

# Aggregation of Multiple Financial Crimes under G.S. 15A-1340.16F

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## I. Introduction

Suppose a defendant is convicted of three counts of false pretenses committed before March 1, 2024, each count involving a value of \$20,000. Each violation in this scenario is a Class H felony.<sup>1</sup> Assuming the defendant is a prior record level one offender and the trial court consolidates the convictions into one judgment, the highest presumptive range sentence the defendant could receive is a minimum 6, maximum 17 months.<sup>2</sup>

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1. Chapter 14, Section 100 of the North Carolina General Statutes (hereinafter G.S.) (if the value involved is less than \$100,000, a violation is a Class H felony).

2. G.S. 15A-1340.17(c) & (d).

Under new Section 1340.16F of Chapter 15A of the North Carolina General Statutes (hereinafter G.S.) (effective March 1, 2024), if a person is convicted of two or more of the same financial crime offenses (FCOs), the offenses may be aggregated for sentencing.<sup>3</sup> If the FCOs are so aggregated, the trial court must use the aggregated value of the property when determining the level of punishment.<sup>4</sup> For a defendant convicted of three counts of false pretenses, each valued at \$20,000, the aggregated offenses would be punished as one Class F felony with a highest presumptive range sentence of a minimum 16, maximum 29 months.<sup>5</sup>

Aggregation under G.S. 15A-1340.16F thus allows a greater range of sentence durations than was previously possible. To be sure, some flexibility was permissible under the prior scheme in the form of consecutive or consolidated sentences.<sup>6</sup> But whereas consolidation is discretionary, under G.S. 15A-1340.16F the court must use the aggregated value of the property when determining punishment.<sup>7</sup> This feature is particularly important to prosecutors and defenders seeking to negotiate a plea agreement.<sup>8</sup> The wider range of sentencing options gives the parties more room to maneuver.

Aggregation under G.S. 15A-1340.16F requires the participation of all parties. The prosecutor must first decide whether to seek aggregation.<sup>9</sup> The defender must then decide whether to recommend that the defendant plead guilty to the FCOs or to the conditions for aggregation.<sup>10</sup> Absent a guilty plea, a jury must determine whether conditions for aggregation have been met.<sup>11</sup> And if convictions are aggregated, the judge must then impose an appropriate sentence.<sup>12</sup>

Like other sentence enhancement statutes, G.S. 15A-1340.16F identifies eligible offenses, prescribes conditions, and establishes a sentencing scheme. Unlike other sentence enhancement statutes, G.S. 15A-1340.16F requires the trial court to treat multiple convictions as one felony for purposes of punishment.<sup>13</sup> This bulletin describes how financial crime offenses may be aggregated.

## II. Sentencing Enhancements Generally

Since its enactment in 1994, Structured Sentencing has always included a provision allowing an enhanced sentence for felonies committed with a firearm or other deadly weapon.<sup>14</sup> That statute, G.S. 15A-1340.16A, was not often used before the legislature amended it in 2013 to expand its

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3. G.S. 15A-1340.16F(b). The statute applies to offenses committed on or after March 1, 2024.

4. G.S. 15A-1340.16F(f). For a copy of the statute, see Appendix A.

5. G.S. 15A-1340.16F(f)(3) (one Class F felony); G.S. 15A-1340.17(c) & (d).

6. See G.S. 15A-1340.15 (multiple convictions).

7. Compare *State v. Tucker*, 357 N.C. 633, 636 (2003) (discretionary) with G.S. 15A-1340.16F(f) (“court shall use”).

8. Cf. G.S. 15A-1023 (plea arrangements relating to sentence).

9. G.S. 15A-1340.16F(d) (prescribing requirements for pleading); see *infra* Section V. Pleading.

10. G.S. 15A-1340.16F(e) (“unless the defendant pleads guilty”); see *infra* Section VI. Procedure, C. Pleading Guilty.

11. G.S. 15A-1340.16F(e) (“during the same trial”); see *infra* Section VI. Procedure, B. During the Same Trial.

12. G.S. 15A-1340.16F(f) (“the court shall”); see *infra* Section VII. Punishment.

13. Cf. G.S. 15A-1340.16B (treating prior conviction of B1 felony as a condition of the enhancement).

14. Jamie Markham, [The New Firearm/Deadly Weapon Enhancement](#), N.C. CRIM. L.: A UNC SCH. OF GOV'T BLOG (October 15, 2013).

