)



- The IDS Commission approved OASIS on February 2, 2024.
- IDS began internal OASIS testing on April 1, 2024.
- A targeted initial field test, limited to a handful of select attorneys, began the week of April 8, 2024.
- Defender District 2 (including Martin, Beaufort, Washington, Tyrrell and Hyde counties) began using OASIS in June 2024. It has now expanded to Guilford and Mecklenburg Counties as well.
- The goal is for full implementation by late-2025.



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ONLINE ATTORNEY STATE INVOICE SYSTEM (OASIS)

OASIS IS NOT OPTIONAL

****Once OASIS goes live in your county, it is the only way for PAC who do adult criminal casework to bill/request payment.**

Judges, Clerks and PAC will be contacted directly by IDS staff, prior to the announcement of each go-live date.

County & Code	OASIS Launch Date	Fee App Cutoff Date*
Swain (5700) Attorney	April 8, 2024	
Martin (570)		
Tyrrell (660)		
Washington (570)	June 6, 2024	June 6, 2024
Hyde (670)		
Guilford (600)	August 27, 2024	August 28, 2024
Mecklenburg (590)	September 26, 2024	October 2, 2024
Chatham (500)		
Carter (500)		
Currituck (500)		
Dare (570)		
Beaufort (500)	November 13, 2024	November 21, 2024
Perquimans (570)		
Union (690)		
Cherokee, Graham, Swain, Haywood, Jackson, Macon, Clay	TBD	


*Fee App Cutoff Date** The fee app cutoff date may be the date you are billing and the date you are paid. From this date forward, the date that you submit bills to OASIS will be the date that you submit bills to OASIS and will be the date that you submit bills to OASIS.



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IDS - WHO TO CONTACT

Financial		Legal Staff	
Aaron Gallagher <small>Fiscal Officer 919-890-1986 a.gallagher@ncids.org</small>	Chadwick Boykin <small>Assistant General Counsel 919-890-2288 cboykin@ncids.org</small>	Shannon Simmons <small>HR Director 919-890-9607 Shannon.Simmons@ncids.org</small>	Whitney B. Fairbanks <small>Assistant Director/General Counsel 919-354-7225 WBFairbanks@ncids.org</small>
		Becky Whitaker <small>IDS Defender Policy & Planning Attorney 919-354-7248 rbecky.b.whitaker@ncids.org</small>	
Resource Unit			
D. Tucker Charns <small>Regional Director, Div. 14-18 919-354-7262 tucker.chnrns@ncids.org</small>	Sarah Rackley Olson <small>Former, Resource Counsel 919-354-7227 Sarah.R.Olson@ncids.org</small>	Carla Huff <small>IDS Recruitment and Training Coordinator 919-354-7287 Carla.Huff@ncids.org</small>	




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IDS - WHO TO CONTACT

State Public Defender Offices

Office of the Capital Defender (Durham)*	919-354-7220
Office of the Appellate Defender	919-354-7210
Office of the Juvenile Defender	919-890-1650
Office of the Parent Defender	919-354-7230
Office of Special Counsel	919-733-5544



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THANK YOU

Becky Whitaker, Defender Policy & Planning Attorney
www.ncids.org

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MEMORANDUM

To: Indigent Defense Attorneys, Public Defenders
 Cc: District and Superior Court Judges, Clerks of Superior Court
 Re: IDS Policies Governing Attorney Fee and Expense Applications in
 Non-Capital Criminal and Non-Criminal Cases at the Trial Level
 From: Office of Indigent Defense Services
 Date: Updated June 04, 2024

Pursuant to G.S. 7A-454, G.S. 7A-458, and G.S. 7A-498.3(c), the Office of Indigent Defense Services (“IDS”) hereby adopts the following policies and procedures, which shall govern fee applications that are directed to district and superior court judges in indigent non-capital criminal and non-criminal cases at the trial level.

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I. Attorney Fee and Expense Applications

A. The Application Forms:

Non-Capital Criminal Cases

To seek compensation in any non-capital criminal case at the trial level that is finally disposed on or after December 1, 2014 (or with an ending date of services on or after December 1, 2014), the appointed attorney must submit the following fee application form to the presiding district or superior court judge, available at www.ncids.org:¹

- AOC-CR-225 (Non-Capital Criminal Case Trial Level Fee Application, Rev. 12/20)²: An attorney applicant must complete this form for payment in any non-capital criminal case at the trial level.
- Online State Attorney Invoice System (“OASIS”): OASIS is the sole means of seeking and receiving compensation for all non-capital criminal cases at the trial level in counties where OASIS has been implemented. For OASIS information, see: <https://www.ncids.org/oasis/>.

Juvenile Delinquency Cases

To seek compensation in any juvenile delinquency case at the trial level that is finally disposed on or after September 1, 2015, the appointed attorney must submit the following fee application form to the presiding district or superior court judge, available at www.ncids.org:

¹ Applicants seeking compensation for representation in cases that began with a charge of first-degree murder or undesignated degree of murder at the trial level (except cases in which the defendant was under 18 years of age at the time of the offense), as well as in capital appeals or capital post-conviction cases, should complete form AOC-CR-425 and submit it directly to the IDS Office. See IDS Rule 2A.1(a). Applicants seeking compensation for representation in non-capital criminal or non-criminal appeals should complete form AOC-CR-426 and submit it directly to the IDS Office. Policies governing fee applications that are submitted directly to the IDS Office are available at www.ncids.org.

² The prior version of this form may be used for cases with an earlier disposition date or ending date of services.

- AOC-J-411 (Juvenile Delinquency Trial Level Fee Application, Rev. 12/20): An attorney applicant must complete this form for payment in any juvenile delinquency or undisciplined contempt case.

Non-Criminal Cases

To seek compensation in any non-criminal case at the trial level that is finally disposed on or after December 1, 2014 (or with an ending date of services this fee requested on or after December 1, 2014), the appointed attorney or guardian ad litem must submit the following fee application form to the presiding district or superior court judge, available at www.ncids.org:

- AOC-G-200 (Civil Case Trial Level Fee Application, Rev. 12/20)³: An attorney or guardian ad litem applicant must complete this form for payment in any civil proceeding, such as abuse/neglect/dependency, termination of parental rights, competency, commitment, and child support contempt cases.

B. Fee Application Deadlines:

- Attorneys should consult IDS Rule 1.9(a)(1a) for deadlines on the submission of final fee applications in non-capital criminal and non-criminal cases at the trial level.
- Final attorney fee applications must be signed by the appointed attorney and submitted to the trial judge within no more than one year after the date on which the case was finally disposed at the trial level. A disposition of “voluntarily dismissed with leave” is a final disposition that triggers the one-year deadline.
- If a fee application was not submitted within the applicable deadline, the attorney may be eligible to apply to the IDS Director for a waiver of the deadline in accordance with IDS Rule 1.9(a)(1a) and IDS Policy, Extensions and Waivers of Appointed Attorney Fee Application Deadlines, *available at* www.ncids.org.

C. General Billing Principles:

- Attorney time must be tracked and reported in hours and tenths of an hour (6 minute increments).
- Attorney time must be reported on fee applications in decimals, not minutes. (For example, if an attorney is claiming one and a half hours on a case, he or she should report that time as 1.50 hours, not 1.30 hours.)
- Attorneys must report their total time claimed, as well as their total time broken down into time in court, time out of court, and time waiting. Time in court is time spent in a court proceeding before a presiding judge or clerk. Time out of court is time spent preparing the case, including negotiations with the prosecution or other opposing counsel, even if such activities take place at the courthouse. Time spent waiting in court is time during which the attorney must be present in court waiting for an appointed case to be called or heard, and the attorney is unable to use that time to conduct work on other cases.
- If an attorney seeks compensation for time spent waiting in court for multiple cases to be called or working on multiple cases simultaneously, the attorney’s time must be prorated among each of the cases involved. IDS Rule 1.9(a)(1a).
- Attorney time spent preparing a fee application is not compensable.

- Absent exceptional circumstances that warrant personal delivery, attorney time and expenses associated with traveling to a court in another county for the sole purpose of hand-delivering or filing a document are not compensable.
- If required by the presiding judge or local rule, an applicant should attach to his or her fee application an itemized billing record that provides sufficient detail regarding counsel's services in the case to demonstrate that the claim for compensation is reasonable.

D. The Identity of the Attorney Applicant:

- The fee application forms require the attorney applicant to identify himself or herself as assigned counsel, public defender, or IDS contract counsel. (For civil cases, there is also an option for guardians ad litem.)

Check the "assigned counsel" box *if*:

- ✓ You are a private attorney and you are submitting one fee application for one client pursuant to an individual appointment to represent that person; or
- ✓ You are a private attorney and you are submitting one fee application for several clients handled on a per session or per day basis pursuant to a fee arrangement that was pre-approved by IDS. In such circumstances, you should write "various clients" in the file number box and attach the court docket to the fee application.
- Check the "public defender" box *if*: You are a salaried state employee who works in one of the district public defender offices, and you are submitting the fee application solely for recoupment purposes (see Section IV. below).
- Check the "IDS contract counsel" box *if*: You are a private attorney who handled the case pursuant to a contract directly with the IDS Office, you are paid a set amount at regular intervals pursuant to the contract, and you are submitting the fee application solely for recoupment purposes (see Section IV. below).

E. Fee Applications Involving One Client with Multiple Cases:

- General Rule: If an attorney represents one client in multiple cases, and all of the cases are disposed of before the same Judge on the same day in the same court, the attorney should complete only one fee application for all of the cases.
- Exception: If an attorney was appointed to handle multiple cases involving the same client, and one or more of the cases arose out of a different transaction, was assigned to counsel at a different time, and resulted in an acquittal or was dismissed by the prosecution on the same day as the unrelated cases but *not* as part of a plea agreement in the unrelated cases, the attorney may complete a separate fee application for the acquitted or dismissed case that arose out of a different transaction.
- File Numbers: If you are submitting one fee application for one client where there are multiple file numbers, you should report the lowest file number in the highest court in the box labeled "File No.," and should report any other file numbers in the box labeled "Additional File Nos."
- Non-Capital Criminal Dispositions:
 - ✓ In completing a fee application for one client with multiple cases, you should view all of the cases disposed of together as a unit when reporting the original charge and the most serious disposition.
 - ✓ If the defendant pled guilty before trial to the most serious original charge, the most serious disposition should be reported as "Guilty Plea Before Trial: Most Serious Original Charge," regardless of the disposition of the less serious charges. Similarly, if the

defendant was convicted at trial of the most serious original charge, the most serious disposition should be reported as “Trial: Guilty Most Serious Original Charge,” regardless of the disposition of the less serious charges.

- ✓ If, on the other hand, the defendant pled guilty before trial to anything other than the most serious original charge, the most serious disposition should be reported as “Guilty Plea Before Trial: Other Offense.” For example, if you represented a client on a Class B and Class E felony, and both were disposed of together, the highest original charge should be reported as a Class B felony. If the Class B felony was dismissed, but the client pled guilty before trial to the Class E felony as charged, the most serious disposition should be reported as “Guilty Plea Before Trial: Other Offense.”
- Juvenile Delinquency Resolution of Charges:
 - ✓ In completing a fee application for one juvenile with multiple cases, you should view all of the cases disposed of together as a unit when reporting the original charge and the most serious resolution of charges.
 - ✓ If the juvenile admitted to the most serious original charge, the most serious disposition should be reported as “Admission: Most Serious Original Charge,” regardless of the disposition of the less serious charges. Similarly, if the juvenile was adjudicated delinquent of the most serious original charge, the most serious disposition should be reported as “Adjudicatory Hearing: Responsible—Most Serious Original Charge,” regardless of the disposition of the less serious charges.
 - ✓ If, on the other hand, the juvenile was adjudicated delinquent of an offense other than the most serious original charge, the most serious disposition should be reported as “Adjudicatory Hearing: Responsible—Other Offense.” For example, if you represented a juvenile on a Class C felony and a Class F felony, and both were disposed of together, the highest original charge should be reported as a Class C felony. If the juvenile was found not responsible for the Class C felony, but the juvenile was adjudicated responsible for the Class F felony, the most serious disposition should be reported as “Adjudicatory Hearing: Responsible—Other Offense.”

F. Date First Substantive Client Interview (AOC-CR-225):

- AOC-CR-225 requires the attorney to provide the date of the first substantive client interview.
- Attorneys who conduct an initial substantive client interview by some means other than in person, such as telephone or video conferencing, are encouraged to indicate the other means in parentheses after the date—*e.g.*, 10/10/10 (phone) or 10/10/10 (video).
- If the attorney arranges for a designee, such as an investigator or paralegal, to conduct the initial interview, the date of the designee’s interview should be provided in that field.

G. Grounds for Return: Non-Capital Criminal Case Fee Applications (AOC-CR-225):

- All fee applications must be typed or printed legibly. Fee applications that are incomplete or illegible will be returned to the Clerk’s Office unpaid.
- Criminal fee applications that do not include the following information will be returned to the Clerk’s Office for completion or clarification:
 - ✓ Court
 - ✓ County
 - ✓ File number(s) (if there are multiple file numbers, see Section I.E. above)
 - ✓ Name and address of indigent client

- ✓ Social security number of indigent client or indication that s/he has no social security number (if you cannot determine the client's social security number after reasonable efforts, write "unknown")
- ✓ Most serious original charge, including felony class (if applicable)
- ✓ Most serious disposition
- ✓ Missing, invalid, or incomplete Assignment of Counsel (AOC-CR-224) for any Class 3 Misdemeanor, including traffic
- ✓ Most serious judgment and sentencing
- ✓ Disposition date (if final fee)
- ✓ Beginning and ending dates for services rendered (even if you are being paid pursuant to a flat fee schedule that has been pre-approved by IDS)
- ✓ Prior total fees and expenses allowed by a judge in the case (if applicable)
- ✓ Total time claimed, as well as total time broken down into time in court, time waiting, and time out of court (unless you are being paid pursuant to a flat fee schedule that has been pre-approved by IDS)
- ✓ Expense information (if applicable); receipts are required for expenses that exceed \$25
- ✓ The attorney's name, address, telephone number, and taxpayer identification number
- ✓ The attorney's signature
- ✓ The amount of fees and expenses allowed by the judge setting the fee
The name and signature of the judge setting the fee

H. Grounds for Return: Juvenile Delinquency Fee Applications (AOC-J-411):

- All fee applications must be typed or printed legibly. Fee applications that are incomplete or illegible will be returned to the Clerk's Office unpaid
- Juvenile delinquency fee applications that do not include the following information will be returned to the Clerk's Office for completion or clarification:
 - ✓ County
 - ✓ File number(s) (if there are multiple file numbers, see Section I.E. above)
 - ✓ Name and address of indigent juvenile
 - ✓ Most serious original charge, including felony class (if applicable)
 - ✓ Most serious resolution of charges
 - ✓ Most serious disposition
 - ✓ Disposition date
 - ✓ Total time claimed, as well as total time broken down into time in court, time waiting, and time out of court (unless you are being paid pursuant to a flat fee schedule that has been approved by IDS)
 - ✓ Expense information (if applicable); receipts are required for expenses that exceed \$25
 - ✓ The attorney's name, address, telephone number, and taxpayer identification number
 - ✓ The attorney's signature
 - ✓ The amount of fees and expenses allowed by the judge setting the fee
 - ✓ The name and signature of the judge setting the fee

I. Grounds for Return: Civil Case Fee Applications (AOC-G-200):

- All fee applications must be typed or printed legibly. Fee applications that are incomplete or illegible will be returned to the Clerk's Office unpaid.
- Civil fee applications that do not include the following information will be returned to the Clerk's Office for completion or clarification:
 - ✓ Court

- ✓ County
- ✓ File number(s) (if there are multiple file numbers, see Section I.E. above)
- ✓ Name of indigent client
- ✓ Original proceeding (appointed attorney or guardian ad litem section)
- ✓ Most serious disposition (appointed attorney or guardian ad litem section)
- ✓ Disposition date (if final fee)
- ✓ Beginning and ending dates for services rendered (even if you are being paid pursuant to a flat fee schedule that has been pre-approved by IDS)
- ✓ Prior total fees and expenses allowed by a judge in the case (if applicable)
- ✓ Total time claimed, as well as total time broken down into time in court, time waiting, and time out of court (unless you are being paid pursuant to a flat fee schedule that has been approved by IDS)
- ✓ Expense information (if applicable); receipts are required for expenses that exceed \$25
- ✓ The attorney's or guardian ad litem's name, address, telephone number, and taxpayer identification number
- ✓ The attorney's or guardian ad litem's signature
- ✓ The amount of fees and expenses allowed by the judge setting the fee
- ✓ The name and signature of the judge setting the fee

II. Standard Hourly Attorney Fees

A. Standard Hourly Rates: (See Section VII., below, for answers to frequently asked questions about the hourly rates)

- ✓ **Fees Set By District Court Judges:**
 - For all cases finally disposed in District Court where the most serious original charge was a non-potentially capital Class A through D felony and the fee was set on or after January 01, 2022, the rate is \$85 per hour.
 - For all other cases finally disposed in District Court, the rate will be \$65 per hour.
 - Any non-capital post-conviction claims brought in District Court should be paid at the same rates but based on the most serious conviction. For example, a non-capital post-conviction challenge to a misdemeanor conviction that is brought in District Court should be paid at the \$65 hourly rate.
- ✓ **Fees Set By Superior Court Judges:**
 - For all cases finally disposed in Superior Court where the most serious charge carries a sentence, or potential sentence, of life without parole (LWOP) and the fee was set on or after January 01, 2022, the rate is \$100 per hour.
 - For all cases finally disposed in Superior Court where the most serious original charge was Class B1-D felony, was a satellite-based monitoring "bring back" hearing, review of NGRI determinations, or non-capital, post-conviction case where the most serious charge was a Class A-D felony, the rate is \$85 per hour.
 - For all other cases finally disposed in Superior Court, including misdemeanor appeals, the rate is \$65 per hour.
 - Any non-capital post-conviction claims brought in Superior Court should be paid at the same rates, but based on the most serious conviction. For example, a non-capital post-conviction challenge to a Class B felony conviction that is brought in Superior Court should be paid at the \$85 hourly rate if the date of final disposition is January

01, 2022 or later, but a non-capital post-conviction challenge to a Class E felony conviction that is brought in Superior Court should be paid at the \$65 hourly rate.

✓ **Fees Set By Clerks:**

- For all cases finally disposed before a Clerk on or after January 01, 2022, the rate will be \$65 per hour.
- Pursuant to IDS Rule 1.9(a)(1b) and (a)(2), judges are asked to review the hours claimed on each fee application and to approve or reduce those hours on line 1 in Section II. of the fee application forms. Judges should make that determination based on the factors normally considered in setting attorney fees, such as the nature of the case, the experience of the lawyer, and the effort and responsibility involved. Once the judge has approved a certain amount of time, the fee should be calculated by multiplying the hours approved by the applicable hourly rate.
- Fee awards that are not set at the applicable standard hourly rate for the approved amount of time (or a pre-approved alternative rate pursuant to II.B. below) will be returned with a request that the amount be adjusted before payment is issued.

B. Deviations from the Standard Rates:

- Districts may utilize compensation systems other than IDS' standard hourly rates, such as per case fee schedules or per session rates, only with the prior written approval of the IDS Director. See IDS Rule 1.9(a)(5).

III. Reimbursable Expenses

The following case-related expenses are reimbursable if the judge setting the fee finds them to be necessary and reasonable. Attorneys may seek prior approval of expenses from a Judge before they are incurred.

A. In-State Travel:⁴

- **Mileage:** Mileage is reimbursable at the current state rate for travel outside of the county of the attorney's office. Travel within the county of the attorney's office is not reimbursable. For current per diem rates see: <https://www.ncids.org/counsel-rates/> ("Expense Reimbursement Rates"). The fee application or time sheets should indicate the number of miles traveled.
- **Meals:** Meals are only reimbursable if there is an overnight stay and then in accordance with the current state authorized per diem, with one per diem per overnight stay. Receipts are not required. For current per diem rates see: <https://www.ncids.org/counsel-rates/> ("Expense Reimbursement Rates").
- **Lodging:** The actual cost of over-night lodging is reimbursable, not to exceed the current state authorized rate, plus actual taxes incurred. A valid hotel receipt is required, and credit card receipts will not be accepted. For current lodging rates see: <https://www.ncids.org/counsel-rates/> ("Expense Reimbursement Rates").

⁴ Reimbursement rates for travel-related expenses are based on the current travel allowances for State employees. See G.S. 138-6.

- B. Out-Of-State Travel:** *Attorneys are urged to obtain prior written approval from a Judge before incurring out-of-state travel expenses.*
- **Travel Costs:** Reasonable travel costs are reimbursable with receipts.
 - **Meals:** Meals are only reimbursable if there is an overnight stay and then in accordance with the current state authorized per diem, with one per diem per overnight stay. Receipts are not required. For current per diem rates see: <https://www.ncids.org/counsel-rates/> (“Expense Reimbursement Rates”).
 - **Lodging:** The actual cost of over-night lodging is reimbursable, not to exceed the current state authorized rate, plus actual taxes incurred. A valid hotel receipt is required, and credit card receipts will not be accepted. For current lodging rates see: <https://www.ncids.org/counsel-rates/> (“Expense Reimbursement Rates”).
- C. Photo-Copying:**
- In-house copying costs are reimbursable at a rate not to exceed \$0.10 per page for single-sided copies and \$0.16 per page for double-sided copies. The applicant must indicate the number of copies prepared, whether they were single or double-sided, and the price charged per page.
 - The actual cost of out-of-house copies are reimbursable with a receipt, at a rate not to exceed \$0.10 per page for single-sided copies and \$0.16 per page for double-sided copies.
- D. Printing Digital Discovery:**
- Effective March 24, 2014, if counsel receives discovery in an electronic format, counsel may print any documents that will be entered into evidence or used in examining witnesses, or when a hard copy is otherwise necessary to prepare the case. However, absent extraordinary circumstances, IDS will not reimburse counsel for printing one or more copies of the entire discovery package.
 - This limitation does not apply if the only way to satisfy a client’s request for discovery is for counsel to print the entire discovery package for the client. In no event will IDS reimburse counsel for printing a copy of the entire discovery package for an investigator.
- E. Facsimiles:**
- The cost of sending facsimiles from a personal or office machine is reimbursable at a rate not to exceed \$0.05 per page.
 - The actual cost of sending facsimiles from an outside machine, such as a hotel facsimile machine, is reimbursable with a receipt.
- F. CDs/DVDs/Audiotapes:**
- The cost of blank CDs, DVDs, or audiotapes is reimbursable at a rate not to exceed \$1.00 each.
- G. Online Video Conferencing with Clients in Jail:**
IDS will reimburse an attorney for actual expenses incurred in utilizing an online video conferencing system to meet with appointed clients who are in the custody of a local jail, at a rate not to exceed \$.65 per minute. Counsel must attach to the fee application a receipt from the company that runs the video conferencing system.

H. Computerized Legal Research:

- The actual case-related costs of computerized legal research (*e.g.*, Lexis-Nexis and Westlaw) are reimbursable only if receipts are provided.
- Courtsearch, NC 123, DMV and DOC searches, etc.: The actual case-related costs of any such computerized searches are reimbursable only if receipts are provided. If actual costs are not incurred, an attorney may be compensated for his or her time according to the applicable hourly rate, but may not be compensated any amount per search.

I. Paralegal or Legal Assistant Time:

- If the judge setting the fee finds it to be necessary and reasonable, IDS will compensate an attorney as a reimbursable expense for the time of an in-house paralegal or legal assistant at a rate of \$15 per hour. The total cost of the paralegal's time should be reported in the field on the fee application form that is labeled "Other (attach receipts if > \$25)." The fee application must be accompanied by an itemized billing record setting forth the paralegal's or legal assistant's time. Paralegal or legal assistant services will only be reimbursed if they are directly related to a case file, and will not be reimbursed if they involve routine administrative office tasks.

J. Providing Closed Client Files:

- Rule 1.16(d) of the Revised Rules of Professional Conduct, as well as Comments [10] and [11] to Rule 1.16, obligate an attorney whose employment is terminated to surrender to the former client "all papers . . . to which the client is entitled." With the exception of an attorney's own notes and incomplete work product, the client is entitled to originals or copies of anything in the file that would be helpful to a successor attorney. Moreover, according to the State Bar, the attorney cannot charge the client if the attorney wants to keep a copy of the client's file for his or her own records. Thus, if a client requests his or her file at the conclusion of the representation or any time thereafter, IDS generally will not compensate an appointed attorney for time spent scanning or preparing copies of an original paper file or reimburse an appointed attorney for scanning or copying expenses.
- However, if the attorney received documents in the client's file in electronic format and never created a paper copy, IDS will reimburse an appointed attorney for expenses associated with preparing a paper copy from the electronic media to provide to an incarcerated client who is requesting those documents. If the attorney received documents in the client's file in paper format and wants to convert them to an electronic format for storage purposes, IDS recommends that the attorney offer the paper record to the client in writing at the conclusion of the representation. If the client declines the paper copy in writing or does not respond to the attorney's offer (and the attorney is reasonably certain that the address for the client is correct and that the client can receive mail at that address), but subsequently requests a copy of the file, the State Bar staff has informed IDS that the attorney may satisfy his or her ethical obligations to the client by providing the file to the client or the client's designee in electronic format, even if the client is incarcerated. Thus, IDS will not reimburse an appointed attorney for expenses associated with preparing a paper copy from the electronic media under those circumstances.
- IDS will compensate an appointed attorney for time spent retrieving a former client's file from storage and for other reasonable time spent responding to a client's request for his or her file, and will reimburse an attorney for postage expenses claimed in compliance with Section III.K., below. If these activities are performed at the conclusion of the representation, the

appointed attorney should include the allowed time and expenses on his or her final fee application. If these activities are performed after the conclusion of the representation and after a final fee application has been submitted, the attorney may submit a supplemental fee application for reasonable allowed time and expenses (other than scanning or copying). In that instance, the attorney must write “Supplemental—Former Client Files” at the top of the fee application form. On that form, the attorney should indicate the most serious offense in the original charge column (for criminal and delinquency cases) or the original proceeding (for criminal cases), and then check “other” and write “providing files” in the disposition and judgment and sentencing columns (for criminal cases) or the resolution and disposition columns (for delinquency cases) or the disposition column (for civil cases). When a former client requests the file after the one-year deadline for the submission of fee applications has expired, that deadline shall not apply to supplemental fee applications for the allowed time and expenses associated with providing a former client with copies of his or her file. Because of the State Bar’s opinion that an attorney cannot charge the client if the attorney wants to keep a copy of a closed client file for his or her own records, IDS will not seek recoupment of these expenses.

K. Other Expenses:

- For all “other expenses” that cumulatively exceed \$25.00 (*e.g.*, parking, postage, film, etc.), an applicant must submit receipts or supporting documentation. If “other expenses” do not cumulatively exceed \$25.00, receipts or supporting documentation are not required.
- Normal overhead expenses, such as case notebooks, paper, push pins, etc., are not reimbursable.

IV. Recoupment: Findings of Fact and Civil Judgments for Attorney Fees

A. Non-Capital Criminal Cases at the Trial Level (AOC-CR-225):

- The back of form AOC-CR-225 is designed to facilitate the entry of civil judgments against a defendant who has been convicted or pled guilty or nolo contendere pursuant to G.S. 7A-455 (attorney fees) and G.S. 7A-455.1 (\$75 attorney appointment fee).⁵
- If the Judge signs Section IV. of form AOC-CR-225, and does not check any of the boxes in Section III. under Judgment #1 or Judgment #2, the Judge has entered judgments for the total amount of attorney fees and the \$75 attorney appointment fee.
- If the Judge determines that a judgment is not appropriate for attorney fees and/or the \$75 attorney appointment fee, the appropriate “opt out” box must be checked under Judgment #1 and/or Judgment #2.
- When completing this fee application, attorneys should provide the name, address, and social security number of the defendant at the top of form AOC-CR-225. (If an attorney cannot determine the client’s social security number after reasonable efforts, he or she should write “unknown.”)

B. Juvenile Delinquency Cases at the Trial Level (AOC-J-411):

- The back of form AOC-J-411 is designed to allow the Judge to enter a civil judgment against a responsible parent or guardian for the value of legal services provided to a juvenile in a delinquency proceeding.