applicability.<sup>15</sup> Other sentencing enhancements exist for subsequent conviction of a Class B1 felony with a minor victim,<sup>16</sup> commission of a felony while possessing a bullet-proof vest,<sup>17</sup> manufacturing methamphetamine resulting in injury to law enforcement officers or EMS or when certain persons reside on the property,<sup>18</sup> and offenses committed as part of criminal gang activity.<sup>19</sup> These sentence enhancement statutes generally follow a pattern. For the most part, all

- specify the sort of offense(s) to which the enhancement applies;
- describe conditions that must be met for the enhancement to apply;
- prescribe language for pleading by indictment of information, usually stating that one pleading is sufficient for all eligible offenses tried at a single trial;
- provide a procedure for a defendant's trial or guilty plea, declaring that the State shall prove the issues beyond a reasonable doubt;
- detail a scheme for determining the higher sentence; and
- contain exemptions, as when the condition constitutes an element of the offense.

G.S. 15A-1340.16F generally follows the pattern established by other sentence enhancement statutes, though it varies in several respects. For example, G.S. 15A-1340.16F contains no explicit exemptions. Further, as noted above, no other sentence enhancement statute requires the trial court to treat multiple convictions as one felony. Other variations are discussed more fully below.

### III. Eligible Offenses

Like other sentence enhancement statutes, G.S. 15A-1340.16F applies only to specified offenses.<sup>20</sup> For purposes of this statute, the term "financial crime offense" means: (1) acts of embezzlement punishable under G.S. Chapter 14, Article 18; (2) acts of false pretenses punishable under G.S. 14-100; and (3) acts of exploitation of an older adult punishable under G.S. 14-112.2.<sup>21</sup> Each category merits brief examination.

#### A. Embezzlement

Embezzlement is not a common law offense. It was created by statute to fill a gap in the law of larceny. The gap resulted from the position that there is no larceny without a trespass. Hence, if a servant receives money or property for his or her master from a third party and converts it to his or her own use, there is no trespass, and thus no larceny. Embezzlement statutes were enacted to cover conversion without trespass when the property was entrusted to the converter

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15. *Id.*

16. G.S. 15A-1340.16B.

17. G.S. 15A-1340.16C.

18. G.S. 15A-1340.16D.

19. G.S. 15A-1340.16E.

20. Formerly applicable only to Class A–E felonies (as still reflected in the title), the firearm enhancement now applies to all felonies. G.S. 15A-1340.16A(c). The enhancement for a subsequent conviction of a Class B1 felony applies only to a Class B1 felony. G.S. 15A-1340.16B(a). The enhancement for possession of a bullet-proof vest applies to all felonies. G.S. 15A-1340.16C(a). The enhancement for manufacturing methamphetamine applies only to that offense. G.S. 15A-1340.16D(a). And the enhancement for gang activity applies to any felony other than a Class A–B2 felony. G.S. 15A-1340.16E(a) & (b).

21. G.S. 15A-1340.16F(a).

for or by the owner.<sup>22</sup> North Carolina's first embezzlement statute, the ancestor of G.S. 14-90, was enacted in 1872.<sup>23</sup> State courts have largely maintained the distinction between larceny and embezzlement.<sup>24</sup>

A form of aggregation was available for embezzlement even before the enactment of G.S. 15A-1340.16F. Under *State v. Mullaney*,<sup>25</sup> each act of embezzlement can support a separate charge, or a single indictment can charge multiple conversions. The defendant in *Mullaney* was the financial secretary for the Chapel of the Cross Episcopal Church in Chapel Hill. Between 1993 and 1996, the defendant wrote more than a hundred checks to himself, forged the name of a priest, and deposited the money in his personal account. The defendant was indicted for embezzling \$478,579.42 and pled guilty to a single count. On appeal, the defendant argued—and the North Carolina Court of Appeals (hereinafter Court of Appeals) majority agreed—that, since the crime was not completed until after October 1, 1994, the trial court should have sentenced him under the Structured Sentencing Act, not the Fair Sentencing Act. In his controlling concurrence, Judge Green explained that each act of embezzlement from the same victim (i.e., each check drawn) might support a separate indictment, but nothing precludes a single indictment charging embezzlement over a period of time and including multiple misappropriations. “The choice of how to proceed is with the district attorney.”<sup>26</sup>