⁵ A separate memorandum has been distributed to court officials concerning the implementation of G.S. 7A-455.1, as revised by Session Law 2005-250, which provides for a \$60 attorney appointment fee in criminal cases.

- Pursuant to G.S. 7A-450.1 through -450.4 and G.S. 7B-2000, the Judge has discretionary authority to enter a judgment against a responsible person if the juvenile was adjudicated delinquent. In deciding whether to enter judgment, the Judge should consider the factors set forth in G.S. 7A-450.3.
- When completing this fee application, attorneys should provide the name, address, and social security number of any potentially responsible parent or guardian in Section III. of form AOC-J-411.

C. Civil Cases at the Trial Level (AOC-G-200):

- The back of form AOC-G-200 is designed to allow the Judge to enter a civil judgment against either a respondent or a responsible parent or guardian in certain types of proceedings.
- Pursuant to G.S. 7A-450.1 through -450.4 and G.S. 7B-603, the Judge has discretionary authority to enter a civil judgment against the respondent for the value of attorney services provided to the respondent in the following types of cases: 1) abuse, neglect, or dependency cases in which the child was found to have been abused, neglected, or dependent; and 2) termination of parental rights proceedings in which the parent's rights were terminated. In deciding whether to enter judgment against the respondent, the Judge should consider the factors set forth in G.S. 7A-450.3.
- Pursuant to G.S. 7A-455, the Judge may also enter a civil judgment against a respondent who has been held in criminal contempt in a child support contempt proceeding.
- When completing this fee application, attorneys should provide the name, address, and social security number of the respondent or any potentially responsible parent or guardian in Section III. of form AOC-G-200.

D. Fee Applications Submitted by Public Defenders or IDS Contract Counsel:

- When a fee application is submitted by a public defender or IDS contract counsel solely for recoupment purposes, the Court should fix the value of services rendered based on the same hourly rates outlined in Section II., above, and enter civil judgment(s) as appropriate. In those cases, the Clerk should docket the judgment(s) as provided by law and file the fee application in the court file. Fee applications that are submitted by public defenders and IDS contract counsel should not be forwarded to IDS Financial Services for payment.

V. Expert and Support Services

A. Expert Fees:

- *Attorneys should never pay an expert with their own funds and then seek reimbursement.*
- Prior authorization is required for the use of any expert services. Prior to October 17, 2011, that authorization may be sought by the attorney for the defendant or respondent submitting a motion and proposed Order to the presiding judge. On or after October 17, 2011, that authorization must be sought by the attorney for the defendant or respondent completing and submitting form AOC-G-309, along with a supporting motion, to the presiding judge. If permitted by case law, the attorney for the defendant or respondent may submit that form and the supporting motion *ex parte*. The requesting attorney does not need to complete form AOC-G-309 for non-expert flat fee services, such as polygraph examinations,⁶ medical

⁶ For defense requested polygraph examinations that are preapproved by a judge, IDS pays a flat fee of \$750.

procedures, lab testing, or defense requested sentencing plans;⁷ to seek prior approval for such services, the attorney should submit a motion and proposed Order to the Court.

- Form AOC-G-309 sets forth a standardized hourly rate schedule for different types of experts, and also serves as the vehicle for the expert to seek payment.
- In extraordinary circumstances, the IDS Director may grant deviations from the standardized base compensation rates listed on form AOC-G-309 when the requesting attorney demonstrates that they are necessary and appropriate based on case-specific needs and the following policies:
 - ✓ Deviations may be granted if the requested expert services are in a new, emerging, or novel area and there are a limited number of experts in the field.
 - ✓ Deviations may be granted if the requested expert services are so unique that there are a limited number of available and qualified experts. For example, there is only one expert who can provide the needed services (*e.g.*, the medical examiner who performed the autopsy) and he or she has refused to provide the services at the applicable standardized rate.
 - ✓ Deviations may be granted based on other exceptional circumstances that justify a deviation from the standardized rates. For example, counsel needs the services of a specific type of expert and has contacted five or more experts in that field and none of the contacted experts were willing and available to provide the needed services at the needed time at the standardized rate.
- Effective October 17, 2011, deviations shall be requested by the attorney of record by completing form AOC-G-310 and submitting it to the IDS Director pursuant to the instructions on that form. Before requesting a deviation from the standardized base hourly rates, counsel must consult with IDS' Forensic Resource Counsel to identify other similar experts in the required field.

B. Lay Witness Fees:

- Compensation for the time and expenses of lay witnesses is governed by G.S. 7A-314(a)-(c) & (e). Those provisions set statutory allowances for the time, mileage, lodging, and meals for lay witnesses.
- If you are seeking compensation for a lay witness in any category of case, you should complete form AOC-CR-235 ("Witness Attendance Certificate") and submit it to the Clerk or Judge as required by G.S. 7A-314. You should also complete Side Two of form AOC-CR-382 ("Certification of Identity (Witness Attendance)") and submit it to IDS Financial Services.

C. Foreign Language Interpreters:

- If an attorney needs the services of a foreign language interpreter or translator in any category of case, he or she should obtain prior authorization from the Court. For details about obtaining an out-of-court interpreter or translator, see the IDS policy on out-of-court foreign language interpreters and translators, *available at* www.ncids.org under the "Rules & Procedures" link.

D. Interpreters for Deaf Persons:

- G.S. 8B-2, 8B-6, and 8B-8 (1999) govern the appointment and compensation of interpreters for deaf persons.

⁷ For defense requested sentencing plans that are preapproved by a judge, IDS pays a flat fee of \$500.

- If you need the services of a sign language interpreter in any category of case, you should obtain prior authorization from the Court using AOC-G-116 (“Motion, Appointment And Order Authorizing Payment Of Deaf Interpreter Or Other Accommodation”). The interpreter can then seek payment from the Clerk using that same form.

VI. Clerk Responsibilities

A. **Fee Awards Must be Sent to IDS by the Clerk’s Office:**

- IDS Financial Services will only accept appointed attorney fee awards from the Office of the Clerk of Superior Court in the county where the case originated.
- The Clerk’s Office does not have to certify each individual fee application. However, whenever fee applications are mailed to Financial Services, the Clerk’s Office must include in the envelope a cover letter on official letterhead stating that the enclosed fee applications are being mailed directly from the Office of the Clerk of Superior Court.
- Fee applications that are mailed to Financial Services by appointed attorneys will be returned to the attorneys unpaid.

B. **Timely Forwarding of Fee Awards:**

- We urge Clerk’s Offices to forward attorney fee awards to Financial Services as promptly as possible. Prompt forwarding of fee awards allows IDS to pay attorneys as quickly as possible for their services and to capture accurate data about the demand on the indigent defense fund.
- Information about the timing of attorney payments, including check run dates, is posted at www.ncids.org under the “News & Updates” link.

VII. Frequently Asked Questions About the New Standard Hourly Attorney Rates

In determining the appropriate hourly rate pursuant to the fee schedule set forth in Section II., above, attorneys, Judges, and Clerks should follow the disposition rules outlined in Section I.E., above, and utilize the highest applicable hourly rate:

1. **Question:** What rate applies to misdemeanor appeals to Superior Court? Does the attorney have to file an interim fee application in District Court upon entering notice of appeal and get paid the District Court rate per hour for the time in District Court, and then file a final fee application in Superior Court and get paid the Superior Court rate per hour for the time in Superior Court? Or does the attorney wait until the case is resolved in Superior Court and get the Superior Court rate for all time in both courts?

Answer: The applicable rate will depend on how the attorney bills. If the attorney submits an interim fee application in District Court and a final fee application in Superior Court, the District Court time should be paid at the District Court rate and the Superior Court time should be paid at the Superior Court rate. On the other hand, if the attorney submits only one final fee application in Superior Court, all time should be paid at the Superior Court rate.

2. **Question:** Does the answer to Question #2 change if the case is remanded from Superior Court back to District Court?

Answer: At the time of remand, attorneys are encouraged to submit an interim fee application in Superior Court at the appropriate Superior Court rate, and then to submit a final fee application for any additional time on remand in District Court at the appropriate District Court rate. If an attorney submits a fee application for the additional time on remand in District Court, he or she must report the “Prior Total Fees and Expenses Allowed” on that fee application.

3. **Question:** Client is charged with a Class C felony and a DWLR at the same time. The Class C felony is indicted but the DWLR remains in District Court. The attorney appears in District Court several times solely on the DWLR to get it continued. The client ultimately pleads guilty to a Class C felony in Superior Court and, as part of the plea, the DWLR is dismissed. Does this require separate fee applications in District and Superior Court?

Answer: No. Because the DWLR was resolved as part of the plea to the Class C felony in Superior Court, both charges should be consolidated onto one fee application pursuant to Section I.E., above, and all time approved by the Superior Court Judge should be paid at the appropriate Superior Court rate.

4. **Question:** If a case starts out as a misdemeanor and, prior to the disposition of that charge, the client is subsequently charged with one or more felonies arising from the same incident, is the time spent prior to the felony charge paid at the misdemeanor rate or the applicable felony rate?

Answer: If the misdemeanor and the felony are disposed on the same day in front of the same judge, they should be consolidated onto one fee application and the applicable rate for all time would be based on the highest original charge. If the misdemeanor and the felony are not disposed on the same day in front of the same judge, the attorney should submit two fee applications and the applicable rate for each would be based on the highest original charge covered by that fee application.

5. **Question:** What happens if a client is indicted on a Class H felony and the District Attorney then indicts the client as a Class C habitual felon? Is this paid at the rate for Class H felonies or the rate for Class C felonies?

Answer: This should be paid at the rate for Class C felonies.

6. **Question:** What rate applies to drug trafficking charges? They are frequently a relatively low-level felony but, because of the mandatory minimum sentence provisions, they carry sentences that are comparable to higher-level felonies. This same question would also apply to other crimes which are sentenced at a higher level than the felony class.

Answer: The rate is dependent on the felony class, regardless of any mandatory minimum sentences.

7. **Question:** What rate applies to DWIs? These cases typically take far more work than other misdemeanors, whether tried in District or Superior, and can also carry sentences normally associated with felonies (up to 24 months). At what level are they paid?

Answer: DWIs resolved in either Superior or District Court should be paid at the same per hour rate listed on the ncids.org rate chart.

8. **Question:** What is the rate structure for a court-appointed Motion for Appropriate Relief (“MAR”) in Superior Court in a non-capital felony case? Does the rate depend on the felony of conviction or the original charge?

Answer: The MAR rate depends on the most serious conviction. For example, a non-capital post-conviction challenge to a misdemeanor conviction that is brought in District Court should be paid at the \$65 hourly rate, a non-capital post-conviction challenge to a Class E felony conviction that is

brought in Superior Court should be paid at the \$65 hourly rate, and a non-capital post-conviction challenge to a Class B1 felony conviction that is brought in Superior Court should be paid at the \$85 hourly rate if the date of disposition is January 01, 2022 or later.

9. **Question:** What date should District Court Judges use in determining the payment rate for contempt cases that do not arise out of a child support case? Does the July 1, 2011 date of work performed apply to non-child support contempt proceedings?

Answer: No, the July 1, 2011 work performed date only applies in child support contempt proceedings, and does not apply to other types of contempt. The reason is that child support contempt proceedings tend to last much longer and involve monthly review hearings.

10. **Question:** If the most serious original charge against a juvenile is a Class A through D felony, does the same hourly rate apply, or does the rate only apply when the defendant is an adult?

Answer: Yes, the same hourly rate applies to both adults and juveniles when the most serious original charge is a Class A through D felony.

If attorneys or court officials have additional questions or concerns about these policies or other billing matters, they should contact Whitney Fairbanks, IDS Assistant Director/General Counsel, at (919) 354-7200 or Whitney.B.Fairbanks@nccourts.org.

CURRENT HOURLY ASSIGNED COUNSEL RATES

January 1, 2022

Case Type^{1, 2}	Effective Date for Current Rate³	Current Rate
Superior Court Division		
LWOP and potentially LWOP	Final disposition on or after January 1, 2022	\$100
Class B1-D felony	Final disposition on or after January 1, 2022	\$85
Satellite-based monitoring “bring back” hearings	Final disposition on or after January 1, 2022	\$85
Reviews of NGRI determinations	Final disposition on or after January 1, 2022	\$85
Non-capital post-conviction where the most serious conviction was a Class A-D felony	Final disposition on or after January 1, 2022	\$85
Class E-I felony or felony probation violation	Final disposition on or after January 1, 2022	\$65
All other cases resolved in Superior Court	Final disposition on or after January 1, 2022	\$65
District Court Division		
Non-potentially capital Class A-D felony	Final disposition on or after January 1, 2022	\$85
Driving While Impaired	Final disposition on or after January 1, 2022	\$65
Class A1 misdemeanor	Final disposition on or after January 1, 2022	\$65
Class E-I felony or felony probation violation	Final disposition on or after January 1, 2022	\$65
Civil cases – child support contempt, civil contempt, and involuntary commitment proceedings	Final disposition on or after January 1, 2022	\$65
Civil cases – abuse, neglect, dependency, termination of parental rights ⁴	Hearing completed on or after January 1, 2022	\$65
All other cases resolved in District Court	Final disposition on or after January 1, 2022	\$65
Capital Cases		
Provisional counsel	Work done on or after January 1, 2022	\$85
Potentially capital cases proceeding non-capitally (cases declared non-capital at Rule 24 hearing or by the DA, or cases that are 1 or more years from warrant served date)	Work done on or after January 1, 2022	\$100
Potentially capital cases (undesignated cases within 1 year of warrant served date)	Work done on or after January 1, 2022	\$100
Capital cases (cases declared capital at a Rule 24 hearing)	Work done on or after January 1, 2022	\$100
Capital direct appeals and post-conviction	Work done on or after January 1, 2022	\$100
Appellate Division		
LWOP and juvenile life with parole	Work done on or after January 1, 2022	\$100
Class B1-D felony appeals and appeals of satellite-based monitoring hearings	Work done on or after January 1, 2022	\$85
Non-criminal and all other criminal appeals ⁴	Work done on or after January 1, 2022	\$75
Capital appeals	Work done on or after January 1, 2022	\$100
Hearings Before Post-Release Supervision or Parole Commissions or Clerk of Court		
Parole and post-release supervision revocation hearings	Final disposition on or after January 1, 2022	\$65
Competency proceedings pursuant to Chapter 35A	Final disposition on or after January 1, 2022	\$65

¹ Applicable rate is based on the highest charge against the defendant or juvenile.

² Unless otherwise specified, rates for the juvenile division of district and superior courts are the same as the equivalent charge against an adult defendant.

³ Fee applications where the current rate is effective at “Final disposition on or after Jan. 1, 2022” (see column 2) will be paid at a single rate; this means that for those cases the current rate applies to all work performed, including work prior to January 1, 2022.

⁴ Effective January 1, 2024, certified child welfare specialists will receive a \$10/ hour incentive rate. See [link](#) for details.

AOC-CR-225

IDS Hourly Rate Information and Fee Application Guidance

This document provides basic guidance on completing the fee application, including a link to the [current hourly rates](#).

For comprehensive information visit <https://www.ncids.org/get-paid/fees-payments/>.

1. Enter complete and correct information in the Heading and Section I. Applications missing disposition information, dates, and signatures must be returned and corrected prior to payment.
 - a. For Original Charge:
 - i. If multiple charges, list the highest charge.
 - b. If Felony
 - i. List Felony Class; *and*
 - ii. List name of offense
 - c. If Misdemeanor *or* Traffic
 - i. List [Misdemeanor Class](#); *and*
 - ii. If [Class 3](#) Attach a Completed [Order of Assignment](#)
2. Ensure that the correct [hourly rate](#) is used.
3. The fee application section must be signed by the attorney (this is the legal request for payment for the work performed) and the order to pay or fix value of services must be signed by the judge (this creates the court order for payment).
4. The completed form must be submitted within one (1) year of the case disposition date.
 - a. If you anticipate not being able to meet the 1-year deadline, a [30-day extension request](#) can be submitted prior to the deadline.
 - b. If the 1-year deadline has passed a [deadline extension waiver request](#) must be submitted.

SCOPE OF REPRESENTATION

IDS Policy:

This policy is intended to clarify some common questions about the scope of representation of indigent clients, and is not intended to be a comprehensive or exhaustive list of contractors' or public defenders' duties to their clients. In all situations described in this policy, the assigned contractor or public defender shall first determine whether there is a potentially meritorious claim to raise, or a valid and ethical action to take on behalf of a client, and the following obligations apply only if the contractor or public defender has so determined. The following obligations do not apply after the assigned case is finally disposed at the trial level and do not extend to representation on direct appeal in the Appellate Division.

(1) Adult Criminal Cases:

(a) If a contractor or public defender is assigned to a case that ends in a deferral or diversion (including a G.S. 90-96 deferral), the contractor or public defender has an obligation to ensure that the case is dismissed if the deferral or diversion is successful or to defend the client against the charge if the deferral or diversion fails.

(b) If a client fails to appear, the assigned contractor or public defender shall continue to represent the client on the original charge(s) and any related failure to appear charge, regardless of whether the client is rearrested, until:

(i) the prosecutor voluntarily dismisses the charge(s) with leave; or

(ii) for a period of six (6) months after the date of the failure to appear, at which point the contractor or public defender may file a motion to withdraw.

(c) At or prior to the time of final disposition at the trial level of a client's Driving While Impaired ("DWI") case, the assigned contractor or public defender has an obligation to seek to obtain a limited driver's privilege for the client.

(d) If a client's property has been seized as part of a criminal case or pursuant to a criminal forfeiture, at or prior to the time of final disposition at the trial level of a client's criminal case, and upon request of the client, the assigned contractor or public defender has an obligation to file a petition for the return of the client's property or to contest the forfeiture.

(e) At or prior to the time of final disposition at the trial level of a client's Driving While License Revoked ("DWLR") case, and upon request of the client, the assigned contractor or public defender shall take reasonable and appropriate steps to address any issues underlying the DWLR, if those issues are in the same county as the pending DWLR case. For underlying issues in other counties, the contractor or public defender shall give the client limited advice and guidance on how the client can address the matters.

(f) If a contractor or public defender is assigned to represent a client who has one or more prior convictions in North Carolina state court that are subject to challenge (*e.g.*, a guilty plea without counsel), one or more of the prior convictions would impact the trial or sentencing in the currently assigned case, and:

(i) The prior conviction(s) is(are) in the same county as the pending case: The contractor or public defender shall take reasonable and appropriate steps to challenge the prior conviction(s), including filing and litigating a motion for appropriate relief ("MAR"); for an extraordinarily complex MAR, a contractor may seek additional compensation outside of the

contract or a reduction in the contract's annual minimum and maximum number of disposed cases; or

(ii) The prior conviction(s) is(are) in another county: The contractor or public defender shall write to the Chief District Court Judge or the Senior Resident Superior Court Judge in the county of the prior conviction(s) and ask the Court to appoint local counsel to investigate and potentially file a MAR; or the contractor may seek prior approval from IDS to investigate, file, and litigate a MAR in the other county for additional compensation outside of the contract or for a reduction in the contract's annual minimum and maximum number of disposed cases.

(2) Juvenile Delinquency Cases:

(a) If a contractor or public defender is assigned to a case that ends in a deferral or diversion, the contractor or public defender has an obligation to ensure that the case is dismissed if the deferral or diversion is successful or to defend the juvenile client against the petition if the deferral or diversion fails.

(b) If a juvenile client fails to appear, the assigned contractor or public defender shall continue to represent the juvenile on the original petition(s) and any related failure to appear/secured custody order, regardless of whether the juvenile is rearrested, until:

(i) the prosecutor voluntarily dismisses the petition(s) with leave; or

(ii) for a period of six (6) months after the date of the failure to appear, at which point the contractor or public defender may file a motion to withdraw.

(c) At or prior to the time of final disposition at the trial level of a juvenile's case, and upon request of the juvenile, the assigned contractor or public defender has an obligation to file a petition for the return of the juvenile's property.

(3) Abuse/Neglect/Dependency and Termination of Parental Rights Cases (Respondent Attorney and Respondent GAL Services):

(a) A contractor's or public defender's representation includes attendance at and participation in mediations, child planning conferences, and pretrial conferences, as well as child and family team meetings to the extent possible.

(b) Prior to October 1, 2013, if a contractor or public defender is assigned to a case in which the abuse/neglect/dependency petition alleges that the client is a responsible individual pursuant to N.C. Gen. Stat. § 7B-807(a1) or the client completes a petition for judicial review and the case is consolidated with the abuse/neglect/dependency case pursuant to N.C. Gen. Stat. § 7B-324(b), the contractor or public defender has an obligation to represent the client at the responsible individuals hearing. If neither of those preconditions are met, the contractor or public defender shall have no obligation to represent the client at the responsible individuals hearing. Effective October 1, 2013, placement on the responsible individual list can no longer be consolidated with an abuse/neglect/dependency case.

(4) Child Support Contempt and Other Contempt Cases:

If a contractor or public defender is assigned to a pending child support contempt or other contempt case, including cases assigned on a per session basis, and the contractor or public defender has identified a motion that, if successfully litigated, would constitute a defense in the contempt proceeding, such as a Rule 60 motion or a motion to challenge paternity, the contractor

or public defender has an obligation to file such motion(s) because the State has introduced “the potential curtailment of the indigent’s personal liberty.” *McBride v. McBride*, 334 N.C. 124, 126, 431 S.E.2d 14, 16 (1993). The contractor or public defender shall also give the client limited advice and guidance on how the client can address other related matters, including recommending other motions such as motions to modify a child support obligation.

Adoption:

Policy adopted May 29, 2012; updated October 8, 2012, June 24, 2013, July 28, 2014, and December 1, 2014.

Authority:

G.S. 7A-498.3(c), 7A-498.5(c)(4).

APPOINTMENT AND PAYMENT OF COUNSEL IN CLASS 3 MISDEMEANOR CASES

Effective for offenses committed on or after December 1, 2013, § 18B.13.(a) of Session Law 2013-360 amends G.S. 15A-1340.23 to provide that, unless otherwise noted, the maximum punishment for a person who is convicted of a Class 3 misdemeanor and who has no more than three prior convictions shall be a \$200 fine. Thus, unless otherwise noted, an indigent defendant who is charged with committing a Class 3 misdemeanor on or after December 1, 2013 and who has no more than three prior convictions shall not be entitled to appointed counsel pursuant to G.S. 7A-451(a)(1). Section 18B.14 of Session Law 2013-360, as amended by §§ 4, 5, and 6 of Session Law 2013-385, reclassifies a number of Class 1 and Class 2 misdemeanors as Class 3 misdemeanors as of the same effective date. As a result of those changes, the Joint Conference Committee Report on the Continuation, Expansion, and Capital Budgets that accompanied Session Law 2013-360 reduced IDS' budget by \$2 million each year of the biennium.

The following IDS policy generally applies when the highest charge against a defendant is a Class 3 misdemeanor offense that was committed on or after December 1, 2013. The following policy does not apply when the General Statutes otherwise provide that a Class 3 misdemeanor charge against a defendant who has three or fewer prior convictions is punishable by an active or suspended term of imprisonment, such as a second or subsequent violation of G.S. 20-138.2A (operating a commercial vehicle after consuming alcohol) or G.S. 20-138.2B (operating a school bus after consuming alcohol). It also does not apply when the General Statutes provide that an offense that would otherwise be a Class 3 misdemeanor under some circumstances is a higher class of misdemeanor under other circumstances, such as G.S. 20-28(a) (providing that driving while license revoked is a Class 1 misdemeanor if the person's license was originally revoked for an impaired driving revocation).

Whenever the term "Court" is used in this policy, it means the presiding judge or the clerk of superior court acting pursuant to his or her authority under G.S. 7A-453 or G.S. 15A-601(e).

IDS Policy:

A defendant who is charged with a Class 3 misdemeanor shall not be exposed to an active or suspended term of imprisonment unless the Court finds that the defendant has four or more prior convictions. If the Court does not find that the defendant has four or more prior convictions at the time the Court determines entitlement to counsel and the defendant is not in custody, the Court should not appoint counsel regardless of the defendant's indigency and the case should proceed as a fine only case pursuant to new G.S. 15A-1340.23(d). Consistent with a defendant's rights against self-incrimination under the Fifth Amendment to the United States Constitution, the Court should not ask the defendant about his or her prior convictions. If the Court finds evidence of four or more prior convictions at a later stage in the proceedings, the Court should either appoint counsel if the defendant is indigent and give counsel an appropriate amount of time to prepare a defense or find that the defendant will not receive an active or suspended term of imprisonment.

If a defendant who is not entitled to counsel for a Class 3 misdemeanor is in custody at the time the Court determines entitlement to counsel, the Court should consider modifying the pretrial detainee's conditions of release to allow him or her to be released pending trial without posting a secured bond, such as by imposing one of the conditions set forth in G.S. 15A-534(a)(1) through (a)(3) or, if the defendant is indigent, appoint counsel to represent the pretrial detainee during the period of pretrial confinement on the Class 3 misdemeanor charge to ensure that he or she has

meaningful access to the courts. This type of appointment would constitute a limited appearance pursuant to G.S. 15A-141(3) and G.S. 15A-143. An attorney so appointed would have authority to represent the defendant both for purposes of modifying the conditions of release and in the underlying Class 3 misdemeanor case, but the appointment would end at the time of the defendant's release from custody.

If the Court appoints a private attorney, an attorney who is under contract with IDS, or a public defender office to represent a defendant who is charged with a Class 3 misdemeanor, and the Court has not found that the defendant has four or more prior convictions or is in pretrial custody, the attorney should inform the Court that the appointment is not authorized by North Carolina law and/or file a motion to withdraw. If the Court appoints a private attorney in violation of this policy, IDS shall not compensate that attorney for the case. If the Court appoints an attorney who is under contract with IDS or a public defender office in violation of this policy, IDS shall not award dispositional credit for the case.

If the Court appoints an attorney to represent a defendant who is charged with a Class 3 misdemeanor, and the Court has found that the defendant has four or more prior convictions, the appointed attorney is not expected to go behind the Court's finding and make an independent determination of its validity. However, if the Court appoints an attorney to represent a defendant who is charged with a Class 3 misdemeanor based on a finding that the offense was committed before December 1, 2013, and that finding contradicts the date of the offense on the warrant, the finding is facially invalid and the appointed attorney should file a motion to reconsider whether there are any other grounds to support appointment of counsel including the requisite number of prior convictions or the fact that the defendant is in pre-trial custody.

Effective December 1, 2013, a revised version of form AOC-CR-224 ("Order of Assignment or Denial of Counsel") will be available to facilitate the Court's ability to record whether a defendant who is charged with a Class 3 misdemeanor has more than three prior convictions and whether the defendant is entitled to counsel. A private assigned attorney who is seeking payment for representing a defendant charged with a Class 3 misdemeanor shall attach to his or her fee application the completed form AOC-CR-224 (Rev. 12/13).

Policy effective December 1, 2013. Revised February 4, 2014 and March 4, 2014.

Authority:

G.S. 7A-451(a)(1); 7A-498.3(c); 7A-498.5(f); § 18B.13.(a) of S.L. 2013-360; *Bourdon v. Loughren*, 386 F.3d 88 (2d Cir. 2004) (holding that pretrial detainees have a right to meaningful access to the courts to defend against the criminal charges resulting in their detention).

**OUT-OF-COURT FOREIGN LANGUAGE INTERPRETATION AND TRANSLATION
FOR INDIGENT DEFENDANTS AND RESPONDENTS¹**

I. INTRODUCTION

A. Definitions:

- Throughout this policy, the terms “interpreter” or “interpretation” refer to *oral* interpretation of a foreign language—*i.e.*, rendering statements spoken in one language into statements spoken in another language.
- The terms “translator” or “translation” refer to *written* translation of a foreign language—*i.e.*, converting a written text from one language into the written text of another language.
- The term “sight translation” refers to reading a written document silently in one language and rendering it orally in another language.

B. The Governing Statutes:

- G.S. 7A-343(9c) provides that the duties of the AOC Director include “[p]rescrib[ing] policies and procedures for the appointment and payment of foreign language interpreters. These policies and procedures shall be applied uniformly throughout the General Court of Justice.”