For purposes of G.S. 15A-1340.16F, the term “financial crime offense” includes acts of embezzlement punishable under G.S. Chapter 14, Article 18.<sup>27</sup> Eight separate embezzlement offenses are codified in Article 18:

- G.S. 14-90 (property received by virtue of office or employment),
- G.S. 14-91 (State property by public officers and employees),
- G.S. 14-92 (funds by public officers and trustees),
- G.S. 14-93 (treasurers of charitable and religious organizations),
- G.S. 14-94 (officers of railroad companies),
- G.S. 14-97 (partnership funds by partner to personal use),
- G.S. 14-98 (surviving partner), and
- G.S. 14-99 (taxes by officers).

For all of these, the value of the property misappropriated determines the class of the felony.<sup>28</sup> Significantly, G.S. Chapter 14, Article 18 does not include the offense of larceny by an employee, a crime that might otherwise be described as embezzlement.<sup>29</sup>

## B. Obtaining Property by False Pretenses

Like embezzlement, false pretenses was also not a common law offense but was created by statute to fill a gap in the law of larceny. The gap here resulted from the principle that no larceny is committed if the wrongdoing by fraud obtains title as well as possession of another's property. The first English statute on the subject was enacted in 1757, and the offense was treated as part

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22. See ROLLIN M. PERKINS AND RONALD N. BOYCE, *CRIMINAL LAW* 351–53 (3d ed. 1982).

23. S.L. 1872-145; see also G.S. 14-90.

24. See *State v. Weaver*, 359 N.C. 246, 256 (2005) (mutually exclusive offenses).

25. 129 N.C. App. 506 (1998) (Green, J., concurring in the result, joined by Timmons-Goodson, J.).

26. *Mullaney*, 129 N.C. App. at 512 (Greene, J., concurring in the result).

27. G.S. 15A-1340.16F(a)(1).

28. E.g., G.S. 14-90 (Class H < \$100K < Class C).

29. G.S. 14-74 (“or if any servant . . . shall embezzle such money”).

of the inherited common law in early American jurisprudence.<sup>30</sup> The crime of false pretenses was first codified in North Carolina in 1811; it now appears at G.S. 14-100.<sup>31</sup> Caselaw has eroded the distinction between larceny and false pretenses.<sup>32</sup>

Under the single-taking rule, a single larceny is committed when, as part of a continuous act or transaction, a defendant steals several items from one victim at the same time and place.<sup>33</sup> The Court of Appeals applied the single-taking rule to false pretenses in *State v. Buchanan*.<sup>34</sup> In that case, the defendant had filed a criminal complaint alleging that his girlfriend had fraudulently cashed three checks on his account. The defendant completed a fraud/forgery affidavit at his bank, and the bank placed a \$600 provisional credit in his account. Later investigation revealed that the defendant had authorized his girlfriend to cash the checks. The defendant was later indicted for two counts of false pretenses, one based on obtaining the \$600 provisional credit for one check and the other based on his attempt to obtain \$300 for the two other checks. Upon review, the Court of Appeals held the submission of one false affidavit represented a single taking.

For purposes of G.S. 15A-1340.16F, the term “financial crime offense” includes acts of false pretenses under G.S. 14-100.<sup>35</sup> Complicating matters somewhat, G.S. 14-100 provides that, if it appears upon trial of an indictment for false pretenses that the defendant obtained the property in such manner as to amount to larceny or embezzlement, the trial court must instruct the jury on such other felony proved.<sup>36</sup> This is contrary to the general rule that a defendant must be convicted, if at all, of the particular offense charged.<sup>37</sup> A charge of false pretenses that results in a conviction for larceny or embezzlement could not be aggregated with another false pretenses conviction, as G.S. 15A-1340.16F requires conviction of “two or more of the same financial crime offenses.”<sup>38</sup>

## C. Exploitation of an Older Adult

The crime of exploitation of an older adult was created by statute in 1995 as part of G.S. 14-32.3.<sup>39</sup> In 2005, the legislature repealed the relevant section of G.S. 14-32.3 and enacted G.S. 14-112.2, devoted exclusively to exploitation of an older or disabled adult.<sup>40</sup> G.S. 14-112.2 was amended in 2013 to broaden its scope (eliminating a complicated mens rea requirement) and simplify the definition of older adult (eliminating an incompetency requirement).<sup>41</sup> An *older adult* is now defined as a person 65 years of age or older.<sup>42</sup> Exploitation of an older adult may be subject to more severe punishment than other frauds and includes a broader array of deceptive behavior.<sup>43</sup>

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30. ROLLIN M. PERKINS AND RONALD N. BOYCE, *CRIMINAL LAW* 363–64 (3d ed. 1982).

31. G.S. 14-100. The statute includes attempt. *Id.*; *cf.* G.S. 14-2.5 (attempt generally punishable at next lower classification).

32. *See* *State v. White*, 289 N.C. App. 93 (2023) (not mutually exclusive); *cf.* Joseph L. Hyde, [The Title Is Affeer’d: Larceny or False Pretenses?](#), N.C. CRIM. L.: A UNC SCH. OF GOV’T BLOG (June 13, 2023).

33. *E.g.*, *State v. Adams*, 331 N.C. 317, 333 (1992).

34. 262 N.C. App. 303 (2019).

35. G.S. 15A-1340.16F(a)(2).

36. G.S. 14-100; *cf.* *State v. Speckman*, 326 N.C. 576, 579 (1990).

37. *E.g.*, *State v. Cox*, 303 N.C. 75, 84 (1981).

38. G.S. 15A-1340.16F(b); *see also infra* Section IV. Conditions.

39. G.S. 14-32.2(c).

40. G.S. 14-112.2; *cf.* *State v. Forte*, 206 N.C. App. 699, 700 n.1 (2010).

41. G.S. 14-112.2. The same amendment changed the previous term “elder adult” to “older adult.”

42. G.S. 14-112.2(a)(2).

43. *See* Shea Denning, [Defrauding an Older Adult Is Its Own Kind of Crime](#), N.C. CRIM. L.: A UNC SCH. OF GOV’T BLOG (Feb. 21, 2018).



Though G.S. 14-112.2 makes it unlawful to exploit either an older or a disabled adult, the term “financial crime offense” in G.S. 15A-1340.16F includes only exploitation of an older adult.<sup>44</sup> It is a felony for a person knowingly, by deception or intimidation, to obtain or use an older adult’s funds, assets, or property with the intent, temporarily or permanently, to deprive the older adult of the property or to benefit someone else.<sup>45</sup> Penalties are generally higher if the defendant stands in a position of trust or confidence or has a business relationship with the older adult.<sup>46</sup> If the property is valued at more than \$5,000, the prosecutor may file a petition to freeze the property in the pending criminal proceeding for purposes of restitution.<sup>47</sup>

There is little North Carolina caselaw illuminating the offense of exploitation of an older adult under G.S. 14-112.2, as amended in 2013.<sup>48</sup> In particular, currently no caselaw defines the unit of prosecution or addresses the application of the single-taking rule to this crime.

## IV. Conditions

Like other sentence enhancement statutes, G.S. 15A-1340.16F requires that additional facts be proved or admitted beyond those required to prove a person’s guilt of the eligible offense(s).<sup>49</sup> Financial crime offenses may be aggregated for sentencing under G.S. 15A-1340.16F if all the following conditions are met:

- The person is convicted of two or more of the same FCOs.
- The person committed the FCOs against more than one victim or in more than one county.
- The FCOs are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a common scheme or plan.<sup>50</sup>

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44. Compare G.S. 14-112.2(b) & (c) with G.S. 15A-1340.16F(a).