C. The Contractual Agreement Between AOC and IDS:

- The Office of Language Access Services (OLAS) is administered by AOC, not IDS. However, IDS has agreed to bear the cost of:
 - ✓ Out-of-court interpreting services performed for counsel for an indigent defendant or respondent;
 - ✓ Translation of written correspondence between counsel and an indigent defendant or respondent, as well as defense witnesses and other persons related to a case;
 - ✓ Translation of select discovery documents for an indigent defendant or respondent; and
 - ✓ Translation of briefs, orders, and other documents filed in the appellate courts of North Carolina on behalf of an indigent defendant or respondent.
- For all foreign language interpreting and translating services that will be paid from IDS’ funds, other than services performed by full-time state employees in IDS offices, all AOC policies and procedures shall apply.

¹ Interpreters for deaf persons are authorized by G.S. 8B-1 *et seq.*, and are not covered by this policy or the AOC policies and procedures on foreign language interpreters.

II. THE AOC POLICIES AND PROCEDURES

Appointed counsel for indigent defendants and respondents should consult the applicable AOC policies and procedures directly. In short, the policies provide the following:

A. Registration:

- Effective February 1, 2007, all foreign language interpreters and translators must register with the AOC. Only persons approved by AOC shall be paid from AOC or IDS funds.
- To access AOC's list of authorized Spanish language court interpreters who have been approved by OLAS to provide language access services in North Carolina courts, go to <https://www.nccourts.gov> and click on "Interpreters & Language Access" under Favorites and then "Registry of Spoken Foreign Language Court Interpreters." The Registry is updated monthly. Registries for other foreign language interpreters and translators are not available on the AOC website at this time.

B. Classification:

- Based on demonstrated qualifications, AOC shall assign a classification level to the registrant.

C. Compensation:

- The registrant's rate of pay shall correlate with his or her classification level as assigned by the AOC.
- All interpreters, including those performing services that will be paid from IDS funds, should consult the AOC policies and procedures for the proper method to seek payment for services rendered, including the appropriate use of the AOC-A-215 invoice form and the AOC-A-216 daily log sheet.
- The compensation rates for Spanish interpreters range from \$35 per hour to \$50 per hour based on the registrant's classification. Translators will be paid by the word pursuant to the case-specific contract.

III. OBTAINING THE SERVICES OF AN OUT-OF-COURT INTERPRETER

A. Obtaining an Authorized Spanish Out-of-Court Interpreter:

- For out-of-court Spanish interpretation of attorney-client communication in a case under the jurisdiction of the district or superior court, as well as out-of-court Spanish sight translation (such as reading discovery in English and rendering it orally in Spanish), counsel for an indigent defendant or respondent should arrange directly with an authorized Spanish interpreter to perform the services. (To access the Registry, go to <https://www.nccourts.gov> and click on "Interpreters & Language Access" under Favorites and then "Registry of Spoken Foreign Language Court Interpreters.") It is the interpreter's responsibility to verify that the attorney is a public defender or private appointed counsel. To bill for services rendered, the selected interpreter should submit forms AOC-A-215 and AOC-A-216 to OLAS.
- For out-of-court Spanish interpretation of attorney-client communication in a case under the jurisdiction of the appellate courts, as well as out-of-court Spanish sight translation,

counsel for an indigent defendant or respondent should determine whether the Appellate Entries form contains court authorization for interpretation during the pendency of the appeal. If the court has not authorized interpretation on the Appellate Entries form, appellate counsel must file a motion in the appropriate court for authorization to utilize an authorized Spanish interpreter. Counsel should then arrange directly with an authorized Spanish interpreter to perform the services. (To access the Registry, go to <https://www.nccourts.gov>, click on “Interpreters & Language Access” under Favorites and then “Registry of Spoken Foreign Language Court Interpreters.”) To bill for services rendered, the selected interpreter should submit forms AOC-A-215, AOC-A-216, and the Appellate Entries form or court order authorizing interpretation to OLAS.

B. Obtaining an Out-of-Court Interpreter for a Language Other than Spanish:

- To obtain an out-of-court interpreter for a language other than Spanish in a case under the jurisdiction of the district or superior court, counsel for an indigent defendant or respondent must complete OLAS’ “Request for Spoken Foreign Language Court Interpreter” form. (To access the request form, go to <https://www.nccourts.gov> and click on “Interpreters & Language Access” under Favorites and then “Request for Spoken Foreign Language Court Interpreter.”) Counsel must then provide to OLAS form AOC-CR-224 (Order of Assignment of Counsel) for non-capital cases or form AOC-CR-624 (Assignment of Counsel by Office of Indigent Defense Services in First Degree Murder (or Undesignated Degree of Murder) Cases at the Trial Level) for potentially capital cases, as well as the completed Request for Spoken Foreign Language Court Interpreter form. OLAS will locate and assign a qualified interpreter on a case-by-case basis and provide counsel with contact information for the authorized interpreter. To bill for services rendered, the interpreter should submit the forms required by the assignment.
- To obtain an out-of-court interpreter for a language other than Spanish in a case under the jurisdiction of the appellate courts, counsel for an indigent defendant or respondent should determine whether the Appellate Entries form contains court authorization for interpretation during the pendency of the appeal. If the court has not ordered interpretation on the Appellate Entries form, appellate counsel must file a motion in the appropriate court for authorization to utilize an appropriate interpreter. Appellate counsel must then complete OLAS’ “Request for Spoken Foreign Language Court Interpreter” form. (To access the request form, go to <https://www.nccourts.gov> and click on “Interpreters & Language Access” under Favorites and then “Request for Spoken Foreign Language Court Interpreter.”) Counsel must then provide to OLAS the Appellate Defender’s form appointing counsel to the appeal, the Appellate Entries form or court order authorizing interpretation, and the Request for Spoken Foreign Language Court Interpreter form. OLAS will locate and assign a qualified interpreter on a case-by-case basis and provide counsel with contact information for the authorized interpreter. To bill for services rendered, the interpreter should submit the forms required by the assignment.

IV. OBTAINING THE SERVICES OF A TRANSLATOR

A. Obtaining a Spanish or Non-Spanish Translator at the Trial Level:

- In a case under the jurisdiction of the district or superior court, for translation of attorney-client correspondence and other case-related documents, counsel for an indigent defendant or respondent must provide to OLAS form AOC-CR-224 (Order of Assignment of Counsel) for non-capital cases or form AOC-CR-624 (Assignment of Counsel by Office of Indigent Defense Services in First Degree Murder (or Undesignated Degree of Murder) Cases at the Trial Level) for potentially capital cases. If the requested translation is of discovery or of audio or video recordings, OLAS shall refer counsel to IDS' Chief Fiscal Officer for advance approval of the translation. In appropriate cases, the IDS CFO may consult with IDS' Public Defender Administrator or the Office of the Capital Defender to evaluate the reasonableness of the request and, for screening purposes, may require counsel to utilize the services of a qualified interpreter to sight translate discovery or to interpret an audio or video recording before approving full written translation. If IDS' CFO approves the translation, OLAS will assign a qualified translator or translation team on a case-by-case basis. To bill for services rendered, the translator(s) should follow the terms of the assignment.
- As a matter of course, trial counsel for an indigent defendant or respondent should not have materials that are received in discovery translated for review by the client. However, if counsel believes that, under the unique circumstances of the case, select discovery documents need to be translated, counsel should verify that the documents have not already been translated at the request of prior counsel or the prosecutor. If they have not, counsel must follow the procedure set forth immediately above.

B. Obtaining a Spanish or Non-Spanish Translator at the Appellate Level:

- In a case under the jurisdiction of the appellate courts, for translation of attorney-client correspondence, proposed issues in the settled record on appeal, briefs filed by the indigent defendant or respondent and opposing counsel, and any appellate opinions, counsel for an indigent defendant or respondent should determine whether the Appellate Entries form contains court authorization for written translation during the pendency of the appeal. If the court has not ordered translation on the Appellate Entries form, appellate counsel must file a motion in the appropriate court for authorization to utilize an appropriate translator. Appellate counsel must then provide to OLAS the Appellate Defender's form appointing counsel to the appeal and the Appellate Entries form or court order authorizing interpretation, and OLAS will locate and assign a qualified translator or translation team on a case-by-case basis. To bill for services rendered, the translator(s) should follow the terms of the assignment.
- As a matter of course, appellate counsel for an indigent defendant or respondent should not have documents other than correspondence, proposed issues, briefs, and appellate opinions translated for review by the client. However, if counsel believes that, under the unique circumstances of the case, select additional documents need to be translated, counsel should verify that the documents have not already been translated at the request of prior counsel or the prosecutor. If they have not, counsel must file a motion in the

appropriate court for authorization to utilize a translator for that purpose. Appellate counsel must then provide the Appellate Defender's form appointing counsel to the appeal and the court order to OLAS. OLAS will locate and assign a qualified translator or translation team on a case-by-case basis. To bill for services rendered, the translator(s) should follow the terms of the assignment.

V. Contacts for Questions and Assistance:

- For specific questions, or to arrange for a translator or an out-of-court non-Spanish interpreter, please contact:

AOC Program Manager for the Office of Language Access Services

Address: P.O. Box 2448, Raleigh, NC 27602

Phone: (919) 890-1213

Fax: (919) 890-1907

Email: OLAS@nccourts.org

- For advance IDS approval of lengthy translations, you may contact the IDS Chief Fiscal Officer at (919) 354-7200 or Aaron.M.Gallagher@nccourts.org.
- For general questions, you may contact the IDS Assistant Director/General Counsel at (919) 354-7200 or Whitney.B.Fairbanks@nccourts.org.


Policy effective April 10, 2007; updated June 21, 2007, August 13, 2007, August 19, 2009, March 3, 2011, July 19, 2012, October 11, 2012, November 20, 2012, August 19, 2013, September 6, 2013, September 24, 2013, June 4, 2014, June 22, 2014, September 10, 2015, April 25, 2022, and October 24, 2023.

Authority:

G.S. 7A-343(9c); Memorandum of Agreement, Foreign Language Interpreter Costs (IDS & AOC, Aug. 18, 2006).

PLEADINGS IN DISTRICT COURT

Candace Washington
Jim Grant
Office of the Appellate Defender



1

Agenda

- Types of Pleadings in District Court
- Pleading Issues
 - ****Defects****
 - Recent Big Change in the Law: *Singleton*
 - Variances
- Practice Points
 - Motions
 - Amendments
- Questions

2

What are they?

- In District Court, the initial criminal process functions as the State's pleading:
 - Arrest Warrant
 - Criminal Summons
 - Magistrate's Order
 - Citation
- Or the ADA can supersede with a "Statement of Charges":
 - Must be signed by the ADA who files it. N.C.G.S. 15A-922(a)
 - Entitles Defense to 3 days trial notice (or in practice longer)

3

Statutory Requirements

- Can be found at N.C.G.S. 15A-924
 - *Defendant's Name*
 - *Separate Count for Each Offense*
 - *County*
 - *Date/Time of Offense*
 - *Citation to Underlying Statute/Ordinance*
 - **A Plain and Concise Factual Statement for Each Element**

4

N.C.G.S. 15A-924(a)(5)

- “A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant’s commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.”
- This is essentially a codification of a longstanding common law requirement. What does it mean?

5

“Fatal Defects”

“A criminal pleading . . . is fatally defective if it fails to state some essential and necessary element of the offense of which the defendant is found guilty.”

State v. Ellis, 368 N.C. 342, 345 (2015).

Show of hands – who’s familiar with this rule?

6

Real Case Example

Client is charged with “disorderly conduct” under N.C.G.S. § 14-288.4(a)(2), which requires the State to prove beyond a reasonable doubt that the defendant:

- (1) intentionally;
- (2) caused a public disturbance;
- (3) by making or using any utterance, gesture, display, or abusive language
- (4) That was intended to, and plainly likely to, provoke violent retaliation and cause a breach of the peace.

7

Real Case Example

The warrant alleged that client “unlawfully and willfully”:

“DID CAUSE DISRUPTION IN NATIONWIDE BUILDING AND PROBATION OFFICE, BY CAUSING A DISTURBANCE THAT WAS DISRUPTING CLIENTS AND MANAGEMENT IN THE INSURANCE BUILDING.”

8

Result?

Conviction vacated, no jurisdiction (under prior precedent):

“Regarding the trial court’s jurisdiction, defendant first contends the trial court lacked jurisdiction because the warrant for his arrest failed to sufficiently charge him with misdemeanor disorderly conduct in a public building. We agree.”

State v. Combs, 2018 N.C. App. LEXIS 975 (unpublished).

9

What fatal defects used to mean...

These sorts of missing element “fatal defects” were, for 200+ years, considered *jurisdictional* problems.

- State v. Owen*, 5 N.C. 452 (1810)
- State v. Gregory*, 223 N.C. 415, 418 (1943)
- State v. Rankin*, 371 N.C. 885 (2018)

10

Jurisdictional?

Could raise any time....

.....even for the first time years later in post-conviction.

11

Until a few months ago....

State v. Singleton, 386 N.C. 183 (2024)

12

Literal First Paragraph

“Since 1811, the plain language and intent of the law has been to move away from common law pleading requirements in criminal cases which were overwrought with technicalities. But old habits die hard in the legal profession. More than two hundred years ago, the legislature eliminated strict common law pleading requirements for criminal indictments. But lawyers and judges continued to grasp “shadowy nothings” that permitted criminals to escape merited punishment. *State v. Hester*, 122 N.C. 1047, 1050 (1898). Despite recognition by this Court in 1898 that “[t]he practical sense of the age demand[ed]” that technicalities should not carry the day for defendants who argue form over substance in our indictment jurisprudence, *id.*, some continued to scour pleadings for procedural niceties long after guilty pleas had been entered or jury verdicts handed down.”

13

What it means now....

- *State v. Singleton*, 386 N.C. 183 (2024)
 - Jurisdictional defect vs. non-jurisdictional defect
 - Jurisdictional = charging document “fails to wholly allege a crime”
 - Now non-jurisdictional = mere failure to allege essential element or facts to support an essential element
 - Subject to waiver and an appellate prejudice test the Court has already said you will not be able to meet.

14

Circling Back to *Combs* example

The warrant alleged that client “unlawfully and willfully”:

DID CAUSE DISRUPTION IN NATIONWIDE BUILDING AND PROBATION OFFICE, BY CAUSING A DISTURBANCE THAT WAS DISRUPTING CLIENTS AND MANAGEMENT IN THE INSURANCE BUILDING.

Is this mere “missing elements” or does it “wholly fail” to allege a crime?

15

Jurisdictional Issue

- *State v. Wilkins*, 2024 N.C. App. LEXIS 723 (Sept. 17, 2024) (currently stayed)
- Obstruction of Justice Indictment:
 - “unlawfully, willfully and feloniously with deceit and intent to defraud, did commit the infamous offense of obstruction of justice by knowingly providing false and misleading information in training records indicating he had completed mandatory in-service training and annual firearm qualification where he had not completed it, and knowing that these records and/or the information contained in these records would be and were submitted to the North Carolina Sheriffs’ Education and Training Standards Division thereby allowing defendant to maintain his law enforcement certification when he had failed to meet the mandated requirements.”

16

Jurisdictional Issue Cont’d

- An act that obstructs justice must be one that is “done for the purpose of hindering or impeding a judicial or official proceeding or investigation or potential investigation, which might lead to a judicial or official proceeding.”
- COA held the indictment failed to entirely charge defendant with a criminal offense. Why?
- The indictment alleged falsified records were submitted for the purpose of maintaining certifications.

17

Read More.....

Did State v. Singleton Bring a Sea Change in the Law of Indictments?

August 26, 2024 [Daniel Soper](#)

[Print](#)

North Carolina Criminal Law
A UNC School of Government Blog

[Home](#)

Indictment Technicalities: Gone Today and Here Tomorrow

October 9, 2024 [Jesse L. Wade](#)

[Print](#)

18

Caselaw Requirements

○

Continued Viability? Now vs. In the Long Run?

Missing statutory elements are not the only ways the allegations can be facially defective.

Examples....

19

Defect in RDO Pleading

○

- Citation for RDO reads, “To wit did resist and delay officer W. E. Prest a state patrolman performing the duties of his office by striking said officer with his hands and fist.
- Seems ok?

(a) If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge an official duty, the person is guilty of a Class 2 misdemeanor.

20

Defect in RDO Pleading

○

“To charge a violation of G.S. 14-223, the warrant or bill must indicate the specific official duty the officer was discharging or attempting to discharge.”

State v. Wells, 59 N.C. App. 682 (1982) (citing *State v. Smith*, 262 N.C. 472 (1964)).

21

A Note on Juvenile Cases

N.C.G.S. 7B-1802 - same rules?

22

Juvenile Petitions

Petition filed alleging that the juvenile was delinquent in that he “did unlawfully, willfully, and feloniously possess with intent to deliver 1 pill of [sic] 1 orange pill believed/told to be an Adderall, which is included in Schedule II of the North Carolina Controlled Substances Act, in violation of G.S. 90-95(a)(1).” *In re J.S.G.*, 2021-NCCOA-40.

23

Also Non-Jurisdictional Now

Recent opinion: *In re J.U.*, 384 N.C. 618 (2023):

“We address here the jurisdictional sufficiency of allegations in a juvenile delinquency petition. Just as ‘it is not the function of an indictment to bind the hands of the State with technical rules of pleading, the plain language of N.C.G.S. § 7B-1802 does not require the State in a juvenile petition to aver the elements of an offense with hyper-technical particularity to satisfy jurisdictional concerns. Because the juvenile petition sufficiently pled the offense . . . and provided adequate notice to the juvenile, the pleading requirements of N.C.G.S. § 7B-1802 were satisfied.”

24

Motion to Dismiss

- “Fatal Defect”
 - Insight from *Singleton*?....
 - Move to dismiss or subject to waiver. N.C.G.S. § 15A-922(e)
 - Result?
 - State can file superseding charging document
 - 3-day continuance
 - Dismissal if not filed within appropriate time period. N.C.G.S. §15A-922 (b)(3)

25

BIG PICTURE RE: DEFECTS

- Argue them, if it makes sense
 - When? No later than MTD, no earlier than?....
- Know that if the judge rules against you, the chances of success on appeal are very low
- Know that even if successful, the State retains the right to go back and properly charge your client
- When it really is unfair – constitutionalize (5+6+14), preserve, and object!
- Lesser Included Offenses?

26

Variance

- Variance occurs when the evidence introduced during trial is different than the allegation in the pleading.
- Has always been non-jurisdictional – must be raised at trial
- Does not bar further prosecution....for a different offense.

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The Jurisdictional Light Switch

Superior Court

Indicted:

- Habitual DWI (F)
- DWLR (M)
- Open Container (M)
- Speeding (I)

31

The Jurisdictional Light Switch

- ~~Habitual DWI (F)~~ Lab: o.o BAC
- DWLR (M)
- Open Container (M)
- Speeding (I)

○ *State v. Armstrong*, 248 N.C. App. 265 (2016)
→ REMAND TO DISTRICT COURT!

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Useful Materials

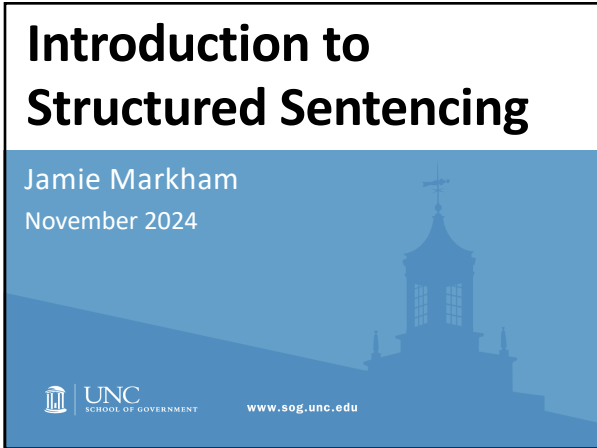
- “The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment”
Administration of Justice Bulletin, Prof. Jessica Smith (2008)
(<http://sogpubs.unc.edu/electronicversions/pdfs/aojbo803.pdf>)
- CRIMES
- An OAD Consult! – 919.354.7210

33

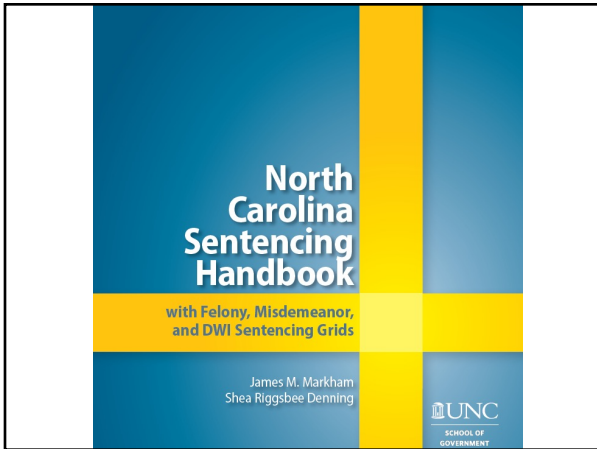
Questions?

candace.m.washington@nccourts.org
james.r.grant@nccourts.org
919.354.7210

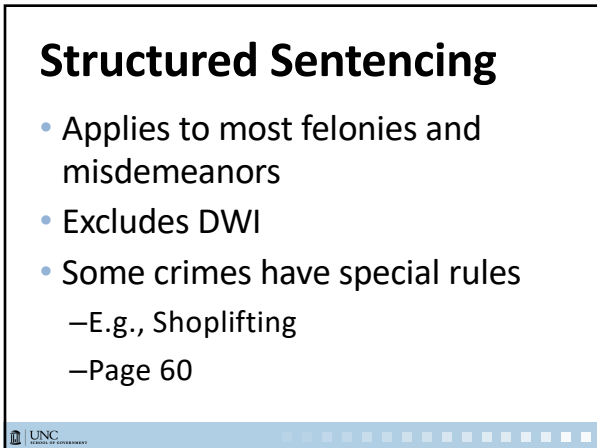
OAD OFFICE OF THE
APPELLATE DEFENDER



1



2



3

Misdemeanor Offenses Committed on or after December 1, 2013				
OFFENSE CLASS	PRIOR CONVICTION LEVEL			
	I No Prior Convictions	II One to Four Prior Convictions		III Five or More Prior Convictions
A1	C/I/A	C/I/A		C/I/A
	1-60 days	1-75 days		1-150 days
1	C	C/I/A		C/I/A
	1-45 days	1-45 days		1-120 days
2	C	C/I		C/I/A
	1-30 days	1-45 days		1-60 days
3	C	One to Three Prior Convictions	Four Prior Convictions	C/I/A
	Fine Only* 1-10 days	Fine Only* 1-15 days	1-15 days	1-20 days

*Unless otherwise provided for a specific offense, the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine.

A—Active Punishment I—Intermediate Punishment C—Community Punishment

4

Basic Steps

- **Step 1: Determine the Applicable Law**
- **Step 2: Determine the Offense Class**
- **Step 3: Determine the Prior Conviction Level**
- **Step 4: Select a Sentence of Imprisonment**
- **Step 5: Choose a Sentence Disposition**
- **Step 6: Review Additional Issues, as Appropriate**

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Sentence Types

- Jail
- Supervised probation
- Special probation (probation with split)
- Unsupervised probation
- Fines and restitution
- Multiple convictions
- Diversions

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6

Offense Class (p. 11)

- Appendix B



13

Appendix B: Offense Class Table for Misdemeanors

Class A1	
Assault by Pointing a Gun (G.S. 14-34)	
*Assault in Presence of Minor (G.S. 14-33(d))	
Assault Inflicting Serious Injury (G.S. 14-33(c)(1))	
Assault on Child under 12 Years of Age (G.S. 14-33(c)(3))	
Assault on Female (G.S. 14-33(c)(2))	
Assault on Government Officer or Employee (G.S. 14-33(c)(4))	
Assault on Handicapped Person (G.S. 14-32.1)	
Assault on School Employee or Volunteer (G.S. 14-33(c)(6))	
Assault with Deadly Weapon (G.S. 14-33(c)(1))	
Child Abuse (G.S. 14-318.2)	
First-Degree Trespass, Utility Premises or Agricultural Center (G.S. 14-159.12)	
Food Stamp Fraud, \$100-\$500 (G.S. 108A-53.1)	
Interfering with Emergency Communication (G.S. 14-286.2)	
Misdemeanor Death by Vehicle (G.S. 20-141.1)	Class 1 for offenses before 12/1/2009
Secretly Peeping, Second Offense or with Photo Device (G.S. 14-202)	
Sexual Battery (G.S. 14-27.33)	Was G.S. 14-27.5A for offenses before 12/1/2009
*Stalking, First Offense (G.S. 14-277.3A)	
Violation of a Valid Protective Order (G.S. 50B-4.1(a))	
Class 1	
Aggressive Driving (G.S. 20-141.6)	
Breaking into Coin-Operated Machine, First Offense (G.S. 14-56.1)	
Breaking or Entering Buildings (G.S. 14-54(b))	
Communicating Threats (G.S. 14-277.1)	
Contributing to the Delinquency of a Juvenile (G.S. 14-316.1)	
Cruelty to Animals (G.S. 14-360)	
Cyber-Bullying, Defendant 18 or Older (G.S. 14-458.1)	
Disclosure of Private Images, Defendant under 18, First Offense (G.S. 14-190.5A)	

14

Offense Class (p. 11)

- Appendix B
- Attempt: One class lower
- Conspiracy: One class lower
- Solicitation: Always Class 3



15

Prior Conviction Level (p. 11-12)

- State's burden to prove
 - Preponderance of the evidence
 - Stipulation, court/DMV records, or any other reliable method
- Ethics: No intentional underreporting

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Prior Conviction Level (p. 11-12)

- **Count**
 - Any prior conviction, felony or misdemeanor
 - Convictions from other jurisdictions
 - Old convictions
 - Traffic convictions
 - Prayer for judgment continued (PJC)
- **Do Not Count**
 - Infractions
 - Juvenile adjudications
 - Contempt
 - Probation revocations
- Count only one conviction from each session of district court and each week of superior court

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Prior Conviction Level

No. Of Prior Convictions	Level
0	I
1 - 4	II
5+	III



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Exercise 1




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Exercise 1

- Communicating Threats
- Prior convictions: 5
- Jail credit: None

- What is the longest permissible Active sentence?



20

Misdemeanor Offenses Committed on or after **December 1, 2013**

OFFENSE CLASS	PRIOR CONVICTION LEVEL		
	I No Prior Convictions	II One to Four Prior Convictions	III Five or More Prior Convictions
A1	C/I/A 1-60 days	C/I/A	C/I/A
1	C 1-45 days	C/I/A 1-120 days	
2	C 1-30 days		
		One to Three Prior Convictions	Four Prior Convictions
3	C Fine Only* 1-10 days	C Fine Only* 1-15 days	C/I 1-15 days
			C/I/A 1-20 days

*Unless otherwise provided for a specific offense, the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine.