45. G.S. 14-112.2(b) & (c).

46. G.S. 14-112.2(d) & (e).

47. G.S. 14-112.2(f); cf. G.S. 14-112.3 (asset freeze procedure).

48. See *State v. Norwood*, COA17-301 (N.C. Ct. App. Jan. 2, 2018) (unpublished) (identifying elements).

49. The firearm enhancement requires that the person committed a felony with a firearm and that the person actually possessed a firearm. G.S. 15A-1340.16A(c). The enhancement for a subsequent conviction of a Class B1 felony requires that the person committed the felony against a victim 13 years of age or younger and that the person has one or more prior convictions of a Class B1 felony. G.S. 15A-1340.16B(a). The enhancement for possession of a bullet-proof vest requires that the person wore or possessed a bullet-proof vest at the time of the felony. G.S. 15A-1340.16C(a). The enhancement for manufacture of methamphetamine requires that the conduct caused serious injury to law enforcement or EMS or that a minor or disabled or elder adult resided on the property. G.S. 15A-1340.16D(a) & (a1). And the enhancement for gang activity requires that the offense was committed as part of criminal gang activity or that the person was a criminal gang leader or organizer. G.S. 15A-1340.16E(a) & (b).

50. G.S. 15A-1340.16F(b). Another condition might be inferred from the penalty scheme, namely that the aggregated value exceeds \$1,500. The statute does not designate a felony class for punishment as one felony if the aggregated value is less than \$1,500. G.S. 15A-1340.16F(f). In that case, aggregation might not be worth pursuing.

## A. Two or More of the Same Offenses

The first condition is that a person be convicted (1) of two or more FCOs and (2) that the FCOs are the same.<sup>51</sup> Whether certain conduct will support multiple convictions depends on the nature of the offense.

### *Embezzlement*

As noted above, a series of misappropriations from the same victim can support multiple convictions for embezzlement. Each act of embezzlement—e.g., each check drawn by the defendant—can support a separate indictment.<sup>52</sup> When the circumstances show multiple acts of embezzlement, whether to charge multiple counts and whether to seek aggregation depends on the value of the property involved and whether other conditions for aggregation are met.

### *False Pretenses*

As noted above, false pretenses is subject to the single-taking rule. Under that rule, a single offense is committed when, as part of a continuous act or transaction, a defendant obtains several things of value at the same time and place.<sup>53</sup> The single-taking rule has, however, been cabined to takings from a single victim.<sup>54</sup> Further, if each taking was motivated by “a unique criminal impulse or intent,” each may be prosecuted as a separate taking.<sup>55</sup> Prosecutors seeking to aggregate multiple counts of false pretenses must ensure that the evidence shows multiple takings.

### *Exploitation of an Older Adult*

As noted above, there is currently no caselaw defining the unit of prosecution for the offense of exploitation of an older adult. Given the possibility that the single-taking rule will be applied, prosecutors should be wary of charging a defendant with multiple counts arising from a single transaction with a single victim.<sup>56</sup> The same concern applies to aggregation.

### *The Same Financial Crime Offenses*

Another difficulty may arise in determining whether two or more offenses are the same offense for purposes of aggregation. A person convicted of three counts of violating G.S. 14-90, for example, has clearly been convicted of two or more of the same offenses. But what about a defendant convicted of one count of embezzlement under G.S. 14-90 and another of embezzlement under G.S. 14-91? On the one hand, there is a plausible argument that a violation of G.S. 14-90 is not the same offense as a violation of G.S. 14-91.<sup>57</sup> On the other hand, there is

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51. G.S. 15A-1340.16F(b).

52. *State v. Mullaney*, 129 N.C. App. 506 (1998) (Green, J., concurring in the result, joined by Timmons-Goodson, J.).

53. *E.g.*, *State v. Adams*, 331 N.C. 317, 333 (1992).

54. *State v. Greene*, 251 N.C. App. 627, 638 (2017).

55. *State v. West*, 180 N.C. App. 664, 667 (2006); *cf.* *State v. Jordan*, 128 N.C. App. 469, 475 (1998) (lapse of time made two larcenies).

56. *See State v. Norwood*, COA17-301 (N.C. Ct. App. Jan. 2, 2018) (unpublished) (one count based on multiple checks); *State v. Martin*, COA13-956-2 (N.C. Ct. App. July 7, 2015) (unpublished) (one count based on multiple transactions).

57. *See State v. Tripp*, 286 N.C. App. 737, 741 (2022) (reciting same-elements test for double jeopardy purposes).

a plausible argument that all acts of embezzlement “punishable under Article 18 of Chapter 14 of the General Statutes” constitute the same offense for purposes of G.S. 15A-1340.16F.<sup>58</sup> In any event, the question of whether two offenses are the same in law is for the judge, not the jury.<sup>59</sup>

## B. More Than One Victim or in More Than One County

The second condition is that the person committed the offenses (1) against more than one victim or (2) in more than one county.<sup>60</sup> As with the first condition, some cases may be more difficult to determine than others.

### *Multiple Victims*

The condition for multiple victims is clearly satisfied if a defendant cheats both natural person #1 and natural person #2. As noted above, the single-taking rule does not apply to takings from more than one victim.<sup>61</sup> In this case, the criminal conduct would support more than one conviction, and it would also satisfy the condition for more than one victim. But what if a defendant makes false representations to two employees of the same company or embezzles from two businesses owned by the same corporation? Arguably these crimes were committed against a single victim, namely the one company whose coffers have been tapped. The facts may support multiple convictions and still not satisfy the condition for multiple victims.

### *More Than One County*

The condition for multiple counties is clearly satisfied if a defendant commits one crime in county #1 and another in county #2. Insofar as the single-taking rule applies only to takings of several items *at the same time and place*, it should not pose any barrier to multiple convictions here.<sup>62</sup> In this case, the conduct would support more than one conviction, and it would also satisfy the condition for more than one county. But what if a defendant makes a false representation in county #1 and collects the proceeds in county #2? Or embezzles from a victim in county #1 by drawing checks on a bank in county #2? In each case, the defendant has committed only one offense, albeit across county lines. Regardless of whether such conduct would satisfy the condition for multiple counties, it would not constitute two or more offenses for purposes of aggregation. But multiple offenses, all committed across county lines, would probably satisfy both conditions.

## C. Same Act or Transaction

The third condition is that the offenses are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a common scheme or plan.<sup>63</sup> This condition thus repeats verbatim the statutory criteria for joinder of offenses at trial.<sup>64</sup> The test for joinder has been summarized as requiring some “transactional connection” between

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58. G.S. 15A-1340.16F(a)(1).

59. *E.g.*, *State v. Newman*, 186 N.C. App. 382, 386 (2007).

60. G.S. 15A-1340.16F(b)(1).

61. *State v. Greene*, 251 N.C. App. 627, 638 (2017).

62. *See State v. Adams*, 331 N.C. 317, 333 (1992).

63. G.S. 15A-1340.16F(b)(2).

64. G.S. 15A-926(a). Strictly speaking, joinder of offenses for trial also requires consideration of whether the accused can receive a fair hearing on more than one charge at the same trial. *State v. Silva*, 304 N.C. 122, 126 (1981).



the offenses.<sup>65</sup> Similarity of offenses alone is insufficient; rather, consideration must be given to several factors, none of which is dispositive.<sup>66</sup> The following factors are relevant to the determination:

- temporal proximity,
- geographical proximity,
- similarities among victims,
- whether the same evidence would be admissible at trial on both offenses,
- similarity in offense type or circumstance,
- similarity of the defendant's motive, and
- similarity of the defendant's modus operandi.<sup>67</sup>

In general, the test is satisfied by evidence showing that the offenses were similar in nature and committed within a short time span.<sup>68</sup> Similarity of place and circumstance may outweigh a more tenuous temporal proximity.<sup>69</sup> By contrast, disparate acts may be connected by evidence that they were committed pursuant to a common plan or scheme.<sup>70</sup>

## V. Pleading

By statute, the pleading in felony cases must be an indictment or information.<sup>71</sup> In general, a pleading must allege facts supporting each element of an offense.<sup>72</sup> When the legislature has authorized a "short form," however, the State is relieved of the obligation to allege each element.<sup>73</sup>

Like other sentence enhancement statutes, G.S. 15A-1340.16F contains a provision on pleading.<sup>74</sup> But the pleading provision for aggregation departs from the pattern used elsewhere. In particular, it refers to the "pleading" rather than to the "indictment or information," and it omits the final sentence, "[o]ne pleading is sufficient for all felonies that are tried at a single

65. *State v. Moses*, 350 N.C. 741, 750 (1999); *State v. Chapman*, 342 N.C. 330, 343 (1995).