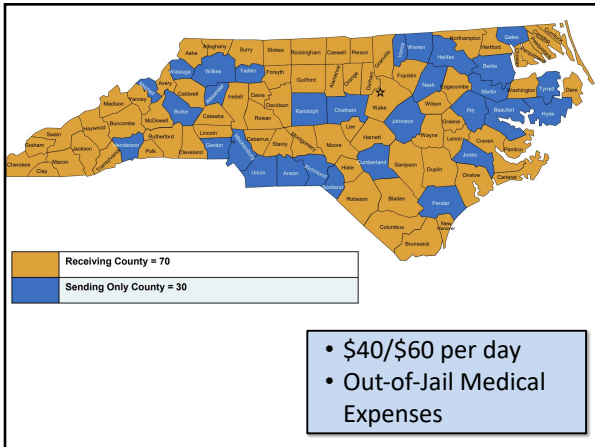
A—Active Punishment I—Intermediate Punishment C—Community Punishment

21

Active Sentences

- Defendant goes directly to jail
- Place of confinement
 - 90 days or less: Local jail
 - Over 90 days: Statewide Misdemeanant Confinement Program

22



23

Credits

- Jail credit (p. 21)
 - **Concurrent sentences:** All get credit
 - **Consecutive sentences:** One gets credit
- Sentence reduction credit (p. 22)
 - **Earned time:** 4 days/month
 - **Good time (DWI):** Cuts time in half

24

Probationary Sentences

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Probation (p. 26)

- Term of imprisonment
- Type of probation
- Period of probation
- Conditions of probation
- Delegated authority

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26

Probation (p. 26)

- Term of imprisonment
- Type of probation
- Period of probation
- Conditions of probation
- Delegated authority

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Misdemeanor Offenses Committed on or after December 1, 2013				
OFFENSE CLASS	PRIOR CONVICTION LEVEL			
	I No Prior Convictions	II One to Four Prior Convictions		III Five or More Prior Convictions
A1	C/I/A	C/I/A 1-75 days		C/I/A 1-150 days
1	C 1-45 days	C/I/A 1-45 days		C/I/A 1-120 days
		C/I 1-45 days		C/I/A 1-60 days
2	1-30 days	One to Three Prior Convictions C 1-45 days		Four Prior Convictions C/I/A 1-20 days
3	C Fine Only* 1-10 days	C Fine Only* 1-15 days	C/I 1-15 days	C/I/A 1-20 days

*Unless otherwise provided for a specific offense, the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine.
A—Active Punishment I—Intermediate Punishment C—Community Punishment

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Probation (p. 26)

- Term of imprisonment
- Type of probation
- Period of probation
- Conditions of probation
- Delegated authority

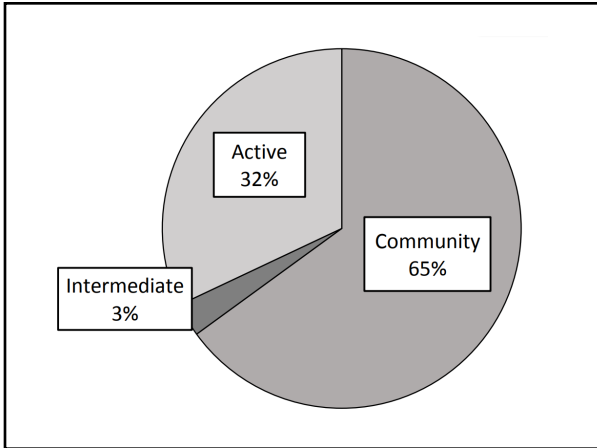
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<h3>Community</h3> <ul style="list-style-type: none"> • Supervised or unsupervised probation that MAY NOT include <ul style="list-style-type: none"> – Special probation – Recovery court 	<h3>Intermediate</h3> <ul style="list-style-type: none"> • Supervised probation that MAY include <ul style="list-style-type: none"> – Special probation – Recovery court
---	--

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Probation (p. 28)

- Term of imprisonment
- Type of probation
- Period of probation
- Conditions of probation
- Delegated authority

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Misdemeanor Offenses Committed on or after December 1, 2013

OFFENSE CLASS	PRIOR CONVICTION LEVEL		
	I No Prior	II One to Four	III Five or More
1	1-45 days	1-45 days	1-20 days
2	C	CII	CIII
	1-30 days	1-45 days	1-60 days

Avg. probation period: 16 months

Length of Probation Period
 The original period of probation for a misdemeanor sentenced under Structured Sentencing must fall within the following limits:

- Community—6 to 18 months
- Intermediate—12 to 24 months

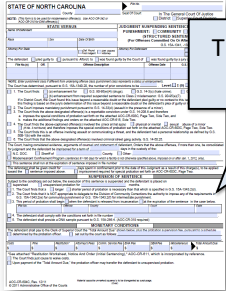
The court may depart from those ranges with a finding that a longer or shorter period is required. The maximum permissible period with a finding is 5 years. G.S. 15A-1343.2.

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Delegated Authority

- Applies unless the court “un-delegates” it



The Court finds that it is NOT appropriate to delegate...

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Exercise 2

41

Exercise 2

- Misdemeanor larceny
 - Prior convictions: 0
 - Jail credit: None
- Give a suspended sentence with the longest possible period of probation the court can order without a finding.



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Misdemeanor Offenses Committed on or after **December 1, 2013**

OFFENSE CLASS	PRIOR CONVICTION LEVEL		
	I No Prior Convictions	II One to Four Prior Convictions	III Five or More Prior Convictions
A1	C/I/A	C/I/A 1-75 days	C/I/A 1-150 days
1	C 1-45 days	C/I/A 1-45 days	C/I/A 1-120 days
		C/I 1-60 days	C/I/A 1-60 days
			C/I/A 1-20 days

Length of Probation Period
 The original period of probation for a misdemeanor sentenced under Structured Sentencing must fall within the following limits:
 • Community—6 to 18 months
 • Intermediate—12 to 24 months
 The court may depart from those ranges with a finding that a longer or shorter period is required. The maximum permissible period with a finding is 5 years. G.S. 15A-1343.2.

A—Active Punishment I—Intermediate Punishment C—Community Punishment

Class 3 misdemeanor who has no

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Special probation (split sentence)

- Intermediate punishment
- Jail confinement as a condition of probation
- Up to ¼ the maximum imposed sentence
- May be noncontinuous (e.g., weekends)
- Optional \$40/day jail fee

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Exercise 3

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Exercise 3

- Assault on a Female
- Prior convictions: 4
- Jail credit: 3 days
- What is the longest permissible split sentence?

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Misdemeanor Offenses Committed on or after December 1, 2013

OFFENSE CLASS	PRIOR CONVICTION LEVEL			
	I No Prior Convictions	II One to Four	III Five or More	IV Six or More
A1	C/I/A 1-60 days	C/I/A 1-75 days	C/I/A 1-90 days	C/I/A 1-120 days
1	C 1-45 days	C/I 1-45 days	C/I 1-45 days	C/I/A 1-45 days
2	C 1-30 days	C/I 1-45 days	C/I 1-45 days	C/I/A 1-45 days
3	C Fine Only* 1-10 days	C Fine Only* 1-15 days	C/I 1-15 days	C/I/A 1-20 days

**Unless otherwise provided for a specific offense, the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine.*

A—Active Punishment I—Intermediate Punishment C—Community Punishment

$\frac{1}{4}$ of 75 = 18 days

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Special probation (split sentence)

- Intermediate punishment
- Jail confinement as a condition of probation
- Up to $\frac{1}{4}$ the maximum imposed sentence
- May be noncontinuous (e.g., weekends)
- Optional \$40/day jail fee
- *Judge's discretion whether to apply jail credit to the split sentence or to the suspended term*

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Sentence Types

- ✓ Jail
- ✓ Supervised probation
- ✓ Special probation (probation with split)
 - Unsupervised probation
 - Fines and restitution
 - Multiple convictions
 - Diversions

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Sentence Types

- ✓ Jail
- ✓ Supervised probation
- ✓ Special probation (probation with split)
 - Unsupervised probation Intermediate
 - Fines and restitution Sex offenders
 - Multiple convictions
 - Diversions

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Sentence Types

- ✓ Jail
- ✓ Supervised probation
- ✓ Special probation (probation with split)
- ✓ Unsupervised probation
 - Fines and restitution
 - Class A1—Court discretion
 - Class 1—Court discretion
 - Class 2—\$1,000
 - Class 3—\$200
 - Multiple convictions
 - Diversions

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Misdemeanor Offenses Committed on or after **December 1, 2013**

**Response to nonpayment:
G.S. 15A-1364 (imprisonment up to 30 days)**

OFFENSE CLASSIFICATION	Convictions	Prior Convictions	Prior Convictions
A1	C/I/A 1-60 days	C/I/A 1-75 days	C/I/A 1-150 days
1	C 1-45 days	C/I/A 1-45 days	C/I/A 1-120 days
2	C 1-30 days	C/I 1-45 days	C/I/A 1-60 days
		One to Three Prior Convictions	Four Prior Convictions
3	C Fine Only* 1-10 days	C Fine Only* 1-15 days	C/I 1-15 days
			C/I/A 1-20 days

*Unless otherwise provided for a specific offense, the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine.

A—Active Punishment I—Intermediate Punishment C—Community Punishment

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Restitution (p. 19)

- Compensation to victim
 - Limited to crimes of conviction (State v. Murphy)
- Must have proof or stipulation
- Court must consider defendant's ability to pay

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53

Sentence Types

- ✓ Jail
- ✓ Supervised probation
- ✓ Special probation (probation with split)
- ✓ Unsupervised probation
- ✓ Fines and restitution
 - Multiple convictions
 - Diversions

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54

Sentencing Multiple Convictions

- Page 20-21
 - Consolidation
 - Concurrent sentences
 - Consecutive sentences
 - Multiple probationary sentences

55

Limit on Consecutive Sentences

- The cumulative term of imprisonment may not exceed twice the maximum authorized sentence for the class and prior conviction level of the most serious offense
- If all convictions are for Class 3 misdemeanors, they may not run consecutively

56

Exercise 4

57



Exercise 4

- Convictions
 - Sexual battery (Class A1)
 - Larceny (Class 1)
 - Injury to personal property (Class 1)
- Prior Conviction Level II
- What is the longest permissible consecutive sentence?

58

Misdemeanor Offenses Committed on or after December 1, 2013

OFFENSE CLASS	PRIOR CONVICTION LEVEL			
	I No Prior Convictions	II One to Four Prior Convictions	III Five or More Prior Convictions	IV*
A1	C/A 1-60 days	C/A 1-75 days	C/A 1-100 days	C/A 1-75 days
1	C 1-45 days	C/A 1-45 days	C/A 1-120 days	C/A 1-45 days
2	C 1-30 days	C 1-45 days	C 1-60 days	C/A 1-45 days
3	C Fine Only* 1-30 days	One to Three Prior Convictions C Fine Only* 1-15 days	Four Prior Convictions C 1-15 days	C/A 1-20 days

75 x 2 = 150

75

45

45

~~105~~

*Unless otherwise provided for a specific offense, the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine.
A—Active Punishment I—Intermediate Punishment C—Community Punishment

“[T]he cumulative length of the sentences of imprisonment shall not exceed twice the maximum sentence authorized for the class and prior conviction level of the most serious offense.”

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Sex Offenders

- Reportable sex crimes (p. 19; p. 58)
 - Sex offender registration (30 years or lifetime)
 - Satellite-based monitoring (SBM)
 - Additional probation conditions (p. 32)
 - No unsupervised probation
 - Optional: Permanent no-contact order

60

Sentence Types

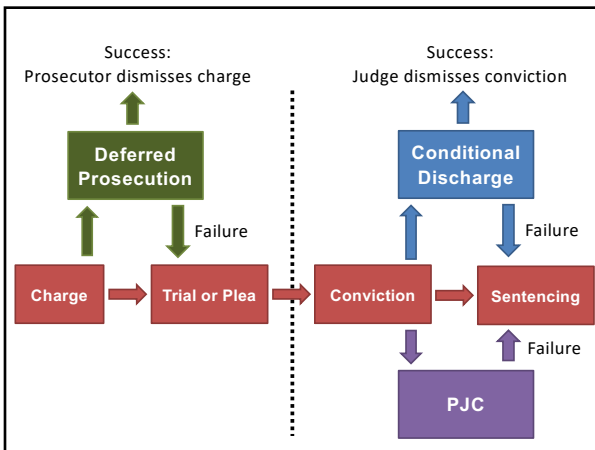
- ✓ Jail
- ✓ Supervised probation
- ✓ Special probation (probation with split)
- ✓ Unsupervised probation
- ✓ Fine only
- ✓ Multiple convictions
 - Diversions

61

Diversions (p. 23-24)

- Deferred prosecution
- Conditional discharge
- Prayer for Judgment Continued (PJC)

62



63

Deferred Prosecution

- Statutory deferred. G.S. 15A-1341(a1)
 - Misdemeanors, Class H/I felonies
 - No prior probation
 - 2-year probation maximum
 - Should not include acceptance of plea
- Informal deferred

64

Conditional Discharge

- | | |
|----------------------------|--|
| • G.S. 90-96(a) | Drug possession/paraphernalia |
| • G.S. 90-96(a1) | Drug possession/paraphernalia |
| • G.S. 90-113.14 | Toxic Vapor offenses |
| • G.S. 15A-1341(a4) | Any Class H/I felony or misdemeanor |
| • G.S. 15A-1341(a5) | Drug Treatment Court |
| • G.S. 15A-1341(a3) | Prostitution |
| • G.S. 14-50.29 | Gang offender under 19 years old |

65

PJC

- After adjudication of guilt, continuation without entry of judgment
- Permissible in any case, except:
 - DWI
 - Solicitation of prostitution
 - Speeding in excess of 25 mph over limit
 - Passing a stopped school bus
- May not include conditions beyond obeying the law and paying costs
- No subsequent authority to “dismiss”

66

Sentence Types

- ✓ Jail
- ✓ Supervised probation
- ✓ Special probation (probation with split)
- ✓ Unsupervised probation
- ✓ Fine only
- ✓ Multiple convictions
- ✓ Diversions



67




68

Probation Violations

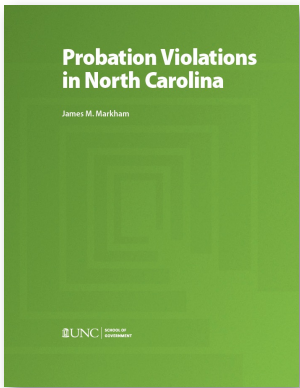
Jamie Markham
UNC School of Government

November 2024



www.sog.unc.edu

1



Probation Violations
in North Carolina

James M. Markham

UNC SCHOOL OF GOVERNMENT

2

Violation Hearings

3

Initiating a Violation

- Probation Violation Report (DCC-10)
- Probationer is entitled to 24 hours notice of alleged violations
- All violations must be filed before case expires

4

Arrest and Bail (p. 6-7)

- Probationers can be arrested for a violation
- Generally entitled to bail
- Exceptions for “dangerous” probationers:
 - With felony charges pending, or
 - Ever convicted of a sex crime
- No statutory authorization for anticipatory bonds
 - “Arrest on first positive drug screen. \$50,000 bond.”
 - “Hold without bond”
 - Court of Appeals has “urged caution” against that practice. State v. Hilbert, 145 N.C. App. 440 (2001)

5

Preliminary Hearings

- Required under G.S. 15A-1345(c)
 - Within 7 working days of arrest
 - Felony preliminary hearings may be held in district court
 - Required only if probationer is detained
- If not held within 7 working days, probationer must be released pending final violation hearing

6

Final Violation Hearings

- Proper venue:
 - Where probation imposed
 - Where violation occurred
 - Where probationer resides
- Court may return the case to district of origin or residence

7

Final Violation Hearings

- Not a formal trial
- Probationer entitled to counsel
- Probationer may confront and cross-examine witnesses, unless the court finds good cause for not allowing confrontation
- Rules of evidence don't apply
 - Hearsay admissible
 - Exclusionary rule inapplicable
- Proof to judge's "reasonable satisfaction"

8

Response Options

9



New criminal offense

- “The mere fact that a probationer is charged with certain criminal offenses is insufficient to support a finding that he committed them. However, a defendant need not be convicted of a criminal offense in order for the trial court to find that a defendant violated [the ‘commit no criminal offense’ condition].” State v. Hancock, 248 N.C. App. 744 (2016)



13

New criminal offense?

the conditions of probation imposed in that judgment, the defendant willfully violated:
General Statute 15A-1343(b)(1) "Commit no criminal offense in any jurisdiction" in that
OFFENDER WAS ARRESTED AND CHARGED WITH FELONY UTTERING A FORGED INSTRUMENT ON 02/28/2022. OFFENSE DATE 09/31/21 AT THE STATE EMPLOYEE'S CREDIT UNION IN WAKE COUNTY CASE 22CR201479.



14

State v. Singletary (N.C. App., 2023)

- **COA:** The evidence presented gave adequate support for the trial court’s independent finding
 - The details in the violation report itself
 - Officer testimony (more about that in a moment)
 - Trial court consideration of images from SECU
- “A probation revocation hearing is not a trial, and the State need not present evidence sufficient to convict Defendant nor call as witnesses the investigating officers of the crimes alleged.”



15



New criminal offense (p. 19)

- “Commit no criminal offense in any jurisdiction”
 - **Conviction** for new offense
 - **Independent findings** of criminal offense at probation violation hearing
- No revocation solely for Class 3 misdemeanor

16

Absconding

17

Absconding (p. 21)

“Not abscond by willfully avoiding supervision or by willfully making the defendant’s whereabouts unknown to the supervising probation officer, if the defendant is placed on supervised probation.”

G.S. 15A-1343(b)(3a)



18



Confinement in Response to Violation (CRV)

- Permissible in response to violations other than “commit no criminal offense” and “absconding”
- Length:
 - Felony: 90 days (do not apply jail credit)
 - DWI: Up to 90 days
 - No CRV for misdemeanors



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CRV (cont.)

- Must be continuous period (no “weekend CRV”)
- Must be to proper place of confinement
 - DAC for felonies (Lumberton/N. Piedmont)
 - SMCP for DWI
- CRV periods ordered in multiple probation cases must run concurrently
- Maximum of 2 CRVs per case (revocation-eligible after that)



23

“Terminal CRV”

- CRV that exhausts the defendant’s suspended sentence
- CRV that runs out the clock on the defendant’s period of probation
- CRV followed by the judge’s affirmative termination of probation
- Terminal splits?



24




Appeals

46

Appeals


- District court defendants have a statutory right to appeal **revocation** or imposition of a **split sentence** to superior court for de novo violation hearing
 - No appeal of CRV
- No de novo appeal to superior court if violation hearing “waived”
- After appeal, case remains in superior court

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Appeals

- Superior court defendant may appeal **revocation** and **split sentences** to the court of appeals
 - Appeal does not stay an activated sentence
 - Appeal stays imposition of a split
 - Court may allow release with conditions pending appeal

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“Elect to Serve”

- No longer an option by statute (since 1997)

49

Jail Credit Upon Revocation

- Pre-trial
- Pre-hearing
- Prior splits
- DART Cherry / Black Mountain
- Contempt
- CRV
- Quick dips

50

General Framework

- Does the court have jurisdiction to act?
- Did the defendant violate a lawful condition?
- Was the violation willful?
- Was the violation revocation-eligible?
- Consider alternatives
- Mitigate



51



Jurisdiction

- Was a violation report filed (and file stamped) before the probation period expired?
 - Watch for “addendum” violations



52

Jurisdiction

- Was the initial period of probation lawful to begin with?



53

Improper Probation Period

- Misdemeanor–Community 6-18 months
- Misdemeanor–Intermediate 12-24 months
- Felony–Community 12-30 months
- Felony–Intermediate 18-36 months

SUSPENSION OF SENTENCE	
Subject to the conditions set out below, the execution of this sentence is suspended and the defendant is placed on probation for _____ months.	<input type="checkbox"/> supervised <input type="checkbox"/> unsupervised
1. The Court finds that a <input checked="" type="checkbox"/> longer <input type="checkbox"/> shorter period of probation is necessary than that which is specified in G.S. 15A-1343.2(d).	



54



Jurisdiction

- Has there ever been an unlawful extension of the defendant's probation?

55

The screenshot shows a legal document titled "OTHER MODIFICATIONS OF PROBATION". It contains two main sections: (a) "for good cause shown, pursuant to G.S. 15A-1344(d)" and (b) "with the defendant's consent, pursuant to G.S. 15A-1342(a) or G.S. 15A-1343.2(d)". A callout box labeled "Ordinary" points to section (a), and another callout box labeled "Special purpose" points to section (b). The document also includes a "CERTIFICATION" section at the bottom.

56

General Framework

- Does the court have jurisdiction to act?
- Was the violation willful?
- Was the violation revocation-eligible?
- Consider alternatives
- Mitigate

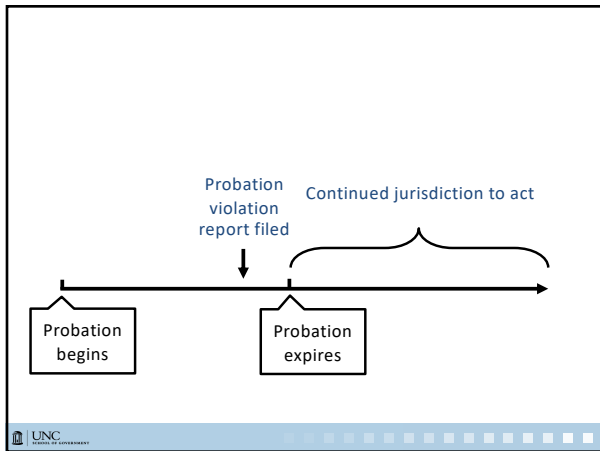
57

Jurisdiction

- The court may act... “[a]t any time prior to the expiration or termination of the probation period.” G.S. 15A-1344(d).
- Court may also act after expiration if violation report filed (and file stamped) before probation ends. G.S. 15A-1344(f).



58



59

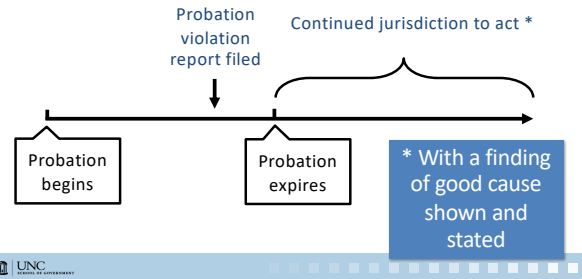
(f) Extension, Modification, or Revocation after Period of Probation. - The court may extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:

- (1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.
- (2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.
- (3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.



60

State v. Morgan



61

General Framework

- Does the court have jurisdiction to act?
- Was the violation willful?
- Was the violation revocation-eligible?
- Consider alternatives
- Mitigate

62

Willfulness

- "Good faith inability to pay"
- Be prepared to show defendant's living expenses, employment, etc.

63

General Framework

- Does the court have jurisdiction to act?
- Was the violation willful?
- Was the violation revocation-eligible?
- Consider alternatives
- Mitigate

General Framework

- Does the court have jurisdiction to act?
- Was the violation willful?
- Was the violation revocation-eligible?
- Consider alternatives
- Mitigate

General Framework

- Does the court have jurisdiction to act?
- Was the violation willful?
- Was the violation revocation-eligible?
- Consider alternatives
- Mitigate

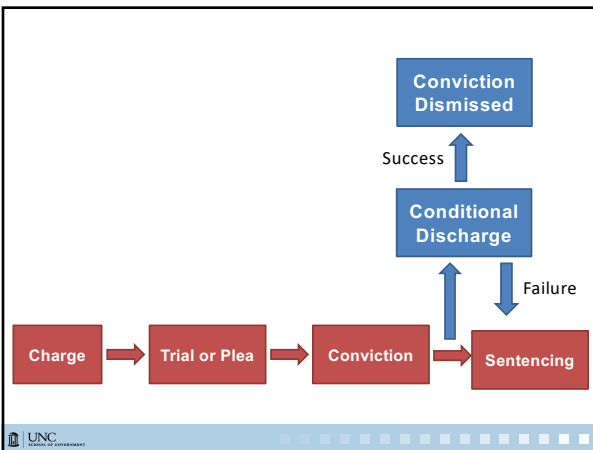
If revocation, mitigate

- Reduce sentence
- Run sentences concurrently
- Make sure all jail credit applied
- Relieve financial obligations

67

Conditional Discharge "Limbo"

68



69

Limbo

- When conditional discharge probation expires, the defendant is “immune from prosecution of the charges deferred or discharged and dismissed.” G.S. 15A-1342(i).
- However, G.S. 15A-1341(a6) says you discharge a defendant “[u]pon fulfillment of the terms and conditions of a conditional discharge.”



70

Limbo

- State v. Hilgert, 866 S.E.2d 532 (2021) (unpublished).
“The State argues Defendant’s charge cannot be discharged and dismissed because ... Defendant did not fulfill the obligations of his side of the contract. ... We disagree. ... If the State wanted to extend, modify, or revoke Defendant’s probation, it needed to do so. ... The State did neither of these things. Thus, G.S. 15A-1342(i) controls.”



71



72



Common Evidence Issues in District Court



Daniel Spiegel
UNC School of Government
Misdemeanor Defender Training, November 2024

1

Common Evidence Issues

This session is not a primer, nor a march through the Rules of Evidence.

We will cover:

- Evidence Resources
- Getting Your Evidence In
- Hearsay Objections
- DV Cases
- Impeachment with Priors
- Google Maps
- Digital Communications
- Photos
- Videos



2

Evidence Resources

Good Resources as you begin your career:

- Thomas Mauet- **Trial Techniques**
- Shea Denning- **Magic Questions** (Evidence Foundations) – in your materials
- Jeff Welty- Orange Brochure – **“Evidence Foundations for Prosecutors”**
- Go deeper: Various treatises



3

Getting Your Evidence In

1. Mark exhibit for ID
2. Show exhibit to **Opposing Counsel**
3. **"May I Approach the Witness?"**
4. Lay Foundation through questions
5. **"Your honor, I move to admit Defense Exhibit #1 into evidence."**



Practice in front of friends and colleagues!
Visualize in your head!

4

Hearsay Objections

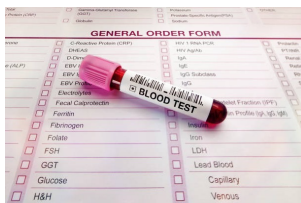
- Documents often contain hearsay.
Possible objections:
 - Rule of Evidence 802 (G.S. 8C-1)
 - 6th Amendment- Confrontation
 - 14th Amendment- Due Process
- Good to make a habit of constitutionalizing your objections early in your career!
- Why?



5

Medical Records- DWI cases

- Testimonial?
- Business Record?
- Expertise in analysis?



6

Domestic Violence cases

- Common Issue: Complaining Witness not present at trial
- Confrontation
 - Are statements testimonial?
 - Statement about a past event or fact that the declarant would reasonably expect to be used later in a criminal prosecution when made.
- Key: **Primary purpose?**
Ongoing emergency when statement made?



Think: 911 call / CW's statement as officers arrive on scene / CW's statement after being separated from D and time has passed

7

Domestic Violence cases

- What about hearsay protections?
- Remember that Confrontation and Hearsay are separate but related bases for objection
- Common hearsay exceptions State may rely on:
 - Present Sense Impression (803(1))
 - Excited Utterance (803(2))
 - Then Existing Mental, Emotional or Physical Condition (803(3))
 - Statements for Purposes of Medical Diagnosis or Treatment (803(4))



8

Impeachment with Prior Conviction- Rule 609

- "What if any crimes punishable by 60 days or more have you been convicted of in the past 10 years?"
- "Other than Class 3 misdemeanors, what if any crimes have you been convicted of in the past 10 years?"
- "Weren't you convicted of felony larceny in 2019?"
- Can also ask about sentence received, time and place of conviction



9

Google Maps

- Rule 201- judicially noticed fact must be one not subject to reasonable dispute
- State courts have overwhelmingly found Google Map images appropriate for judicial notice
- You don't need to call Google CEOs
- (but it's a different question for driving times, other app functions)



10

Authentication Basics

- Authentication is identification
 - The proponent must show that “the [evidence] in question is what its proponent claims.” N.C. R. Evid. 901
- Authentication is “a special aspect of relevancy”
 - Adv. Comm. Note, N.C. R. Evid. 901(a)
- Authentication is a low hurdle
 - *State v. Ford*, 245 N.C. App. 510 (2016) (stating that the “burden to authenticate . . . is not high – only a prima facie showing is required”)
- Authentication often comes from:
 - Testimony of a “[w]itness with [k]nowledge,” Rule 901(b)(1)
 - The “distinctive characteristics” of the evidence or other “circumstances,” Rule 901(b)(4).



11

Two Step Authentication

- (1) Does the exhibit (screen capture, photo, video) accurately reflect the communication?
 - (2) Is there reason to believe that the purported author actually wrote the communication?
- “To authenticate [social media] evidence . . . there must be circumstantial or direct evidence sufficient to conclude a screenshot accurately represents the content on the website it is claimed to come from and to conclude the written statement was made by who is claimed to have written it.”
- *State v. Clemons*, 274 N.C. App. 401 (2020).



12

Memory Tool: "SANDVAT"

- **"S" is for "Substance"** – how does the **substantive content of the digital evidence itself** tend to authenticate it?
 - Remember, this is appropriate under Rule 104(a)- for preliminary questions such as authenticity, the court is not bound by rules of evidence (except for privileges)
 - *Example:* the sender uses the name of a common child and refers to an unusual incident
- **"A" is for "Account"** – information about the account (login, properties, pieces of identifying information associated with profile)
- **"N" is for "Name"** – is there a name or "handle" associated with the social media account?
- **"D" is for "Device"** – who possessed the phone or computer? What can we learn from the hardware itself?

13

Memory Tool: "SANDVAT"

- **"V" is for "Visuals"** - what do the photos/videos show on the account?
- **"A" is for "Address"** – what can we learn from the IP address or physical address associated with the evidence?
- **"T" is for "Timing"**
 - When was the post made?
 - What is the overall chronology and how does that line up with events IRL?
(Example: D was released from prison in *Clemons* at a particular time and the messages started just after)
- **"SANDVAT" – remember, this is just a memory tool (not a legal test), but it can be a helpful way to think about the paths to authenticate digital evidence- both for getting things in and keeping things out.**

14

State v. Clemons, 274 N.C. App. 401 (2020)

- V has a DVPO against D
- D is released from prison and their adult daughter picks him up
- Shortly thereafter:
 - V begins receiving multiple calls daily from an unknown number; the caller sometimes leaves messages referencing events from D and V's past
 - Comments appear on some of V's Facebook posts; they are made from V's daughter's account, but V testifies that her daughter never comments on her posts and wouldn't make comments of that kind
- V takes screenshots of the Facebook comments and gives them to the police, who charge D with violating the DVPO by contacting V

15

State v. Clemons, 274 N.C. App. 401 (2020)

- (1) “the screenshots must have accurately reflected [V’s] Facebook page. . . . Therefore, the screenshots must have been authenticated as photographs.”
- (2) “the screenshots of the Facebook comments are also statements—the State wanted the jury to use the screenshots to conclude [D] communicated with [V] in violation of the DVPO through the Facebook comments. . . . In light of this purpose, the Facebook comments also needed to be authenticated by evidence sufficient to support finding they were communications actually made by Defendant.”

16

Circumstantial Evidence of Authorship

State v. Ford, 245 N.C. App. 510 (2016)

- D’s dog DMX killed a neighbor
- D charged: involuntary manslaughter
- Did D know DMX was dangerous?
- State introduced a screenshot of what it said was D’s MySpace page, featuring a video titled “DMX the Killer Pit”
- Authentic? Yes. Account name included D’s nickname and account contained pictures of D and DMX



17

Mechanics of Receiving Digital Evidence in District Court

- What happens when moving party tries to get in evidence directly off the phone?
- From General Rules of Practice for the Superior and District Courts:

Rule 14. Custody and Disposition of Evidence at Trial

Once any item of evidence has been introduced, the clerk (not the court reporter) is the official custodian thereof and is responsible for its safekeeping and availability for use as needed at all adjourned sessions of the court and for appeal.

After being marked for identification, all exhibits offered or admitted in evidence in any cause shall be placed in the custody of the clerk, unless otherwise ordered by the court.

- Should video evidence be burned onto a new disc? (Initials and date on copy)
- Using Printouts as exhibits

18

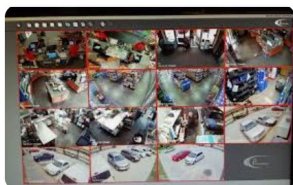
Authenticating Photographs

- **Illustrative**
 - Don't need person who took the photo- photo just illustrates testimony of witness
- **Substantive**
 - Generally have foundational witness who either took the photo or is familiar with how photo was taken



19

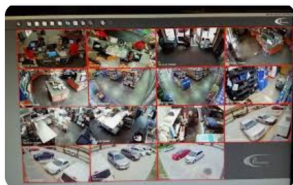
Surveillance Video



20

Authenticating Surveillance Video

- **Fair and Accurate** method (Illustrative)
 - Witness was present during the recorded events and can testify that the footage is a "fair and accurate" depiction of what occurred
 - Ex. Loss Prevention Officer was actually there and saw D steal items at the store
- **Silent Witness** method (Substantive)
 - No live witness
 - Footage has been retrieved and there is either a chain of custody for the footage or some other combination of factors that go to authenticity/reliability



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State v. Jones

North Carolina Criminal Law
A UNC School of Government Blog

Home

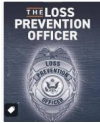
Surveillance Video- When It Comes In and When It Doesn't
March 19, 2014 DAVID BURDE

Video evidence authentication has received a fair amount of treatment on this blog. The topic remains an area of practical significance given the prevalence of video evidence in criminal trials and how common it is for the prosecutor's case to hinge on the admission of video. We are increasingly sophisticated society. Between home security cam, doorbell cam, body-worn cam, in-car cam, pole cam, and even [carling.biz.com](#), juries increasingly expect to see video, whether the incident in question occurred outside a home, near a business, or on the roadside.

22

Surveillance Video- Common Authenticating Witnesses

- Loss Prevention Officer
- Store Clerk
- Store Manager
- Homeowner
- Law Enforcement Officer who extracted the video from the system (may or may not be specialist/expert)
- Investigating Officer (think *State v. Jones*)



23

State v. Jones

ADEQUATE Foundation for Surveillance Video*	INADEQUATE Foundation for Surveillance Video*
<p>State v. Jones, 288 N.C. App. 178 (2013)</p> <p>Officer testified that:</p> <ol style="list-style-type: none"> 1. Video was same as footage she saw on night of incident; 2. Improvment's description of events matched the video; 3. Surveillance system was working correctly "to [her] knowledge." 	<p>State v. Moore, 254 N.C. App. 544 (2017)</p> <p>Officer testified that:</p> <ol style="list-style-type: none"> 1. The day after the incident, since store manager was unable to make a copy of the footage, officer recorded footage on the store's equipment with his cell phone; 2. The video, which was a copy of the cell phone recording, accurately showed footage he had reviewed at the store.
<p>State v. Sneed, 368 N.C. 811 (2016)</p> <p>Loss prevention manager testified that:</p> <ol style="list-style-type: none"> 1. He was familiar with recording equipment and it was in working order; 2. He reviewed the footage on the recording equipment and video was same as the footage he viewed. 	<p>Store clerk testified that the defendant was seen on video, but did not testify as to whether the video accurately depicted events he observed on day in question.</p>
<p>State v. Fleming, 347 N.C. App. 812 (2016)</p> <p>Corporate investigator testified that:</p> <ol style="list-style-type: none"> 1. He was familiar with the recording system, it was functioning properly, and he made a copy of footage; 2. Video was the same as footage he copied, unedited, and same as that created by system. 	<p>No testimony pertaining to type of recording equipment and whether it was in good working order/reliable.</p>
<p>State v. Rhoads, 249 N.C. App. 472 (2016)</p> <p>Store manager testified that:</p> <ol style="list-style-type: none"> 1. Cameras were working properly because time and date stamps were accurate. 	<p>State v. Moore, 144 N.C. App. 20 (2009)</p> <p>Two store employees testified that surveillance system was in working order but were unfamiliar with maintenance, testing, or operation.</p>

24

State v. Jones

ADEQUATE

Foundation for Surveillance Video*

State v. Jones, 288 N.C. App. 175 (2023)

Officer testified that:

1. Video was same as footage she saw on night of incident;
2. Homeowner's description of events matched the video;
3. Surveillance system was working correctly "to [her] knowledge."

25

State v. Moore

INADEQUATE

Foundation for Surveillance Video*

State v. Moore, 254 N.C. App. 544 (2017)

Officer testified that:

1. The day after the incident, since store manager was unable to make a copy of the footage, officer recorded footage on the store's equipment with his cell phone;
2. The video, which was a copy of the cell phone recording, accurately showed footage he had reviewed at the store.

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State v. Moore (continued)

Store clerk testified that the defendant was seen on video, but did not testify as to whether the video accurately depicted events he observed on day in question.

No testimony pertaining to type of recording equipment and whether it was in good working order/reliable.

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Surveillance Video- Example

- Misdemeanor Larceny trial
- Loss Prevention Officer (LPO) from Walmart is present
 - The LPO retrieved the disc from where it was stored at the store
 - The LPO was not present during the incident
 - A previous LPO (who quit) was the one who burned the disc from the system
- Does the surveillance video come in? Why or why not?

28



Questions

29

Common Evidence Issues



Daniel Spiegel
UNC School of Government
Misdemeanor Defender Training, November 2024

30

Magic Questions

New Prosecutors' School

Shea Denning, School of Government

May 2019

Audio V Evidence

1. Are you familiar with this recording system?
2. Was the system working properly at the time of the events recorded?
3. How did you obtain the recording from the system?
4. Did you provide a copy of the recording to the State?
5. Is this recording the one you copied?
6. Has the recording been edited in any way from its original version?

Documentary Evidence

1. Are you familiar with Exhibit "A" (business records) for identification?
2. Can you identify these documents?
3. Were these documents prepared in the ordinary scope or course of the business of your company?
4. Who prepares these documents or how are they prepared?
5. Are these documents made at or near the time the events occurred?
6. Is it a regular part of your business to keep and maintain records of this type?
7. Are these documents of the type that would be kept under your custody or control?

Illustrative Evidence

1. I hand you what has been marked (for the purpose of identification) as State's Exhibit # ____.
What is State's # ____?
2. Do you recognize State's # ____?
3. What is it a picture of?
4. Did you take this picture? (Not necessary that picture be taken by witness)
5. Are you familiar with the subject matter depicted in the picture? (Optional)

6. Does State's # ___ fairly and accurately represent (subject matter) as it appeared (Date and Time)?
7. (If for Illustrative Purposes) Would State's # ___ assist you in illustrating your testimony to the Court/Jury?
8. Your Honor, the State moves to introduce State's # ___ into evidence for illustrative purposes / to illustrate the testimony of this witness. I hand you what has been marked as State's # ___ .

Introducing a diagram

1. What is State's # ___ a diagram of?
2. Are you familiar with the area / object depicted in the diagram?
3. Did you prepare the diagram? (Optional)
4. When did you prepare the diagram? (Optional)
5. How did you prepare the diagram? (Optional)
6. Is it drawn to scale?
7. Does it accurately depict the relationship of the objects shown to each other?
8. Does it fairly and accurately depict the area/object?
9. Would the use of the diagram on State's # ___ assist you in explaining and illustrating your testimony to the Court/Jury?
10. Your Honor, the State moves to introduce State's # ___ into evidence for illustrative purposes / to illustrate the testimony of the witness.

Physical Evidence

Nonfungible

1. Do you recognize this item?
2. How do you recognize it?
3. Is it in the same or similar condition as when you last saw it?
4. If not, describe the changes and explain how you are still able to identify it.

Fungible

1. How are you able to recognize it?
2. When did you first see it?

3. What condition was it when you [first, last] saw it?
4. What if anything did you do with it after you seized it?
5. Has it remained in your care, custody and control since you received it?
6. Have you done anything to alter or change it in anyway?
7. Does it appear now in the same or substantially the same condition as [when you received it, first saw it or last saw it]?

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ETHICAL ISSUES IN DISTRICT COURT

NOVEMBER 13, 2024

1

Court reporter:
“Counsel, how do you always have SO much energy?”

Defense attorney:
“Oh no, it’s not energy. It’s PANIC.”

2

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2

The Wrong Guy

3

RULE 1.6
(A)

Cannot reveal information acquired during professional relationship without consent

4

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4

RULE 1.6
(A)

Cannot reveal information acquired during professional relationship without consent

Exceptions?

5

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5

RULE 1.6
(A)

Cannot reveal information acquired during professional relationship without consent

Exceptions?

- RPC/court order

6

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6

**RULE 1.6
(A)**

Cannot reveal information acquired during professional relationship without consent

Exceptions?

- RPC/court order
- Commission of a crime

7

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**RULE 1.6
(A)**

Cannot reveal information acquired during professional relationship without consent

Exceptions?

- RPC/court order
- Commission of a crime
- Reasonably certain death or bodily harm

8

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**RULE 1.6
(A)**

Cannot reveal information acquired during professional relationship without consent

Exceptions?

- RPC/court order
- Commission of a crime
- Reasonably certain death or bodily harm
- Prevent or mitigate client's crime or fraud in using lawyer services

9

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RULE 1.2
(D)

Cannot advise a client to engage in conduct she knows to be criminal or fraudulent

10

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10

RULE 1.2
(D)

Cannot advise a client to engage in conduct she knows to be criminal or fraudulent but

11

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11

RULE 1.2
(D)

Cannot advise a client to engage in conduct she knows to be criminal or fraudulent but

- may discuss the legal consequences of any proposed course of conduct

12

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12

RULE 3.1

May not assert factually or legally frivolous positions but

- may defend a proceeding by requiring that all elements of the case be established

13

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RULE 3.3

May not make false statement of material fact or offer evidence that the lawyer knows to be false but

- may refuse to offer evidence she reasonably believes to be false

Exception:

- defendant's testimony

14

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14

RULE 4.1

Must be truthful but

- no obligation to inform opposing party of relevant facts

15

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15

THE SOCIAL DRINKER

2 hours ago · 🌐

Drivin drunk... classic ;) but to whoever's vehicle i hit i am sorry. :P

16

CASES AND RULINGS

2014 Formal Ethics Opinion 5

In civil case, attorney must advise client regarding legal impact of postings on social media sites. If counsel determines that removing existing postings does not constitute spoliation, counsel may advise client to remove postings, but should advise client to retain a copy. Counsel may advise client to increase privacy settings if such advice does not violate the law or a court order. [But see Rule 3.4]

17

17

CASES AND RULINGS

2018 Formal Ethics Opinion 5

Yes, if

- it's displayed on public portion of person's page

Rule 4.1 – Lawyer cannot use deception to gain access to restricted social media

Rule 8.4(c) – Lawyer cannot instruct a third party to use deception to gain access

18

18

RULE 4.2(A)

Cannot communicate about the case with someone she knows is represented by another


- unless with consent of other lawyer or authorized by law


19

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19

CASES AND RULINGS

 **RPC 93**

 Counsel may not speak with represented persons, even when not technically co-defendants, and even when persons initiate contact, without permission of their counsel

20

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20

JUDGE: Ma'am, are you under the influence of something right now?

DEFENDANT: No, Judge.

JUDGE: Are you telling me you could pass a drug test today?

DEFENDANT: Judge, that is *not* what I said.

THE WAKE & BAKE


21

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21

RULE 1.14

<p>Must</p> <ul style="list-style-type: none"> ● Maintain a normal client-lawyer relationship ● Keep client's information confidential <ul style="list-style-type: none"> ○ Exception only to extent necessary to protect client's interests 	<p>May</p> <ul style="list-style-type: none"> ● Take protective action <ul style="list-style-type: none"> ○ substantial physical, financial or other harm and ○ cannot act in own interest
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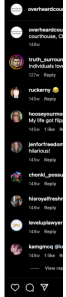
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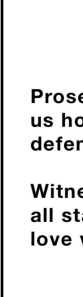
Prosecutor: Can you tell us how you know the defendant?

Witness on the stand: It all started when I fell in love with my weed dealer.




THE HOST WITH THE MOST





23




23


CASES AND RULINGS

98 Formal Ethics Opinion 2

May explain the effects of service of process but may not advise client to evade service



24



24

RULE 3.4

- Cannot help/ counsel another to
 - unlawfully obstruct another party's access to evidence
 - unlawfully destroy or conceal
- No obligation to inform opposing party of relevant facts

25

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CASES AND RULINGS

RPC 221 (1995)

Absent legal authority otherwise, lawyer may take possession, examine, return evidence to its source, and advise source of legal consequences of possession or destruction of evidence

26

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26

CASES AND RULINGS

RPC 221 (1995)

Absent legal authority otherwise, lawyer may take possession, examine, return evidence to its source, and advise source of legal consequences of possession or destruction of evidence

2007 FEO 2 - lawyer may not take possession of contraband

27

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27



28

CASES AND RULINGS



2011 Formal Ethics Opinion 3




Cannot assist client in fraudulent conduct

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29

2011 FORMAL ETHICS OPINION 3



Cannot assist client in fraudulent conduct


May advise client on consequences of any proposed course of conduct

So, you can tell client that posting bond may speed up deportation and result in dismissal of the case

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30

2011 FORMAL ETHICS OPINION 3



Cannot enter a notice of appeal simply for delay or frivolous reason, but seeking to enforce your client's constitutional right to a trial de novo is not simply for delay or frivolous.

So, you may enter notice of appeal

31

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31



THE ENFORCER

32

CASES AND RULINGS



2005 Formal Ethics Opinion 3



Cannot threaten to report an opposing party or witness to immigration to gain advantage in civil settlement

33

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33

CASES AND RULINGS

2005 Formal Ethics Opinion 3

Cannot threaten to report an opposing party or witness to immigration to gain advantage in civil settlement

2009 Formal Ethics Opinion 5

May seek information about immigration status in discovery

34

CASES AND RULINGS

2005 Formal Ethics Opinion 3

Cannot threaten to report an opposing party or witness to immigration to gain advantage in civil settlement

2009 Formal Ethics Opinion 5

May seek information about immigration status in discovery
BUT
may not report status to ICE unless required to do so by law

35

THE
BRAWLER



36

Current Clients

37

37

RULE 1.7

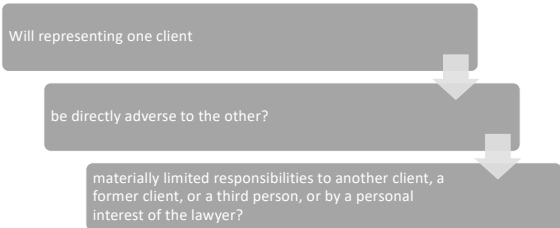


Cannot represent if the representation involves a concurrent conflict of interest

38

38

CONCURRENT CONFLICT OF INTEREST



39

39

EXCEPTIONS

Do you

- reasonably believe you can provide competent and diligent representation all clients?

Is the representation

- prohibited by law?

Does it involve a claim by one client against the other?

Has the client given written consent?



40

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40

RULE 1.8



Caution

Cannot use client information to the disadvantage of the client
UNLESS

- the client gives informed consent

41

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41

Former Clients

42

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42

RULE 1.9



- Cannot
- represent another person in the same or a substantially related matter if
 - current client's interests are materially adverse to the former's interests
- UNLESS
- former client gives informed consent, confirmed in writing

43

43

CASES AND RULINGS

2010 Formal Ethics Opinion 3

Client A is a witness in case and
You represent Client B in that case and
In order to effectively represent Client B, you
would have to cross-examine Client A, then

44

44

CASES AND RULINGS

2010 Formal Ethics Opinion 3

Concurrent Conflict of Interest
and
Conflict Cannot be Waived

Client A is a witness in case and
You represent Client B, you
would have to cross-examine Client A, then

45

45

CASES AND RULINGS



2011 Formal Ethics Opinion 2



Delay on the part of a former client in objecting to conflict of interest is not, by itself, a waiver of the conflict, but is one factor to consider in whether the lawyer must now withdraw from representing their current client

46

46



The Over Exposed

47

RULE 1.2(A)(1)

Defendant
has the
authority
to decide

plead guilty/ go to trial

testify

after consultation with the lawyer


48

48

RULE 1.4

Must keep client informed Giving client sufficient information to make informed decisions

can fulfill by providing a summary and consulting with the client about relevance



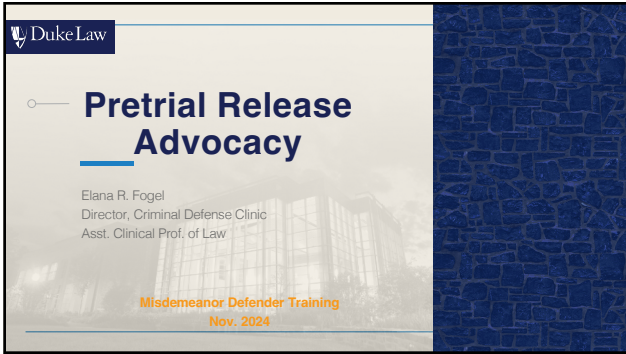
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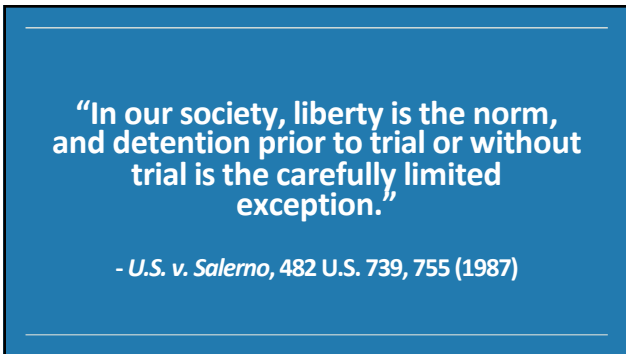


#SAFEGUARDINGJUSTICE

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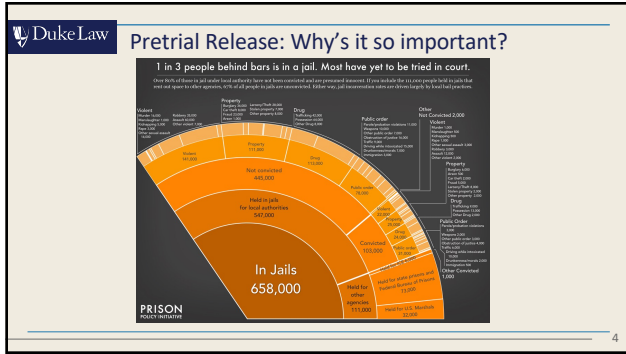
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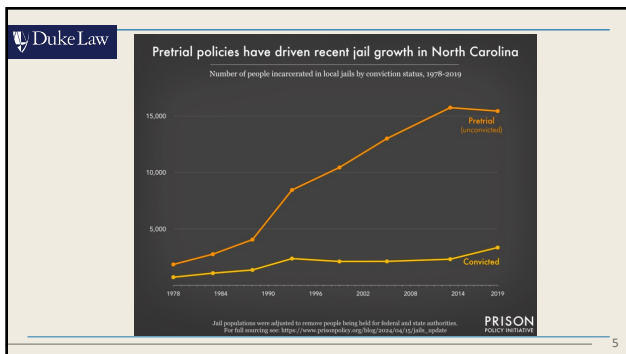
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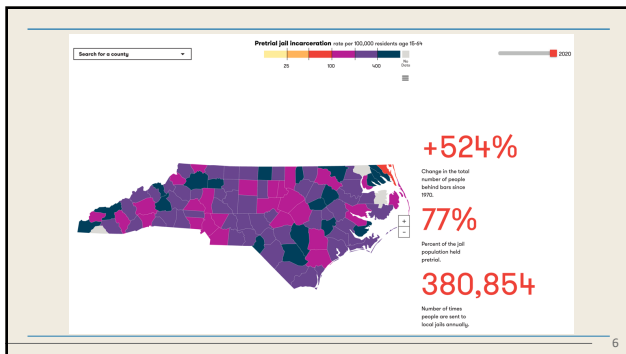
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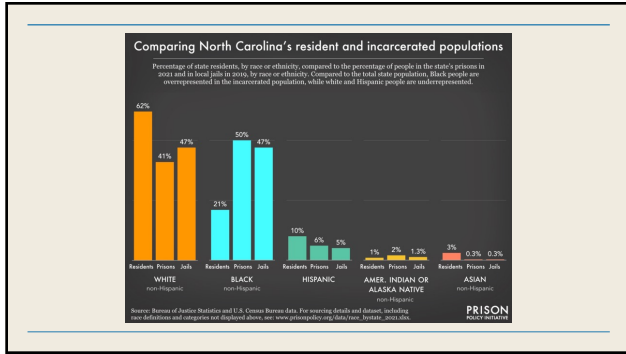
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5



6



7



8



9

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Pretrial Release: How to Get It

§ 15A-534. Procedure for determining conditions of pretrial release.
 (a) In determining conditions of pretrial release a judicial official must impose at least one of the following conditions:

- (1) Release the defendant on his written promise to appear.
- (2) Release the defendant upon his execution of an unsecured appearance bond in an amount specified by the judicial official.
- (3) Place the defendant in the custody of a designated person or organization agreeing to supervise him.
- (4) Require the execution of an appearance bond in a specified amount secured by a cash deposit of the full amount of the bond, by a mortgage pursuant to G.S. 58-74-5, or by at least one solvent surety.
- (5) House arrest with electronic monitoring.

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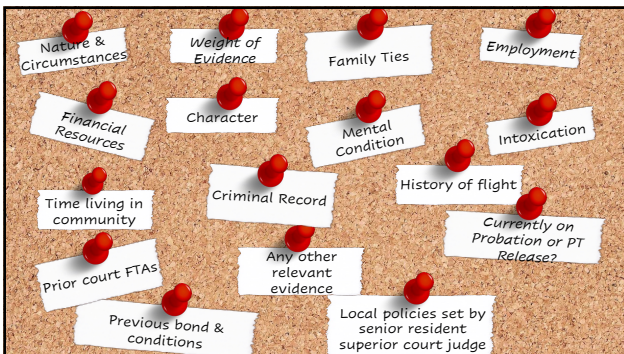
Duke Law

Pretrial Release: How to Get It

Pretrial Integrity Act

- o went into effect on Oct. 1, 2023
- o applies to offenses alleged on and after Oct. 1
- o expands the list of charges for which only a judge, rather than a magistrate, can set conditions of release to enumerated non-capital charges
 - whether to set conditions is also in the judge's discretion
 - extends 48-hour DV hold

11



12

Duke Law

Pretrial Release: How to Get It



13

Duke Law

Stay in Touch!
Email: fogel@law.duke.edu
Instagram: [@dukeccrimdefense](https://www.instagram.com/dukeccrimdefense)



**CRIMINAL DEFENSE
CLINIC**
DUKE UNIVERSITY SCHOOL OF LAW

14

NEGOTIATING EFFECTIVELY

Daniel Meier
Meier Law Group PLLC
daniel@meierlegal.com

1

Most Important Thing to Remember

- It is your client's case, NOT yours.

2

Why Negotiate?

- EVERY case should be treated as if it is for trial – even if it won't go to trial.
- Client doesn't want a trial.
- There are facts that the State doesn't currently know that may come out in trial.
- Judicial Efficiency
- Loss of control over the outcome.
- Can resolve other unrelated cases – Client's best interests.

3

Time to Negotiate

- Know your Client
- Know your Client's Support System
- Know your Case
- Know your Victim
- Know your DA
- Know your District
- Be ready for Trial

4

Know your Client

- What do they want?
- What is their potential exposure?
 - Misdemeanor Sentences – N.C. Gen. Stat. sec. 15A-1340.22(a)
 - Maximum punishment cannot exceed twice the maximum sentence for the class and prior conviction level of the most serious offense (A1, 1, 2)
 - If all convictions are class 3 misdemeanors, consecutive sentences cannot be imposed.
 - Felony Sentences – no limit on stacking.
- Are they good candidate for probation?
- What is their support system?

5

Client Support System

- Family/Friends - Listen to them, but not their case
 - Make sure you have Client's permission – even to share court dates.
 - What support or insight can they offer about your Client?
- You
 - Are you prepared to go to trial?
 - Are you prepared for sentencing?
 - Do you have your documents ready?
 - Does the DA believe you will actually try the case?
 - Do you know the case?

6

Know Your Case

- What are the Charges?
 - What is the law?
- Flaws in the charging documents?
- Are there valid issues/defenses?
 - Are necessary witnesses available?
 - Motion to Suppress?

7

Know Your Victim

- Domestic
- Stranger
- Neighbor
- Violent
- Property
- What do they want?

8

Know the DA

- Do they normally handle this kind of case?
 - Superior Court ADA handing District Court
- Do they have a specific issue with this kind of case?
 - Lot's of ADAs have issues with DUIs, some with Drugs, some Domestic.
- Persecutor v Prosecutor
 - Don't live in your client's world
- Wants to be a Judge
- Just wants to go home

9

Every ADA is Different

- Know how to present the case
- Know when to present the case
- Know how hard to push
- Will they actually try a case?
- Are they prepared?
- Do they know/like the Officer?
 - Google your officer.

10

Know the District/Judges

- How much discretion does the ADA have?
- Are there ways to step around policy?
 - 1st time offender
 - Age/Maturity
 - Letters of support
 - Cooperation
 - Community Service
- Can you negotiate sentences?
- Will the Judge accept the Plea?

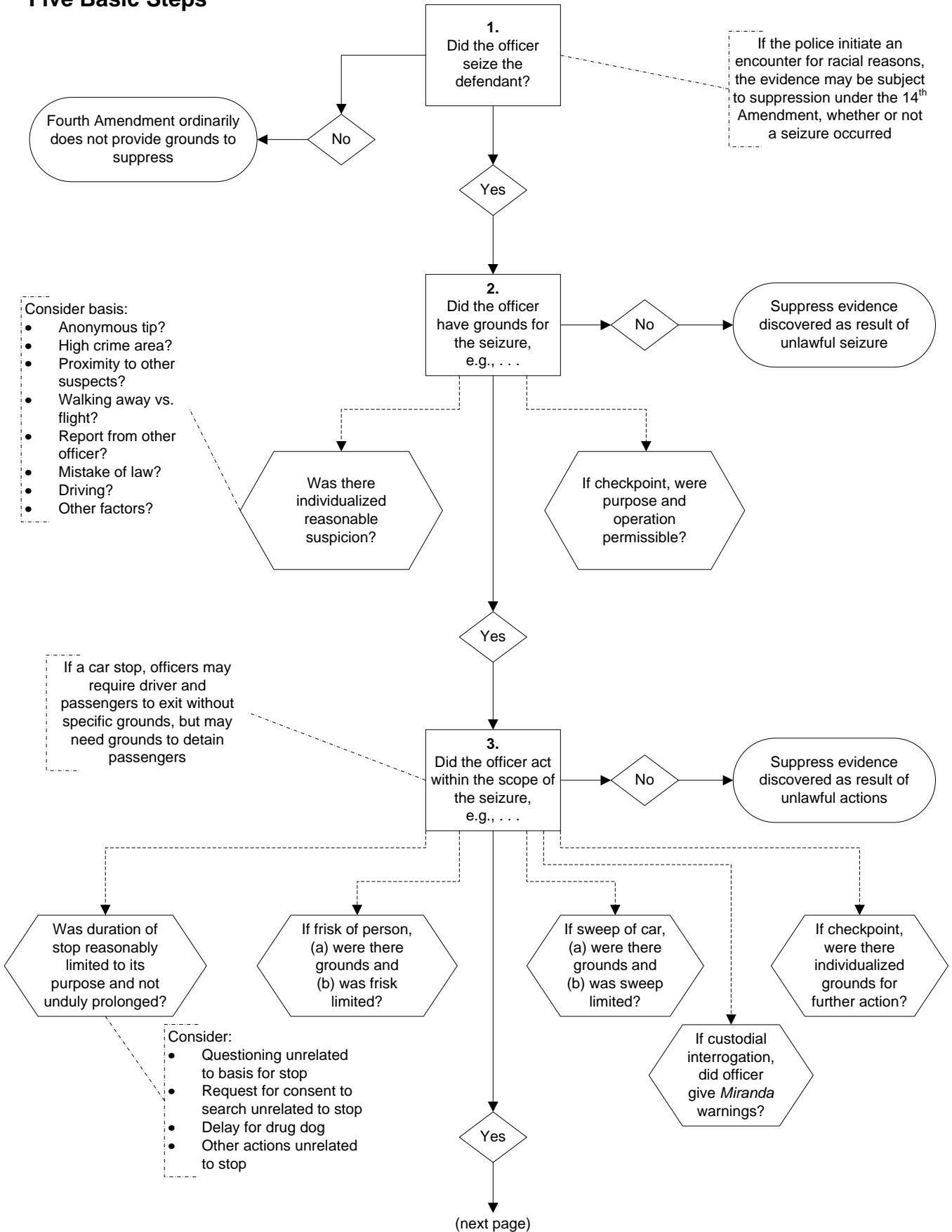
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What Does your Client Want?

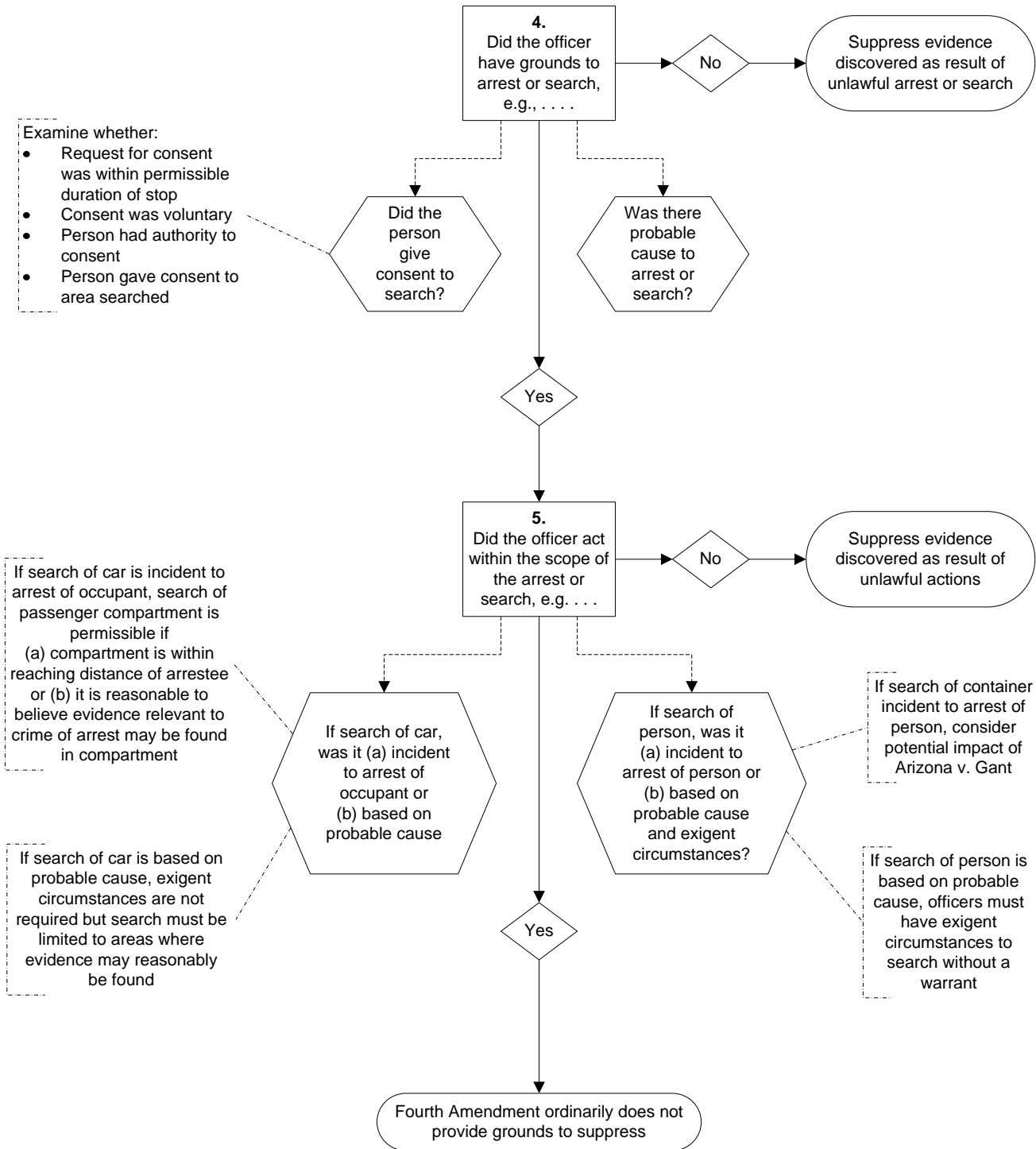
- Will they take what you worked out?
- Ultimately you inform them, they make the decision.

12

Appendix 15-1
Stops and Warrantless Searches:
Five Basic Steps



Five Basic Steps (cont'd)



**Warrantless Stops and Searches:
Discussion Problems**
September 2019

Did the officer seize the defendant?

1. Law-enforcement officers set up a driver's license checkpoint on a two lane city street (one lane in each direction). The officers were checking licenses at the checkpoint, but there is also evidence that the real purpose of the checkpoint was to look for drugs. One of the officers, Officer Jones, sees a car turn into a side street just before the checkpoint and begins following the car. The driver pulls into an apartment complex and parks. Jones pulls his car into the lot and approaches the defendant. Jones asks the defendant what he's doing, and the defendant replies in a slurred voice that he lives at the complex, which turns out to be true. Jones smells an overpowering odor of alcohol about the defendant and directs him to perform various field sobriety tests. The defendant does poorly, and Jones arrests him for driving while impaired. The defendant later blows a .26.

What is your theory for suppressing the evidence of defendant's impairment?

What evidence or lack of evidence would support your theory?

Did the officer seize the defendant?

Did the officer have grounds for the seizure?

2. An unidentified person calls the police from his cell phone. He describes a car and its license plate and the general appearance of a man with long blond hair as the driver. He says that the car was weaving. The caller says he thinks the driver is drunk. Officer Connor receives a dispatch and pulls the car over. During the course of the stop, Connor discovers evidence that the driver is impaired and arrests him for impaired driving.

What is your theory for suppressing the evidence of defendant's impairment?

What evidence or lack of evidence would support your theory?

Did the officers seize the defendant?

Did the officers have grounds for the stop?

Did the officers act within the scope of the seizure?

3. Drug officer Jones is driving an unmarked car in an area where drug activity is common. He sees an African American man, Harold Bryant, driving a fancy car slowly through the neighborhood and stops him for not wearing a seat belt. The officer asks Bryant whether he can search his car. The officer will swear that Bryant freely gave his consent. A search of the car uncovers marijuana, and the officer arrests Bryant for that offense.

What is your theory for suppressing the marijuana?

What evidence or lack of evidence would support your theory?

Did the officer seize the defendant?

Did the officer have grounds for the seizure?

Did the officer act within the scope of the stop?

Did the officer have grounds to search?

4. Officer Smith clocks a car traveling 58 in a 45-mile per hour zone. Jones turns on his blue light, and the driver pulls over to the side of the road. The officer approaches the car, directs the driver and passengers to step out of the car, inspects the car for weapons, and pats each person down. While patting down the defendant, who was one of the passengers, Smith feels a small bottle in the defendant's right pants pocket and hears a rattling noise. Smith removes and opens the bottle and sees what he believes to be a few rocks of hashish. Laboratory analysis confirms that the substance was 1/10 of an ounce of hashish.

What is your theory for suppressing the hashish?

What evidence or lack of evidence would support your theory?

How To Read a NC Driving Record

- Be familiar with abbreviations
 - PERM – Permanent Revocation
 - Permanent means forever? Yes, but that is where you come in
 - INDEF – Indefinite Revocation
 - Revoked until whenever the revocation is ended
 - Note: CJ Leads records do not say INDEF, just blank
 - PJC – Prayer for Judgment Continued
 - Shows when a PJC was used
 - ACDNT – Accident
 - If an accident was reported, then it is on the record. This does NOT mean the person was at fault, just that they were involved.
 - CLS – Class
 - Describes the class of license to let you know if a Commercial Drivers License (CDL) is in play (Class C is a typical non-CDL)

4

2 Types of Suspension

<p>N.C. Gen. Stat. § 20-24.1 (Indefinite Suspension)</p> <ul style="list-style-type: none"> ○ Revocation (INDEF) for FTA or FTP/FTC ○ Remains in effect until the FTA case is disposed or FTC case is paid 	<p>N.C. Gen. Stat. § 20-28 (a) and N.C. Gen. Stat. § 20-28.1 (Definite Suspension)</p> <ul style="list-style-type: none"> ● Any moving violation conviction requires additional suspension of 1 year, 2 years or permanently if the moving violation was committed while in a state of suspension (20-28.1). ● Same with any conviction of DWLR-Impaired or DWLR-Non-Impaired with an offense date before 12/1/2015
---	--

5

Other Possible Causes of a Revocation

North Carolina General Statute § 20-16 provides, that the Division of Motor Vehicles has the authority to suspend the license of any driver, if a driver has:

- Accumulated twelve or more points within a three year period
- Been convicted of Driving While Impaired
- Been convicted of Speeding more than 80 MPH in a 70 MPH zone
- Been convicted of Speeding more than 75 MPH in a less than 70 MPH zone
- Been convicted in 12 months of Speeding 55 to 80 MPH and:
 - Speeding 55 to 80 MPH; or
 - Careless and Reckless Driving; or
 - Aggressive Driving;
- Committed Fraud involving a Driver's License or Learner's Permit
- Been Convicted of Illegally Transporting Alcohol
- Been Ordered Suspended as part of a Court Order

6

Moving vs. Non-Moving Violations

Moving Violations

<ul style="list-style-type: none"> • DWLR (Impaired) • Speeding • Stop Sign/Stoplight • No Insurance • Unsafe movement • Reckless Driving (C&R) • Move Over Law • DWLR Non-Impaired** • No Operator's License (NOL)** <small>**Offense Date Before 12-1-2015</small> 	<ul style="list-style-type: none"> • Driving While Impaired (DWI) • Open Container • Following Too Closely • Left of Center • Passing a Stopped School Bus • Failure to Yield to Emergency Vehicle • Illegal Passing • Child Seat/Child Seatbelt (<16 years)
---	---

7

Moving vs. Non-moving

Non-moving Violations

<ul style="list-style-type: none"> • Improper Equipment • Adult Seatbelt (age \geq 16) • Exp/Rev/Fict Registration • Exp Inspection • Fictitious Info to Officer • Parking in a Handicapped Space 	<ul style="list-style-type: none"> • Failure to Notify DMV of Address Change • Window Tint • All City Ordinance Violations • DWLR (Non-Impaired)* • No Operators License* <small>*Offense 12/1/15 or later</small>
--	---

8

Alternatives to a Moving Violation Conviction

- Dismissal or Acquittal
- Reduce or Amend to Non-Moving Violation
- Prayer for Judgment Continued (PJC)

9

Dismissal/Acquittal

- Acquittal (i.e. a NG verdict) is usually an impractical route in these cases (exceptions apply)
 - Exception: Defendant agrees to plea to another moving violation, a non-moving violation, a criminal charge, etc. (Dismissal per plea)
 - Exception: Unsafe movement, Failure To Reduce Speed, etc. resulting from a vehicle collision – Defendant presents a letter from his insurance company
- BUT, a dismissal of CHARGED non-moving violation is quite common – FIX IT and show proof!
 - Expired Inspection, Registration
 - Improper Equipment, Window Tint

10

Reduce or Amend to Non-moving Violation

- Speeding → Improper Equipment-Speedometer
 - Exception: IE is NOT available if speed > 25mph over
- Stoplight/Stop Sign → City Code Violation (or Improper Equipment-Brakes)
- DWLR/NOL → A non-moving violation for offense dates on/after Dec 1, 2015

11

Prayer for Judgment Continued (PJC)

- PJC is unique to North Carolina
- Guilty but not a "conviction" (court agrees to continue the judgment indefinitely)
- **NOTE:** only 2 PJCs per driver every 5 years for DMV purposes
- **BUT** only 1 PJC per household/policy every 3 years for insurance purposes
 - See N.C. Gen. Stat. § 58-36-75(f)
- *****Legislative Update: This changes to 1 every 5 years starting January 2025.**
- DMV will not honor a PJC for the following:
 - DWI
 - Passing Stopped School Bus
 - Speed > 25mph over
 - Any offense committed while driving a commercial vehicle OR possessing a commercial drivers license

12

Extraordinary Relief

- (1) FTA Sent in Error
- (2) Nunc pro Tunc
- (3) Motion for Appropriate Relief (MAR)
- (4) Chapter 14 Criminal Charge of FTA

13

FTA Sent In Error

- Judge orders the clerk to transmit to the DMV that the clerk sent the FTA in error.
- If the FTA is removed (on the original charge), the period of suspension is not just ended (like paying off the FTA), but instead the suspension is removed like it never happened.
- Practical Tip: Recent DMV changes now interpret Stricken and Sent In Error as the same thing

14

FTA Sent In Error

- Example: Client is suspended from an FTA on a stop sign ticket in 2015. Client is currently charged with DWLR (non-impaired) and Speeding 111 in a 55. The ADA is not willing to reduce the speed. Your client can't get an LDP if the speed isn't the only suspension (high speed, FTA suspension, moving violation while suspended)
- Get the 2015 FTA Sent In Error. Now the FTA susp never happened. The moving violation no longer occurred while in a state of suspension.

15

FTA Sent In Error

- You now can plead to the current moving violation (the speed will suspend). It no longer occurred during a period of suspension. The DWLR will be dismissed because the client wasn't suspended when pulled over. The client will be eligible for the Limited Driving Privilege with automatic reinstatement after one year.
- Practical Tip: Draft your order to say the FTA was Stricken and Sent In Error "BY NO FAULT OF THE CLERK"

16

Nunc Pro Tunc (now for then)

- Rewrite history by changing the date a conviction, PJC or other action is entered. Has a retroactive legal effect. It is as though the action had occurred at an earlier date.
- Can use on an open or closed case. BUT, if want to Nunc Pro Tunc a date on a closed case, you need a way to open the closed case (see MAR...)
- Practical Tip: Use this for the PJC law change

17

Motion for Appropriate Relief (MAR)

- N.C. Gen. Stat. § Section 15A-1415
- Allows an old case to be opened and change what happened in the past. Use when:
 - PJC was used improperly and need to get it back to use today
 - PJC was available and was not used OR is now available
 - Pled to speed when IE was an option
 - Change a Speeding plea to Exceeding a Safe Speed in a situation where there are two speeds greater than 55mph within a year

18

Chapter 14 Criminal Charge of FTA

- Ask ADA to amend the Chapter 20 traffic ticket (DWLR or moving violation) to the *criminal* charge of Failure to Appear (Chapter 14).
- Chapter 14 is not a traffic charge. If person pleads Guilty to a Chapter 14 charge of Failure to Appear, their DL will NOT be revoked because this is NOT a Chapter 20 moving violation.
- This is less useful with DWLR being non-moving

19

Limited Driving Privilege

- N.C. Gen. Stat. § 20-20.1 Petition and Order (2 step process)
- COURT order allowing a person with a revoked license to drive on a limited basis. Prior to implementation of this statute, a DMV hearing was the only way to obtain a driving privilege.
- License is still revoked but judge grants a limited driving privilege (work, school, household maintenance, religious worship)

20

Limited Driving Privilege (cont'd)

- Does not need a DMV hearing (issued by Judge).
- The person's license must be currently revoked under N.C. Gen. Stat. § G.S. 20-28.1 and this must be the ONLY revocation currently in effect.
- Can not be granted if person currently has any indefinite suspensions, has pending traffic charges or the suspension was a result of a DWI.

21

Limited Driving Privilege Cont'd

- Eligible to file petition in district court in the county of the person's residence:
 - 90 days after 1 year revocation period begins
 - 1 year after 2 year revocation period begins
 - 2 years after Permanent revocation period begins
- If Judge issues, clerk of court sends copy of the limited driving privilege to DMV.
- After one year of driving on a limited driving privilege for a Permanent Revocation, the license must be reinstated (but, for some reason, a hearing is still required)

22

Misdemeanor Reclassification

- DWLR – Impaired Revocation is still a Class 1 misdemeanor where counsel may be appointed
- DWLR – Non-Impaired Revocation is a Class 3 misdemeanor with a cost/fine disposition therefore eliminating the ability to apply for appointed counsel
 - Exception: Where a defendant has 4 or more previous convictions, a disposition other than a cost/fine is possible so the defendant may apply for court appointed counsel
 - Practical Tip: Courts will often appoint counsel on DWLR Non-Impaired if the defendant already has appointed counsel on other charges

23

NC Drivers License Restoration Act

What Does the NC DL Restoration Act do?

- The Act provides some weapons in the fight against the License Revocation Cycle
- The Act made great strides in ending additional license suspensions from "Driving While Poor"
- The Act has provided traction for programs in some counties to clean up old FTA'd cases

24

In a Nutshell...

- The Act makes DWLR (Non-Impaired) a NON-MOVING violation
 - This eliminates any suspensions for DWLR (as they currently stand...like moving violations while suspended)
 - Applies to anyone who is charged with DWLR on or after December 1, 2015
 - NOTE: "Charged" not "Convicted" – Changed in the Technical Corrections phase of the law
 - Practical Tip: DMV is not currently issuing suspensions for convictions after 12/1/2015 regardless of offense date

25

What Did This Do?

- You can now enter a plea to DWLR to (hopefully) get the accompanying moving violation (speeding, etc.) dismissed → No Additional Suspension (Stops the DWLR Cycle)
- The Act was INTENDED TO encourage those with old charges to add them on to a docket and resolve them by plea. They can enter a plea of guilty to DWLR charges, pay off what they owe, and get a license back. Now it encourages new charges first.
- Get more licensed, insured drivers on the road (or reduce the amount of unlicensed/uninsured drivers)

26

Potential Pitfalls

- DMV may still view any pleas to non-moving violations as evidence of driving.
 - Even though a non-moving violation will not make a defendant ineligible for a hearing, it can be used against them as evidence of driving during the suspension (very common)
 - Practical Solution: Evidence of driving is irrelevant in consideration for the limited driving privilege, and after successfully having the privilege for 1 year, the license is reinstated (although a hearing is still required for a perm susp)

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Potential Pitfalls

- The act encourages pleas that will result in a criminal record
 - DWLR (misdemeanor) will not suspend you further...Speeding 1mph over the limit (infraction) will suspend you for 1 year, 2 years, or permanently
 - There is a strong motivation to enter a plea of guilty to a misdemeanor (creating a criminal record if otherwise clean) instead of a traffic infraction to avoid a license suspension

28

NC DMV Hearings

- Most DMV hearings and interviews cannot be scheduled until a hearing fee has been paid
- DMV will let you pay for a hearing, schedule a hearing, and show up for a hearing...just to tell you that you are not eligible for a hearing
- Things that are perfectly fine for court and limited privilege purposes can be held against you in a DMV hearing and prevent license reinstatement

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Filing Fees for DMV Hearings

DMV HEARING FEES	
Driver improvement clinic eligibility	\$45
Commercial driver license disqualification	\$200
Violation of Safety & Responsibility law	\$200
Compliance with probation or restoration agreement	\$220 (billed after hearing)
Pre-interview held before license restoration (situations involving alcohol-related convictions, suspensions or revocations)	\$225
License restoration (DWI)	\$425
License restoration (driving with revoked license)	\$200
License restoration (moving violations while driving with revoked license)	\$200
Refusal to submit to chemical analysis	\$450
Alcohol concentration restriction violation	\$450
Ignition interlock device restriction violation	\$450 (billed after hearing)
License suspensions or revocations not otherwise listed to include those found inapplicable or inapplicable 6	\$100

30

Affidavit of Indigence for DMV Hearings

- Available in English and Spanish online
- Income must be verified
 - Recent W-2 or 1099 tax docs
 - Tax Filings or Statement
 - Pay Stubs
 - Proof of government assistance

31

Tips For License Restoration

- Always keep the DL in mind when resolving criminal cases. Even if unrelated, you can often help get a license back by getting charges dismissed with the same plea you were going to enter anyway. Always check CIPRS (NC Public Criminal & Infraction Records) before a plea!
- You can never have a license if you don't resolve the INDEF suspensions!
 - If indefinite suspensions exist you will be in a revoked status
 - If definite/permanent suspensions exist you have an end date

32

Tips for License Restoration

- Keep money in mind! Your client definitely is.
 - An FTA can cost \$200 extra.
 - Just because you can get something dismissed doesn't always mean you should
 - Post-Act, you can save the \$200 fee and avoid the additional suspension by entering a plea on the new DWLR charge (non-moving violation)
 - Remember: It is a criminal charge

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Tips for License Restoration

- **Use and Build Your Network!**
 - Call around and find out how a client can reset an old case in another county and if that is feasible to do without an attorney
 - Some counties will really try to help those who are trying to help themselves obtain a valid license
 - You will be surprised how many people will volunteer to help and can often just get an old case dismissed by showing what the client has done/paid so far

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Any Questions?

Feel free to contact me at any point in the future if I can help you out in any way.

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Crimmigration

2024 Misdemeanor Defender Training
UNC School of Government
November 14, 2024

1

What is the purpose of this presentation?

To help you develop a strategy to effectively advise all immigrant defendants of the immigration consequences for their criminal prosecution (when the consequences are known)

2

Padilla v. Kentucky, 559 U.S. 356 (2010)

- HELD: **When immigration consequences are CLEAR**, the criminal defense attorney has a DUTY to give correct advice regarding those consequences.
- Failure to do so is INEFFECTIVE ASSISTANCE OF COUNSEL to be analyzed under Strickland v. Washington, 466 U.S. 668 (1984).
- Silence is not an option.
- Wishy washy advice is not an option.
- Telling client “you should consult with an immigration attorney” is not an option.

3

Lee v. United States, 137 S.Ct. 1958 (2017)

- Question for the court was essentially whether an immigrant can demonstrate prejudice under Strickland v. Washington analysis when the case against them is very strong. (Answer: YES)
- HELD: “but for his attorney’s incompetence, Lee would have known that accepting the plea agreement would certainly lead to deportation. Going to trial? *Almost* certainly. If deportation were the ‘determinative issue’ for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that ‘almost’ could make all the difference.”

4

State v. Nkiam, 778 S.E.2d 863 (2016)

- NC first case applying Padilla
- HELD: when the consequence of deportation is clear, counsel is required by Padilla to give **correct advice** and not just advise defendant that his pending criminal charges *may carry a risk* of adverse immigration consequences
- *The judge cannot “cure” the failure to advise. The duty is that of defense counsel alone.*

5

Juvenile Clients

- UNLESS A CASE IS REMOVED TO SUPERIOR COURT (or is going to be), Juvenile Defenders do not need to advise under Padilla
- Padilla does not apply because adjudications in juvenile court are NOT convictions
- **Special Immigrant Juvenile Status (SIJS)** : an immigration classification that applies to children present in the US w/o status, in need of humanitarian protection b/c they have been abused, abandoned, or neglected by a parent

6

Important Definitions:

- a. Admission: lawful entry into US after inspection and authorization by an immigration officer
- b. Inadmissibility: cannot lawfully enter US and/or gain lawful status. *I.E. an inadmissible LPR cannot (w/o relief) become a USC and will be turned away at the border if travels abroad and seeks to return to US.*
- c. Removable: able to be removed from US according to US code
- d. Deportation: the act of removing someone who was previously lawfully admitted to the US

7

Our Process (Durham Co. Office of Public Defender)

- APD meets with client → "Where were you born?"
- APD completely fills out Non-Citizen Defendant Worksheet (included in written materials)
- APD gives me the form
- I analyze
 - Including contacting immigration attorneys when needed
- I email APD w/ information and advice (example included in written materials)
 - APD accounts for my time in their client file
- I keep form w/ advice email, notes, correspondence attached
- APD informs me when/how the case is resolved
- I return the original form and all advice emails to APD for closed file

8

Tips for Success during your client interview

- Find a way to ask... (i.e. social security number does not equal citizen)
- Tip: A work permit IS NOT a status...it is a BENEFIT OF lawful status
- Tip: There are MANY types of visas...find out what kind...copy the card!
- Tip: If client has/had help of an immigration attorney, get a release to talk to the attorney if they or you are unclear about their status

9

My analysis, Part I

- What are the goals of the immigrant, based on his/her status?
 - Undocumented, permanent residency, asylum, refugee, TPS, DACA, U Visa, T Visa
- What position do I believe the immigrant to be in based on prior record? (*including prior convictions and dismissals*)
 - i.e. is client removable? Inadmissible? Are there forms of relief for which s/he is ineligible?
- What are the consequences of the current charges for the immigrant?
- What suggestions can I make regarding case outcome?
- What local agencies can I refer the immigrant to for referrals to immigration attorneys?

10

My analysis, Part II

- When I am looking at the charges pending against an immigrant, I need to know whether they carry any of the following potential **criminal grounds for removal or inadmissibility**:
 - Aggravated Felony
 - Crime of Moral Turpitude
 - Substance Abuse Grounds
 - Firearm/Destructive Device Grounds
 - DV Grounds
 - Stalking Grounds
 - Child Abuse/Neglect/Abandonment Grounds
 - Violation of a Protective Order Grounds
 - Prostitution
 - Human Trafficking
 - Money Laundering
 - Gambling

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Resources I Use

- **Immigration Consequences of a Criminal Conviction in North Carolina** by Sejal Zota and John Rubin (2017) FREE on School of Government Website
- **IDS Expert:** www.ncids.org/immigration-consultations/
- Local friendly immigration attorneys

- **Kurzban's Immigration Law Sourcebook** by Ira J. Kurzban
- **Immigration Consequences of Criminal Activity** by Mary E. Kramer

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Additional Online Resources

- NAPD: National Association of Public Defenders
 - My Gideon, archived in "Sentencing and Collateral Consequences" section
 - FREE "Padilla in Perspective" Webinars by Jessica Stern
- ILRC: Immigrant Legal Resource Center www.ilrc.org
- National Immigration Project of the National Lawyers Guild www.nipnlg.org
- Immigrant Defense Project www.immigrantdefenseproject.org

Hi,

Thanks for the immigration referral. Please see my information and advice below.

If you have questions please let me know. Also, please let me know when/how the case is disposed so that I can update the database and return your form to you for your closed file.

Please account for 15 minutes in your file for my time.

1. Your client is removable simply for being in the US w/o permission. Any conviction hurts if/when s/he comes into contact with ICE.
 - a. Your client's priorities will be: 1) to avoid inadmissibility; and 2) to avoid criminal grounds for removal (even though s/he is already removable)
2. Commonly used phrases/information:
 - a. Admission: lawful entry into US after inspection and authorization by an immigration officer.
 - b. Inadmissibility: cannot lawfully enter US and/or gain lawful status. I.E. an inadmissible LPR cannot (w/o relief) become a USC and will be turned away at the border if travels abroad and seeks to return to US.
 - c. Aggravated Felony (AF) Consequences:
 - i. Worst of the worst classification of criminal convictions for immigrants in removal proceedings
 - ii. Will be removed
 - iii. Will be barred from almost all forms of relief from removal
 - iv. Permanently inadmissible and permanently barred from returning to US
 - v. Held without bond during removal proceedings
 - vi. Can face up to 20 years in prison for federal crime of illegal reentry.
 - d. Crime of Moral Turpitude (CMT) Consequences:
 - i. Deportable if convicted of one CMT committed w/in five years of lawful admission to US and punishable by at least one year active.
 - ii. Deportable if convicted of two or more CMTs any time after lawful admission regardless of sentence.
 - iii. Inadmissible if convicted of one CMT w/o relief.
3. **PRIOR RECORD**
 - a. *DWI/NOL*:
 - i. *Not AFs*
 - ii. *Not CMTs*
 - iii. *No other criminal grounds for removal/inadmissibility*
4. **CURRENT CHARGES/CONSEQUENCES (AND POSSIBLE ALTERNATIVES)**
 - a. *DWI/NOL/DWLR IR/failure to give name & address*
 - i. *Are not AFs*
 - ii. *Are not CMTs*
 - iii. *No other **criminal** grounds for removal/inadmissibility*
 - iv. *However, a second DWI conviction could be problematic for your client if/when she ends up in ICE custody/removal proceedings. See below information from my expert cut/pasted from another email*

1. There is another ground of inadmiss of:
 - a. 212(a)(1)(A)(i) [1182(a)(1)(A)(i)] who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance;
 - b. DOS routinely applies this to recent or multiple DWIs. I'd imagine ICE would too in the context of **removal proceedings** if the posture of his case is that he needs to demonstrate admissibility
 - v. *Also, it looks to me like this DOO is within 7 years of her prior conviction. Keep in mind that any active sentence she serves will be served in the "misdemeanor confinement program" and could result in her transfer to another county jail. That jail may or may not cooperate with ICE holds.*
5. Defenses to Removal
 - a. Undocumented Client
 - i. Cancellation of Removal: barred by AF conviction
 1. Must have lived in US 10 years prior to commission of offense (there is an exception for honorably discharged veterans)
 2. Must establish that removal would result in extreme hardship to USC or LPR spouse, parent, or child
6. Common Outcomes
 - a. Technical Definition of conviction for immigration purposes: a formal judgment of guilt by a court (OR if adjudication of guilt has been withheld) where
 - i. Person found or pled guilty OR admitted sufficient facts to warrant finding of guilt
 - ii. AND punishment, penalty, restraint on liberty imposed.
 - b. Informal deferred/earned VD: not a conviction
 - c. Conditional Discharge: IS A CONVICTION, regardless of whether the charges are later discharged as dismissed by the Court.
 - d. Deferred Prosecution: sometimes safe, sometimes not
 - i. District: not a conviction
 - ii. Superior: not safe b/c of recordation and factual basis required
 - e. PJC: not a conviction so long as the only condition in the record to have the PJC is the cost of court.
 - f. Unsupervised Probation: safe outcome.
 - g. Supervised Probation: try to avoid for immigrants without lawful status b/c DPS is required to cooperate with ICE if called upon to do so.
 - h. Jail: Durham County Jail is safe under current Sheriff.
 - i. DAC: Once an immigrant finishes his/her sentence in DAC if ICE wants him/her, s/he will be turned over to ICE.
7. The agencies listed below can assist your client with referrals to immigration attorneys.

El Centro Hispano	Durham	(919) 687-4635
Alerta Migratoria	Durham	(984) 377-2622
D.E.A.R. Foundation	Raleigh	(919) 803-0559
NC Justice Center	Raleigh	(919) 856-2570

Non Citizen Defendant Worksheet

Client Name: _____

Attorney: _____ Next Court Date: _____

Immigration Status:

- LPR – Lawful Permanent Resident (greencard)
 - o Since: _____
 - o Renewal Date: _____
 - o COPY CARD, please
- Refugee or granted asylum status (circle one)
 - o Since: _____
- Undocumented (entered illegally)
 - o Since: _____
- Previously Deported
 - o By ICE or Saw Immigration Judge
- Other: _____

DOB: _____ Age today: _____

POB: _____

ICE Detainer: Yes No

Defendant is in Custody: Yes No

Family Ties

Spouse: USC LPR Undocumented

Partner: USC LPR Undocumented

Children: Number: _____ Ages: _____
USC: _____ LPR: _____ Undocumented: _____

Mother: USC LPR Undocumented

Father: USC LPR Undocumented

US Citizen Grandparents: Yes No

Client's Goals re: Immigration Consequences

- Avoid conviction that triggers deportation
- Preserve Eligibility to obtain future immigration benefits (e.g. LPR status or citizenship)
- Preserve ability to ask immigration judge to get/keep lawful status & stay in US
- DACA/DAPA (President Obama's Executive Orders for children/parents)
- Get out of jail ASAP
- Immigration consequences, including deportation, are not a priority

Complete Criminal History

(Include offense, file number for offense, date of conviction, and sentence [including suspended time], and arrests, deferred prosecutions, juvenile history, or other resolutions, include dismissals)

Current charge(s) (w/ statute #, if obscure):

File Number(s): _____

Related to DV? Yes No

Relationship to victim? V is D's: _____

Plea Offer(s):

Padilla and Effective Assistance of Counsel

Padilla v. Kentucky, 559 U.S. 356 (2010)

The U.S. Supreme Court held that counsel must inform their client whether his or her plea carries a risk of deportation:

“In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla's conviction. [...] When the law is not succinct and straightforward...a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.” *Id.* at 369.

State v. Nkiam, ___ N.C.App. ___, 778 S.E. 2d 863 (2016)

The NC Court of Appeals, following *Padilla*, held that when the consequence of deportation is truly clear, it is not sufficient for the attorney to advise the client only that there is a risk of deportation. *Id.* at 869. When the consequence of deportation is ‘truly clear,’ counsel is required by *Padilla* “‘to give correct advice’ and not just advise defendant that his ‘pending criminal charges may carry a risk of adverse immigration consequences.’” *Id.* at 871 (citing *Padilla v. Kentucky, 559 U.S. at 369*).

In short, when the immigration consequences are clear, merely indicating that deportation is a possible consequence or risk is not enough.

Lee v. United States, 137 S.Ct. 1958 (2017)

The Court held that “but for his attorney's incompetence, Lee would have known that accepting the plea agreement would certainly lead to deportation. Going to trial? *Almost* certainly. If deportation were the “determinative issue” for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that “almost” could make all the difference.” 137 S.Ct. at 1968-69.

Criminal Court Fines & Fees and Best Practices for Representation

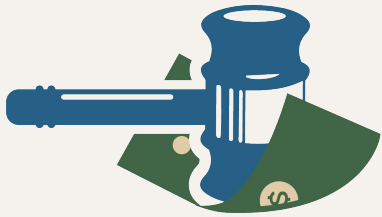
Whitley Carpenter, Forward Justice
Laura Webb, NC Justice Center
Danny Spiegel, UNC School of Government

November 15, 2024

Campaign to End Criminal Justice Debt in North Carolina

The Problem:

- Since 1999, the number of criminal court fees has increased from 4 to nearly 50
- The base cost for use of court has increased from \$61 to nearly \$180
- Fees are assessed against those already living on the economic edge
 - 40% of people are unable to afford an unexpected \$400 expense
 - 80-90% of criminal defendants nationally cannot afford a lawyer
 - 70% of people in prison in NC don't have a high school diploma

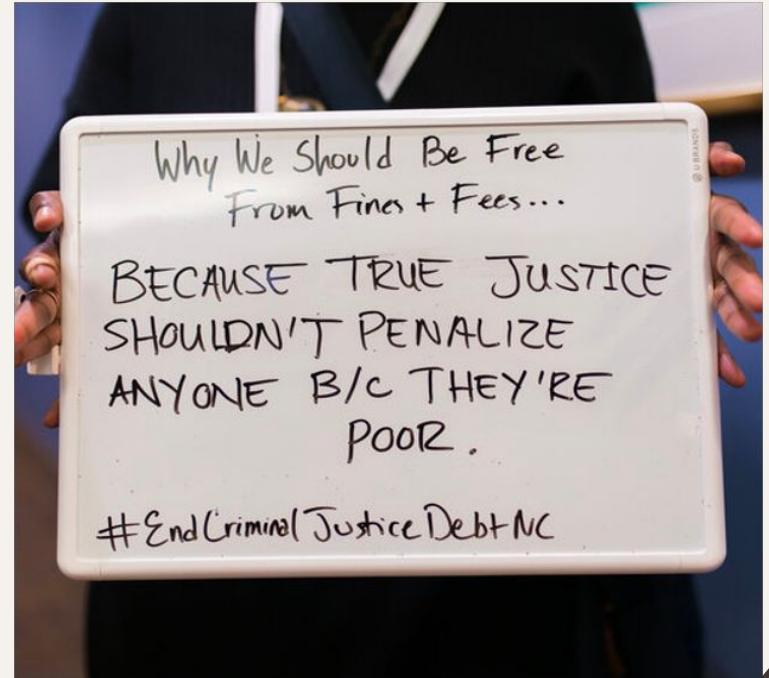


**END
CRIMINAL
JUSTICE
DEBT**
NORTH CAROLINA

The Impact

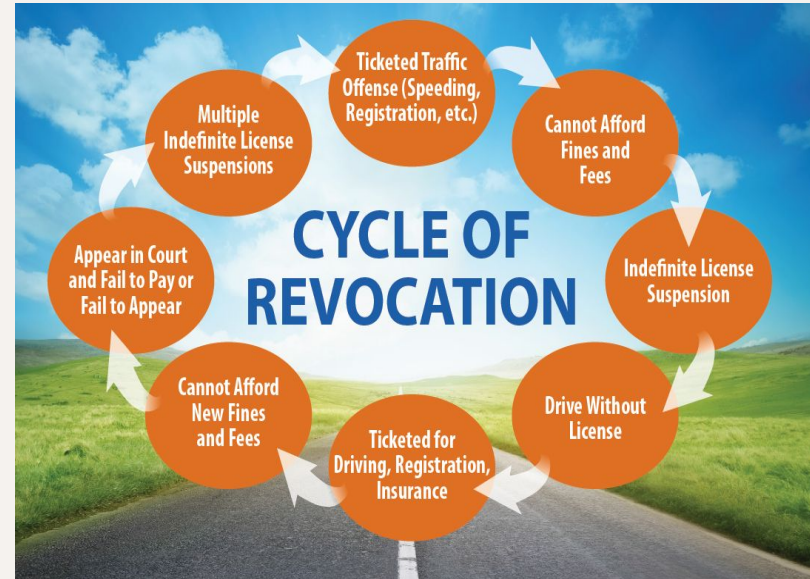
Many North Carolinians cannot afford to pay the steep amounts assessed against them, and are exposed to:

- Driver's license suspension
- Probation Violations
- Extended Probation
- Civil Liens/ Civil Judgment
- Extended Community Service
- Incarceration



Debt-based Driver's License Suspensions

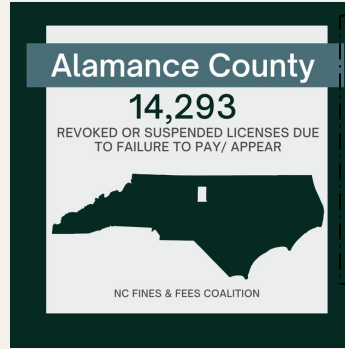
- Most common penalty for failure to pay
- Statewide, more than 400,000 North Carolinians have a suspended driver's license for failure to pay criminal court fines and fees
- 58% of the people with these suspensions are people of color
- 8.5 years is the average length of failure to pay based suspension



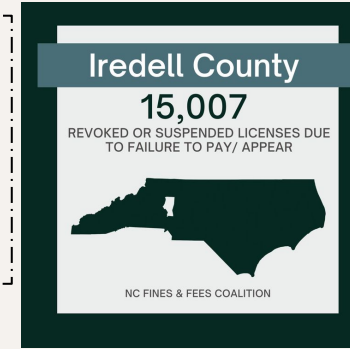
By the Numbers:



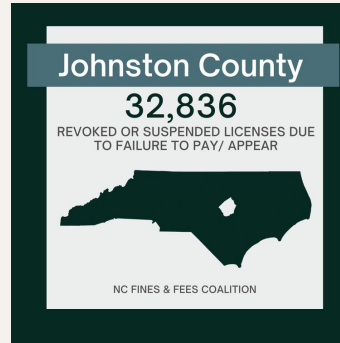
- **Statewide**
- Poverty Rate: 24%
- Low-Income: 43%
- Ave. Sus.: 10 years



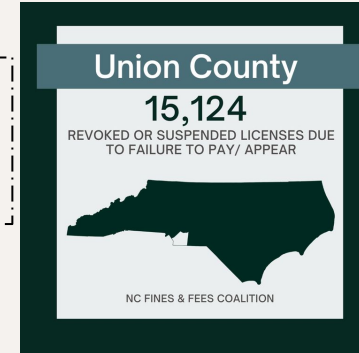
- **Alamance County**
- Poverty Rate: 14%
- Low-Income: 34%
- Ave. Sus.: 12 years



- **Iredell County**
- Poverty Rate: 9%
- Low-Income: 24%
- Ave. Sus.: 10 years



- **Johnston County**
- Poverty Rate: 11%
- Low-Income: 29%
- Ave. Sus.: 12 years



- **Union County**
- Poverty Rate: 7%
- Low-Income: 21%
- Ave. Sus.: 12 years

When I was younger and didn't make enough money, I had a lot of tickets for driving while license revoked, driving with no insurance, and failure to pay fines - which caused my license to be revoked. I needed to pay \$300 but once it went into suspension, there was another fee on top of that. I paid close to \$1,000 just to get my drivers license straight. There were years we didn't get tax refunds because we used it to pay off fines.

-Dreama Caldwell

"It really stemmed from a seatbelt ticket that I had and it escalated from there. The fines and fees eventually became too much to pay. So my license continued to be suspended. I would pay but then I wouldn't be able to afford to pay the restoration fee at the DMV, so my license would then get suspended again. It was a vicious cycle over and over. There were times when I had to go without things, such as eating... 'Do I pay the traffic ticket or get food for myself?'"

-Lauren Robbins

Probation Considerations

- Payment of fines and fees is a condition of supervised probation in NC and an inability to pay can lead to many consequences:
 - **Technical Probation violations** : Statewide, unpaid criminal court fines and fees is one of the top five causes of technical probation violations.
 - **Prolongation of probation** : Extended terms prolong loss of liberty, subject to warrantless searches, inability to vote, serve on jury, seek elected office
 - **Continued imposition of court costs** : Monthly fees (i.e. \$40 sup. fee) imposed while on supervised probation



The Harms of Converting Criminal Court Debt to Civil Judgments

- Cannot be waived or reduced regardless of inability to pay. See NC R. Civ. P. 60. Most cannot be discharged in bankruptcy. *Kelly v. Robinson*, 479 US 36 (1986); 11 USC 1328(a)(3).
- May accrue interest at 8%/year. NCGS 24-1, -5; NCGS 15A-1340.38(c); *State v. Webb*, 358 NC 92 (2004).
- May cause the debtor to miss out on the chance for expunction. NCGS 15A-145 et seq.
- Can make it difficult to sell or transfer real estate. NCGS 15A-1365, 7A-455, 15A-1340.34(b).
- Can complicate finding a job or housing if employer or landlord searches for judgments.
- May lead to seizure of a debtor's state tax refund. NCGS 105A-1.
- May negatively impact a debtor's credit score.

"When I had a public defender, the state charged me for that representation. I was in prison for 9 years and when I came home and got a job to really try to get on a good path and be a positive part of my community, I got a letter from the state saying they were going to take my income tax refund to pay for the attorneys' fees."

-Salahudeen Abdallah

The Harms of Converting Criminal Court Debt to Civil Judgments

- 374,000 misdemeanor cases converted to civil judgments from 2017-2021
- \$94 million of criminal obligations docketed civilly
- 4.7% (\$4.5 million) collected from 2017-2021
- 29% of the amount converted is for attorney's fees owed by indigent defendants
- 6% of attorney's fees were collected.



Learn more: <https://www.endcriminaljusticedebtnc.org/harm-of-civil-judgments>

What's the Alternative? → Fee Waivers

- The US Constitution prohibits incarcerating people for failure to pay criminal debt if they cannot afford to. Bearden v. Georgia, 461 US 660 (1983).
- NC Constitution also prohibits imprisonment for debt (Art. 1 Sec. 27) and prohibits imposing excess fines (Art. 1 Sec. 28)
- NC statutes state that judges must consider a person's resources when imposing a fine. NCGS 15A-1362(a).
- Courts may exempt a person from paying probation supervision fees for good cause and upon motion of person on probation. NCGS 15A-1343(c1).
- Judges may remit fines and other costs without written findings. NCGS 15A-1363.
- The court shall take the person's resources into consideration when determining amount of restitution to be paid. NCGS 15A-1340.36

Ability to Pay Rule & Form

IN THE SUPREME COURT OF NORTH CAROLINA

**ORDER AMENDING THE
GENERAL RULES OF PRACTICE
FOR THE SUPERIOR AND DISTRICT COURTS**

Pursuant to section 7A-34 of the General Statutes of North Carolina, the Court hereby adopts Rule 28 of the General Rules of Practice for the Superior and District Courts.

* * *

Rule 28. Equitable Imposition of Monetary Obligations in Criminal Cases and Infraction Cases Based on the Defendant's Ability to Pay

(a) **Scope.** This rule applies only in criminal cases and infraction cases in which the court has discretion to impose costs, fees, fines, restitution, or other monetary obligations equitably based on the defendant's ability to pay.

(b) **Motion for Relief.** A defendant convicted of a crime or found responsible for an infraction may use AOC-CR-415, Request for Relief from Fines, Fees, and Other Monetary Obligations, to move the court to impose costs, fees, fines, restitution, or other monetary obligations equitably based on the defendant's ability to pay.

(c) **Determination by Court.** The court must consider the defendant's motion and, if necessary, conduct a hearing. The court must rule on the motion prior to imposing costs, fees, fines, restitution, or other monetary obligations and may grant the defendant any relief permitted by law.

* * *

This amendment to the General Rules of Practice for the Superior and District Courts becomes effective on 1 January 2022.

This amendment shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

STATE OF NORTH CAROLINA		File No.
County		In The General Court of Justice <input type="checkbox"/> District <input type="checkbox"/> Superior Court Division
STATE VERSUS		
Name Of Defendant		REQUEST FOR RELIEF FROM FINES, FEES AND OTHER MONETARY OBLIGATIONS, AND ORDER ON REQUEST Rule 28 of the General Rules of Practice for the Superior and District Courts Name And Address Of Attorney <input type="checkbox"/> I am self-represented.
Defendant's Telephone No.	Defendant's Date Of Birth	
Defendant's Street Address	<input type="checkbox"/> I am homeless.	
Attorney's Telephone No.		
ABILITY TO PAY WORKSHEET		
Employment Income (per month) <small>List employer(s).</small>	<input type="checkbox"/> I am unemployed.	\$
Other Income (per month) <small>Specify, including for example, rental income, investment income, pension, spouse's income, and gifts and financial support from family.</small>		\$
How many people, including yourself, does this income support?		\$
What is the total value of your cash on hand and in bank accounts?		\$
What is the total value of all real property you own?		\$
What is the total value of all major personal property you own (vehicles, jewelry)?		\$
Rent/mortgage you pay monthly		\$
Childcare/child support payments you pay monthly		\$
<small>(check all that apply)</small>		
I receive the following public assistance:		
<input type="checkbox"/> TANF (Temporary Assistance for Needy Families)	<input type="checkbox"/> I have been homeless in the past 6 months	
<input type="checkbox"/> Supplemental Security Income (SSI)	<input type="checkbox"/> I have been incarcerated on an active sentence in the past 6 months	
<input type="checkbox"/> Social Security Disability Insurance (SSDI)	<input type="checkbox"/> I am under 18	
<input type="checkbox"/> SNAP/Food Stamps	<input type="checkbox"/> I am a full-time student	
<input type="checkbox"/> Veterans' Benefits		
<small>Use the space below to provide any additional information about other circumstances the court should consider when evaluating your ability to pay, such as a disability or illness, a change in work hours, or other support obligations or significant expenses.</small>		
AOC-CR-415, Rev. 3/22 © 2022 Administrative Office of the Courts		(Over)

Toolkit for AOC-CR-415



<https://www.endcriminaljusticedebtnc.org/fines-fee-relief>



Updated Form 415 Toolkit

Link to new form 415:

https://www.nccourts.gov/assets/documents/forms/cr415_2.pdf?mWnCj7Xaz8BaW1WwcojRcEtny4_VZkGR

Guide to Completing Court Form AOC-CR-415 MOTION FOR RELIEF FROM FINES, FEES AND OTHER MONETARY OBLIGATIONS, AND ORDER ON MOTION

What is AOC-CR-415?

This is a motion. In our court system a motion is what we call any request made to the court or a judge to do something in your favor. This particular motion is requesting the court to relieve you from your responsibility to pay, in full or in part, or requesting more time to pay court costs/fees, fines or other money that is due to the court.

The terms "court costs" and "court fees" can be used interchangeably. They refer to the costs assessed by the court for the basic handling of a case in district or superior court. These costs are standard throughout civil and criminal cases. These include costs associated with public defenders, incarceration, probation supervision, community service, court proceedings, etc.

Court fines are **financial punishments** that are assessed by a judge as part of a sentence after conviction as a penalty. The judge usually has discretion, within limits set by the law, to decide how much of a fine to impose in a case.

Restitution is an amount of money that a court can order a defendant to pay for the purpose of compensating victims of a crime for their losses.

Here is an example of restitution: You were charged with larceny from Walmart for stealing items totaling \$147.83 and the court ordered you to pay Walmart back in the amount of \$147.83 to compensate them for the items that were stolen.

****Below, the term, "monetary obligations" refers to court costs, fees, fines, and restitution****

How can this form be used?

This form can be used for various reasons, here are a few examples:

Statewide Commitment Efforts

- We are asking for a firm commitment ensuring the following:
 - All _____ County Public Defenders will file a motion requesting that the court consider their client's financial status using form AOC-CR-415 each time their client is convicted of a crime.
 - All _____ County Assistant District Attorneys will consent to each AOC-CR-415 motion filed by a person that is deemed indigent by the court.



Commitment Statement

On January 1, 2022, the NC Supreme Court adopted Rule 28 of the General Rules of Practice for the Superior and District Courts, pursuant to N.C.G.S. §7A-34. Rule 28 makes it mandatory for courts to consider the financial status of an individual who has been convicted in a criminal case or found responsible for an infraction, once they file form AOC-CR-415 requesting relief from fines, fees, and other monetary obligations.

This rule is written recognition of long-established precedent requiring the courts to consider one's ability to pay prior to imposing fines and fees. While the rule allows for a hearing, it would be counterproductive to judicial efficiency to hold a hearing to assess the financial status of an individual who has already been deemed indigent and eligible for court-appointed counsel.

Currently our courts are being funded by the poorest people in our communities. North Carolina collects nearly fifty separate fees, disbursing them to four state agencies and 611 counties and municipalities. It uses fees to fund half of the state's judicial budget as well as jails, law enforcement, counties, and other state entities. The General Court of Justice fee has increased 260% (for District Court) and 243% (for Superior Court) since 1995, while minimum wage has only increased by a mere \$3.

Together we have the opportunity to initiate ending the practice of criminalizing poverty by funding the judicial system on the backs of those who often can barely afford daily necessities. We are asking for a firm commitment ensuring the following:

A. All Wake County Public Defenders will file a motion requesting that the court consider their client's financial status using form AOC-CR-415 each time their client is convicted of a crime.

B. All Wake County Assistant District Attorneys will consent to each AOC-CR-415 motion filed by a person that is deemed indigent by the court.

This commitment will be the inception of ending the predatory imposition of fines and fees against poor people in our state. Furthermore, this undertaking will increase judicial efficiency by automating this practice and avoiding repetitive hearings. We want to ensure the longevity of this commitment to ending the practice of collecting insurmountable fines and fees from those living in poverty. We invite you to make this commitment with us.

Wake County District Attorney

Wake County Public Defender

What's Our General Assembly Doing to Address this?

Fines and Fees Related Bills:

- **House Bill 979 (2024):** made community service fee waivable, reduce general court of justice fee to be consistent with inflation, and removed court costs for seat belt convictions.
- **House Bills 888 (2023):** ended driver's license suspensions for unpaid traffic tickets and missed courts dates
- **House Bill 636 (2023):** reduced failure to appear fee, ended debt-based driver's license suspension, eliminated the \$20 installment fee, makes the community service fee waivable, eliminates seat belt fee, and amended probation supervision fees

- **Senate Bill 792:** 2022 Governor's Budget (2022): allowed for the end of FtA suspension after 12 months; allowed for the end of FtC suspension after 12 months if the person enters into a payment plan
- **Senate Bill 486 (2021):** Allowed for the automatic reinstatement of a driver's license for failure to appear and failure to pay after 12 months
- **Senate Bill 490/House Bill 570 (2021):** Allowed for end of suspensions after 12 months if the person enters and maintains installment payments of at least \$10/month.
- **Senate Bill 596 (2021):** Repealed debt-based driver's license suspension. Requires the court to convert unpaid driver's license debt into a civil judgement for the amount owed if the debt is not paid within 40 days.

- **Senate Bill 656:** Allowed for restoration of debt-based DL suspension after 12 months (except for DWI-convictions) if the person can provide proof of insurance. Repeal DWLR limited driving privileges
- **House Bill 532 (2021):** Allowed for restoration of debt-based DL suspension after 12 months (except for DWI-convictions) if the person can provide proof of insurance. Repeal DWLR limited driving privileges
- **House Bill 670:** reduced failure to appear fee, ended debt-based driver's license suspension, eliminated the \$20 installment fee, makes the community service fee waivable, eliminates seat belt fee, and amended probation supervision fees

Feedback, Questions, & More Information

Contact Information:

- Whitley Carpenter
 - wcarpenter@forwardjustice.org
- Laura Webb
 - laura@ncjustice.org



Learn more at endcriminaljusticedebtnc.org - be on the lookout for details on our upcoming People's Convening on Fines & Fees in NC May 31-June 1st!

Litigating Ability to Pay

Daniel Spiegel, Assistant Professor
Misdemeanor Defender Training 2024




1

Litigating \$ in Criminal Case

• Pretrial Release/Bond


- Diversion
- Restitution Hearing
- Probation Violations
- Post-conviction



2

Pretrial Release

◊ 15A-534(b) The judicial official in granting pretrial release must impose condition (1)[written promise], (2)[unsecured bond], or (3) [release to custody of person] in subsection (a) above unless he determines that such release will not reasonably assure the appearance of the defendant as required, will pose a danger of injury to any person, or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses.



3

In re Register,
84 N.C. App. 336
(1987)



“Pay to Play” Deferred Prosecutions

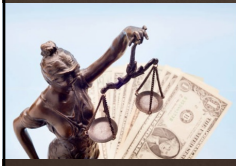
July 27, 2018 [Jenna Markham](#)

[Print](#)

A district attorney generally has discretion in structuring his or her approach to deferred prosecutions. The DA could have a broad program, allowing deferrals for all defendants who might be eligible as a matter of law. Or there could be no program at all (aside from the handful of diversions that are mandatory in certain circumstances). Regardless, whatever program the State has must not discriminate

4


In re Register,
84 N.C. App. 336
(1987)



- ◊ 17 juveniles charged with breaking into a home
- ◊ Some juveniles paid \$1,000 each as restitution, some did not
- ◊ Those that paid received dismissals
- ◊ Those that did not pay did not

5


Restitution mandatory??



◊ 15A-1340 34(b) If the defendant is being sentenced for an offense for which the victim is entitled to restitution under Article 46 of this Chapter, the court shall, in addition to any penalty authorized by law, require that the defendant make restitution to the victim....

6


But what about ability to pay?



- ◊ 15A-1340.36 In determining the amount of restitution to be made, the court shall take into consideration the resources of the defendant ... the defendant's ability to earn, the defendant's obligation to support dependents ... and the court may order partial restitution when it appears that the damage or loss caused by the offense is greater than that which the defendant is able to pay ...

7


Probation Violations



- ◊ If State shows that D didn't pay, burden shifts to D to show inability to pay.
- ◊ *State v. Floyd*, 213 N.C. App. 611 (2011) (trial court should have considered D's evidence that he was unable to pay cost of treatment program)
- ◊ *Bearden v. Georgia*, 461 U.S. 660 (1983) (D cannot be incarcerated for failing to pay money where D makes bona fide effort to pay)
- ◊ G.S. 15A-1364 and 15A-1345(e) – procedures, modifications of fines/costs

8


"Admit or Deny?"



- ◊ Consider challenging **willfulness** of nonpayment
- ◊ Know your judge
- ◊ Example of child support contempt

9

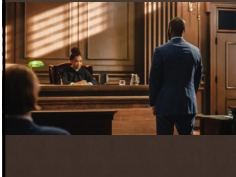
Strategy of Persuasion



- ◊ How to tell the story of your client's inability to pay?
 - ◊ Talk about the kids?
 - ◊ Talk about why mom can't pay?
 - ◊ Day in the life?
 - ◊ Enumerate expenses?
- ◊ How to talk about poverty?

10


Strategy of Persuasion



- ◊ How else can client make amends other than restitution? (community service, apology, showing new path in life?)
- ◊ Is client already going to prison?
- ◊ Corporate victim vs citizen victim?
- ◊ Consider PJC for separate restitution hearing? Advantages/disadvantages
- ◊ Is S the afterthought of the criminal negotiation or the main concern?

11

Post-conviction: Restitution and Notice to Victims



- ◊ 15A-1340.39(b) If the court finds that the remission of the order is warranted and serves the interests of justice, the court may remit the order of restitution.
- ◊ (a) No court may remit all or part of an order of restitution entered pursuant to G.S. 15A-1340.34 **without providing notice** and an opportunity to be heard to... the victim...

12

Post-conviction: Fines or Costs



◊ 15A-1363 A defendant who has been required to pay a **fine or costs**... may at any time **petition the sentencing court for a remission or revocation** of the fine or costs ... If it appears ... that the **circumstances** which warranted the imposition of the fine or costs **no longer exist**, that it would otherwise be **unjust to require payment**, or that the proper administration of justice requires **resolution of the case**, the court may remit or revoke the fine or costs ...

13

Thanks!

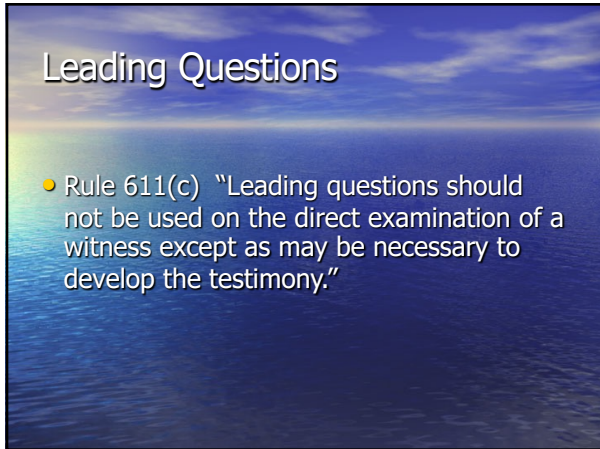
Spiegel@sog.unc.edu



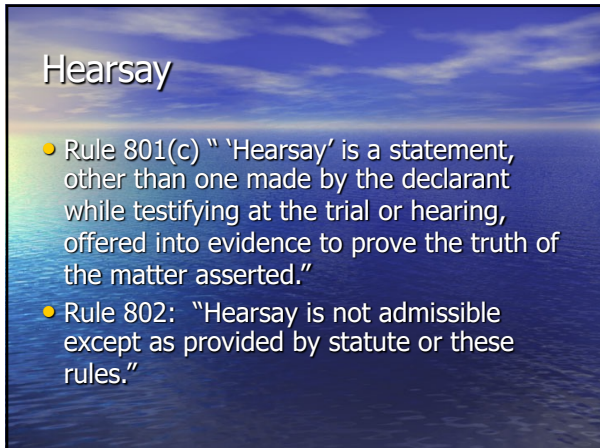
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1



2



3

Lack of Personal Knowledge

- Rule 602: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter."

4

Speculation

- Rule 602 "Lack of Personal Knowledge"
- Rule 701: "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perceptions of the witness, and (b) is helpful to a clear understanding of his testimony or determination of a fact in issue."

5

You can lead on cross

- Rule 611 (c): "Ordinarily leading questions should be allowed on cross examination."

6

Impeachment

- A prior statement that is inconsistent with the witnesses testimony may be used to impeach that witness.

7

Right to confrontation

- Sixth Amendment to the United States Constitution: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."
- Crawford v. Washington, 541 U.S. 36 (2004)

8

Other crimes evidence

- Rule 404(b): "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident."
- Rule 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

9

Privileges

- Husband-wife (communications) N.C Gen. Stat. 8-57
- Doctor-patient 8-53
- Clergyman-communicants 8-53.2
- Psychologist-patient 8-53.3
- Social worker privilege 8-53.7
- Optometrist-patient privilege 8-53.9
- Attorney client privilege

10

Polygraphs

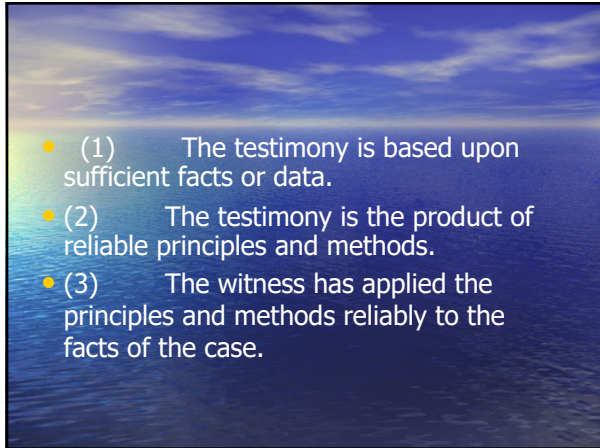
- The results of polygraph examinations are strictly forbidden to be placed into evidence.

11

Rule 702

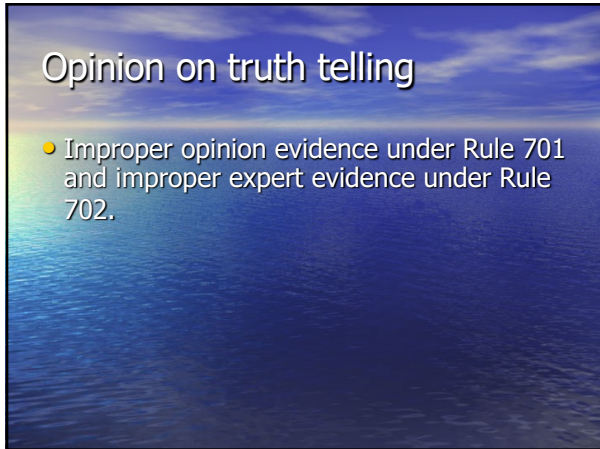
If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

12



- (1) The testimony is based upon sufficient facts or data.
- (2) The testimony is the product of reliable principles and methods.
- (3) The witness has applied the principles and methods reliably to the facts of the case.

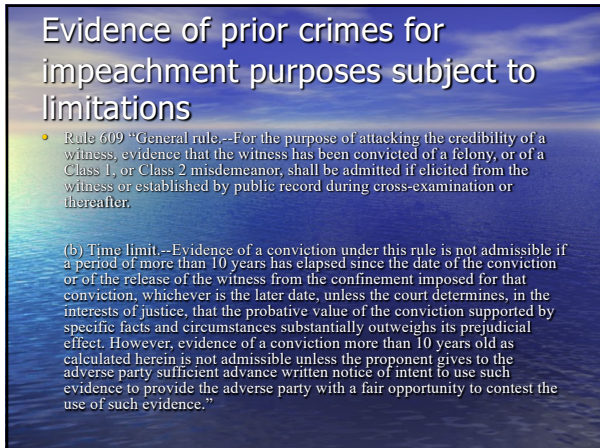
13



Opinion on truth telling

- Improper opinion evidence under Rule 701 and improper expert evidence under Rule 702.

14



Evidence of prior crimes for impeachment purposes subject to limitations

- Rule 609 "General rule.--For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter.

(b) Time limit.--Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence."

15

Can't ask about bad, but not dishonest, misconduct

- Rule 608(b) "Specific instances of conduct.--Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."

16

Can't ask a witness about their religious beliefs

- Rule 610: "Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced; provided, however, such evidence may be admitted for the purpose of showing interest or bias."

17

Corroboration

- In North Carolina, prior consistent statements of the witness may be introduced to corroborate that witness's testimony.

18

Third party guilt evidence

The admissibility of evidence of the guilt of one other than the defendant is governed now by the general principle of relevancy. Evidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard. It must point directly to the guilt of the other party. Under Rule 401 such evidence must tend *both* to implicate another *and* [to] be inconsistent with the guilt of the defendant.

State v. Cotton, 318 N.C. 663, 351 S.E.2d. 277 (1987)

19

Out of court statements not hearsay if not being offered for truth of the matter asserted.

20

Hearsay exception: statement against interest

- Rule 804(b) () “(b) Hearsay exceptions.--The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
- Statement Against Interest.--A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.”

21

New Misdemeanor Defender Training Fact Problem

State v. Ronny Clements: misdemeanor larceny of beer from Quickie Mart

1) Report of Alice Tubbs, Quickie Mart Clerk

Tubbs is a 60 year-old African American woman who has been working at the Quickie Mart on South Blount Street in downtown Raleigh for two years. On July 11, she was working as the cashier at the Quickie Mart at 10:00pm, when five teenage males came in. Two of them were black and three were white. Some of them had on baggy pants and necklaces and they were “cutting up”. She had the feeling they were up to no good and started watching them using the mirrors in the corners of the store. They spread out in different aisles, cracking jokes and laughing loudly while they handled merchandise.

Two of the white males went to the beer cooler and Tubbs focused on them because they did not seem of age to buy alcohol. One was wearing a black T-shirt with an eagle on it and no hat. His hair was dark but he had long hair in the back dyed blonde, which stood out to Tubbs as unusual. The other was wearing an oversized white T-shirt, a backpack, and a Durham Bulls cap. The one in the cap looked shorter (between 5’6” and 5’9”) and thinner than the male in the black T-shirt, who was at least 6 feet tall and muscular. The one in the cap started to walk in the direction of the store exit, but the taller male yanked him by the backpack, pulled off the backpack, and stuffed it in the smaller male’s hands. Ms. Tubbs could not hear what they were saying, except that the taller man addressed the other, “Boy!” in a stern voice. The one in the cap then unzipped his backpack and held it open while the taller male took a case of Pabst Blue Ribbon beer from the cooler, put it in the backpack, and zipped it. The smaller male in the cap put the backpack on and they both started walking towards the checkout counter. The other three males also quickly approached the checkout counter. One of them asked Ms. Tubbs, “How much is this?” holding up a box of candy, while the two males who had taken the beer walked by the checkout counter and towards the store exit. They were about five feet from the exit when Ms. Tubbs said in a loud voice, “You need to pay for what’s in that backpack.” They all started to run except the young man in the Bulls cap who froze. Someone yelled, “Boy, you better run!” and pulled him by his backpack strap out of the store. All five then took off running down the block.

Ms. Tubbs called 911 and reported the theft. Officer Davis arrived and learned that the store’s video camera was not functional. Ms. Tubbs said the owner of the Quickie Mart was so cheap and mean that he would sooner see his employees get killed than pay a dime for proper security. She had called him to report the theft right after she called the police and he had berated her for causing the store to lose money. She had had it with that man and was going to quit. Now that she thought about it, those kids had done her a favor and she wished they had gotten away with more merchandise.

2) Report of Officer Davis

I knew from Ms. Tubbs' description that the male in the black T-shirt with the eagle on it was Harland White. White has short, dark hair with a long "rat tail" peroxided white, and a muscular build from his high school football days. I have dealt with White many times before. In fact, I asked him some questions about break-ins in the neighborhood earlier this week when I ran into him on Fayetteville Street. I thought he might want to provide a little cooperation since he has a court date coming up for misdemeanor B & E and he already has one on his record.

The next day, July 12, I went to White's home and told him he had been caught on video tape stealing beer from the Quickie Mart. He said, "Man, that was all Ronny Clements. You can't pin that shit on me. I was just along for the ride and had no idea that boy was going to pull that stunt. You know he's joined the family business, dealing smack with his brother Jordie. They are messed up." We discussed the possibility of a PJC for White's pending charge in exchange for his honest testimony against Ronny Clements.

That afternoon, I interviewed Ronny Clements at his apartment building. I told him that he was caught on video tape stealing beer from the Quickie Mart and that Harland White was prepared to testify against him. He said, "Harland White? That guy has always had it in for me. He used to give Jim Sharp and me wedgies in the locker room in high school. He beat the hell out of Jim too when Jim told on him. Broke his drum for marching band too." Ronny denied involvement in the larceny but did not account for his whereabouts, saying, "I know my rights. I don't have to talk to you. This is BS."

Consistent with Ms. Tubbs' description, Ronny Clements was a young, white male, 5'8", and slight of build, wearing a silver chain with a cross on it and a Durham Bulls cap. I obtained warrants for arrest for misdemeanor larceny for Ronny Clements and Harland White.

3) Interview of Client and Family Members

a) Your client, Ronny Clements, a 19 year-old white man, is 5'8", weighs 135 lbs., wears his hair in a "mohawk", and often wears a necklace with a big silver cross on it. He lives in an apartment in downtown Raleigh with his mother and brother. He says that he has two prior juvenile delinquency adjudications for misdemeanor larceny, and one prior adult misdemeanor conviction for possessing marijuana.

Ronny says that he was not at the Quickie Mart on the night of July 11. He was home with his 25 year-old brother, Jordan Clements, from 8:00pm on. (His mother was working an extra shift and was gone all day, arriving home after midnight.) When asked what he and Jordan were doing at home that night, Ronny initially says "Nothing, hanging out," but when pressed, admits he was helping his brother package marijuana and make small sales to clients who dropped by. He only knows the clients by their first names or street names, and does not know how to contact them.

b) Jordan Clements has a record for drug offenses, including two felony convictions of sale of cocaine for which he recently served 12 months in prison. He also pled guilty to forging checks belonging to an elderly neighbor in 2012. Jordan confirms that Ronny was at home with him on

the night of July 11, and remembers that they were watching the Cubs/Cardinals game on TV. Other than that, he claims he does not remember what they were doing or whether anyone visited the apartment.

c) Mrs. Clements says that Ronny graduated from high school, but academics were a struggle for him because he has a learning disability. She had to take time off from work for school meetings about his IEP. She wishes that he would attend college but so far he does not show any interest. She is worried that he is spending too much time with his older brother Jordan, who has had drug trouble and may not be a good influence. Ronny's father died of cancer when Ronny was six years-old, which was very hard on him. He has always been a small boy, and she thinks his size combined with not having a father around made him a target for bullies. He is an obedient son who takes pride in cleaning and maintaining her car.

Cross and Direct Workshop Assignments

1. Decide on a theory of defense.

2. Prepare a direct examination that advances your theory of defense through one of the following witnesses:

- Your client, Ronny Clements
- Your client's brother, Jordan Clements
- Your client's mother, Mrs. Clements
- Jim Sharp

3. Prepare a cross examination that advances your theory of defense through one of the following witnesses:

- Alice Tubbs, the store clerk
- Harland White

The Basics of Cross-Examination

The Purpose of Cross-Examination:

Obtain FACTS that will be used in closing argument (*as opposed to making a closing argument during cross-examination*). [There is crucial difference between eliciting facts from a witness and making an argument to a jury based upon those facts.]

I. Preparation

- 1) List all of the facts you need from each witness.
- 2) Organize, by topic, how you want to elicit (or present) the facts. Use one page for each topic or major fact (i.e., the “chapter” method).
- 3) On each page, list all of the predicate (or foundation) questions required to get the fact or cover the topic.

II. Courtroom Technique

- 1) Never ask a question when you do not know the answer.
- 2) Always ask leading questions.
- 3) Always ask one-fact questions.

DIRECT EXAMINATION WORKSHOP

This workshop will work the same as the cross workshop and you will use the same fact pattern. The potential witnesses for direct examination are:

- Client, Ronny Clements
- Client's brother, Jordan Clements
- Client's mother, Mrs. Clements
- Jim Sharp

They will have to decide which two witnesses would most advance their theory of defense. If they pick the genre that the client was not the guy in the store/alibi, they will most likely call Ronny and his brother Jordan. Discuss whether they run the risk that information about the drug dealing may come out. How might they deal with that concern? If they pick the genre that the client was there at the store but was coerced/had no criminal intent, they will most likely call Mrs. Clements and Jim Sharp on direct.

Susan's "Three P's of Direct Examination" follow will give you an idea of the skills you should focus on in the workshop. There just may be more material to cover than there is for cross. If you find that to be the case, you can ask the participant to limit their direct to key scenes or portions they want to cover.

THE THREE P'S OF DIRECT EXAMINATION

1. PLAYERS

Select witnesses who advance your theory of the case

2. PREPARATION

a. Think about your questions

i. Open-ended

- Who
- What
- When
- Where
- How
- Why
- Tell us about/Describe

ii. Specific

i. Prepare and practice with the witness

3. PRODUCTION

a. Remember primacy & recency

b. Use “chapters” and “signposts”

c. Elicit factual details

d. Tap into your frustrated inner actor

e. Have a conversation with the witness

f. LISTEN

Class A1

Assault by Pointing Gun (14-34)
 Assault Inflicting Serious Injury (14-33(c)(1))
 Assault on a Child Under 12 (14-33(c)(3))
 Assault on a Female (14-33(c)(2))
 Assault on Firefighter / EMS (14-34.6) F
 Assault on a Govt Official (14-33(c)(4)) F
 *Assault on Handicapped Person (14-32.1)
 Assault on School Personnel (14-33(c)(6)) F
 Assault with a Deadly Weapon (14-33(c)(1))
 Assault and pers rel in presence of minor (14-33(d))
 Child Abuse (14-318.2) F
 Food Stamp Fraud \$100-\$500 (108A-53.1)
 Ind Lib by School Personnel, not Teacher (14-202.4)
 Interfering with Emergency Comm (14-286.2)
 Patient Abuse (14-32.2) F
 @Secret Peeping #2 or w/photo device (14-202) F
 Sex with Student by School, not Teacher (14-27.7)
 *Sexual Battery (14-27.5A)
 *Stalking *(14-277.3) Felony if prior or while 50B/C
 Unfair Trade of Cigarettes (14-401.18)
 Violation of 50B Order (50B-4.1)

Class 1

Alcohol offense, not otherwise specified (18B-102(b))
 Altering Serial Number (14-160.1)
 Assault on Sports Official (14-33)
 Blackmail (14-118)
 Breaking or Entering (14-54) F
 B&E Coin Operated Machine (14-56.1) F
 Communicating Threats (14-277.1)
 Contrib to Delinq of Juvenile (14-316.1)
 Criminal Domestic Trespass (14-134.3) F
 Damaging Computers < \$100 (14-455) F
 Death by Vehicle (20-141.4) F
 Disorderly Conduct #2 (14-288.4) F
 DWLR (20-28)
 Escape by Misdemeanor (148-45) F
 Ethnic Intimidation (14-401.14)
 Failure to File State Tax Return (105-236) F
 Failure to Stop for School Bus (20-217)
 Failure to Yield Emerg Vehicle w/ Dam (20-156-57) F
 False Imprisonment (CL)
 Food Stamp Fraud < \$100 (108A-53) F
 Forgery (CL)
 Going Armed to the Terror (CL)
 Hit and Run w/ Prop Dam (20-166) F

Conspiracy – 1 class lower Attempt – 1 class lower

Multiple Prior Convictions §15A-1340.21(d) If an offender is convicted of more than one offense in a single session of District Court, or in a single week of Superior Court or of a court in another jurisdiction, only one of the convictions may be used to determine prior conviction level.

Multiple Convictions §15A-1340.22(a) If the court elects to impose consecutive sentences for two or more misdemeanors and the most serious misdemeanor is classified in Class A1, Class 1 or Class 2, the cumulative length of the sentences of imprisonment shall not exceed twice the maximum sentence authorized for the class and prior conviction level of the most serious offense. Consecutive sentences shall not be imposed if all convictions are for Class 3 misdemeanors.

Concurrent and consecutive terms of imprisonment §15A-1354(a) If not specified or not required by statute to run consecutively, sentences shall run concurrently.

Prior Record Level for Felony Sentencing §15A-1340.14(b)(5) For each prior misdemeanor conviction as defined in this subsection, one point. For purposes of this subsection, misdemeanor is defined as any Class A1 and Class 1 nontraffic misdemeanor offense, impaired driving (GS 20-138.1), impaired driving in a commercial vehicle (GS 20-138.2) and misdemeanor death by MV (GS 20-141.4(a2)) but not any other misdemeanor traffic offense under Chapter 20 of the General Statutes.

Sentences of Imprisonment §15A-1351(a) Split sentence may not exceed ¼ of the maximum sentence of imprisonment imposed for the offense. The judge may credit any time spent committed or confined, as a result of the charge, to either the suspended sentence or to the imprisonment required for special probation.

Standard Probation Lengths §15A-1343.2 Community Punishment 6-18months / Intermediate Punishment 12-24 months

CLASS	I – No Priors	II – One to Four Priors	III – 5+ Priors
A1	1-60 days C//A	1-75 days C//A	1-150 days C//A
1	1-45 days C	1-45 days C//A	1-120 days C//A
2	1-30 days C	1-45 days C/I	1-60 days C//A
3	1-10 days C	1-15 days C/I	1-20 days C//A

Inciting a Riot (14-288.2) F
 Injury to Personal Prop > \$200 (14-160)
 Injury to Real Prop (14-127)
 Injury to Trees, Crops, Lands (14-128)
 Larceny \$1000 or Less (14-72) F
 Loitering for Prostitution (14-204.1)
 Obstruction of Justice (CL)
 Passing a Stopped School Bus (20-217) F
 Picketing Courthouse (14-225.1)
 Poss Weapon on School Grounds (14-269.2) F
 Possession of Drug Paraphernalia (90-113.22)
 Possession of M/J > ½ oz. (90-95) F
 Possession of Stolen Goods (14-72) F
 Prearranged Racing (20-141.3)
 Prostitution / Maintaining Place (14-204 & 208)
 Receiving Stolen Goods (14-72) F
 Secret Peeping (14-202) F
 Shoplifting #3 w/in 5 yrs (14-72.1) F
 Speeding to Elude (20-141.5) F
 Soliciting for Prostitution (14-204-208) F
 Toxic Fumes Violations (90-113.10-.13)
 Unauthorized Use of MV (14-72.2) F
 Unlawful Assembly (CL)
 Welfare Fraud (108A-39) F
 Worthless Check \$2000 or Less 4th Conv (14-107) F
 Worthless Check with Closed Acct (14-107(d)(4)) F

Class 2

Adult Establishment #2 (14-202.11-.12)
 Carrying Concealed Weapon (14-269) F
 Cyberstalking (14-196.3)
 Defacing Public Property (14-132)
 Defrauding Innkeeper (14-110)
 Disorderly Conduct (14-288.4) F
 Driving After Consuming <21 (20-138.3)
 Driving w/ Open Cont Alcohol in System #2 (20-138.7)
 Failure to Disperse (14-288.5)
 Failure to Notify DMV of Address Change (20-7.1)
 Failure to Work After Being Pd (14-104)
 Failure to Return Rental Prop (14-167) F
 Fail to Yield / Stop Emerg Vehicle (20-156-57) F
 Filing False Police Report (14-225)
 Fornication / Adultery (14-184)
 Furnishing False Information (20-29)
 Gambling (14-291-292)
 Harassing Phone Calls (14-196)

Hit and Run Failure to Notify (20-166.1)
 Indecent Exposure (14-190.9) F
 Injury to Personal Prop \$200 or Less (14-160)
 Littering #2 (14-399) F
 Lottery Viol (14-289-291)
 MV Law, not otherwise specified (20-176)
 NOL (20-35)
 Obtaining Prop by WC (14-106)
 Possession of Handgun by Minor (14-269.7)
 Reckless Driving (20-140)
 RDO (14-223)
 Scalping (14-344)
 Setting Fire to Woods (14-137)
 Shoplifting #2 w/in 3 yrs (14-72.1) F
 Simple Assault / Battery / Affray (14-33)
 Soliciting for CAN (CL)
 Tampering with MV (20-107)
 Trespass, 1st degree (14-159.12)
 Willful Racing (20-141)
 Worthless Check \$2000 or Less (14-107) F

Class 3

Adult Establishment Viol (14-202.11-.12)
 Driving Comm Vehicle after Cons (20-138.2A)
 Driving w/ OC Alcohol in System (20-138.7)
 Fishing w/o License (133-271)
 Hunting w/o License (133-270.2)
 Intoxicated and Disruptive (14-444)
 Littering (14-399) F
 Permitting Bitch at Large (67-2)
 Possession of M/J < ½ oz. (90-95) F
 Shoplifting (14-72.1) F
 Solicitation to Commit Mis Assault (CL)
 Solicitation to Commit Obst of Justice (CL)
 Trespass, 2d degree (14-159.13)
 Unsealed Wn / Lqr in Pass Area (18B-401(a))
 Using Profane Lang on Rdwy (14-197)
 Violation of City or County Ord (14-4)

Infraction

Violation of Ord re: operation of vehicles (14-4(b))

KEY
 *Subject to DNA Sample (15A-266.4)
 @ Potential Sex Offender Registry (14-202)
 F = possible felony enhancement
 DV / Knowing female is pregnant is 1 class higher. If A1, becomes class I felony (14-18.2)
 50B viol w/3 prior = Class H felony

INTERMEDIATE PUNISHMENTS

§15A-1340.11
 Special Probation / Split Sentence
 Residential Program
 Electronic House Arrest
 Intensive Supervised Probation
 Day Reporting Center
 Drug Treatment Court Program
FINES §15A-1340.23(b)
 Unless otherwise specified:
 Class A1 = discretion of court
 Class 1 – discretion of court
 Class 2 - \$1000