66. *State v. Montford*, 137 N.C. App. 495, 498 (2000); *cf. State v. Williams*, 355 N.C. 501, 530 (2002).

67. *See* ROBERT FARB, [NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK: JOINDER AND SEVERANCE](https://benchbook.sog.unc.edu/criminal/joinder-and-severance) 2 (2017) <https://benchbook.sog.unc.edu/criminal/joinder-and-severance>; *cf. State v. Moses*, 350 N.C. 741, 751–52 (1999) (similarity of victims); *State v. Perry*, 142 N.C. App. 177, 181 (2001) (reciting factors).

68. *State v. Chapman*, 342 N.C. 330, 343 (1995) (common modus operandi and temporal proximity); *State v. Bracey*, 303 N.C. 112, 118 (1981) (similar modus operandi and similar circumstances in victims, location, time, and motive); *State v. Greene*, 34 N.C. App. 149, 151 (1977) (similar in nature and occurred within short time span), *aff'd*, 294 N.C. 418 (1978); *cf. State v. Clark*, 301 N.C. 176, 181 (1980) (committed on same day and per common modus operandi).

69. *State v. Brown*, 67 N.C. App. 223, 231 (1984); *State v. Street*, 45 N.C. App. 1, 6 (1980).

70. *State v. Kornegay*, 313 N.C. 1, 24 (1985); *State v. Albert*, 312 N.C. 567, 573 (1985); *State v. Silva*, 304 N.C. 122, 127 (1981); *State v. Avery*, 302 N.C. 517, 525 (1981).

71. G.S. 15A-923(a). For constitutional requirements pertaining to indictments, see JOSEPH L. HYDE, *ARREST WARRANT AND INDICTMENT FORMS* xvi (UNC School of Government, 2024).

72. G.S. 15A-924(a)(5).

73. *See State v. Jerrett*, 309 N.C. 239, 259 (1983).

74. G.S. 15A-1340.16F(d). The language used by other sentence enhancement statutes is virtually identical. *See* G.S. 15A-1340.16A(d); 15A-1340.16B(d); 15A-1340.16C(c); 15A-1340.16D(b); *cf.* 15A-1340.16E(d) ("the facts that qualify the offense for an enhancement under this section").

trial.”<sup>75</sup> Under G.S. 15A-1340.16F, the pleading for FCOs aggregated under this section shall (1) allege the conditions for aggregation and (2) identify the FCOs to which aggregation shall apply.<sup>76</sup>

The pleading is sufficient if it alleges that the defendant committed the financial crime offenses against more than one victim or in more than one county and that the financial crime offenses are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a common scheme or plan.<sup>77</sup>

Significantly, the pleading provision for aggregation does not require an allegation of aggregated value. This is perhaps because the allegations for the substantive offenses will allege a value.<sup>78</sup>

A reviewing court will likely consider the condition of multiple victims and multiple counties as separate *theories* of the offense. When the facts satisfy both alternatives, both should be alleged. However, the State may be bound by the pleading to prove the allegations or face dismissal.<sup>79</sup> For a pleading form, see Appendix B.

## VI. Procedure

Like other sentence enhancement statutes, G.S. 15A-1340.16F requires the State to prove certain additional facts during the same trial in which the defendant is tried for the substantive offenses unless the defendant pleads guilty to the issues.<sup>80</sup> Unlike all other sentence enhancement statutes, G.S. 15A-1340.16F contains a venue provision.<sup>81</sup> Each component merits consideration.

### A. Venue

Under the venue provision of G.S. 15A-1340.16F, “[e]ach county where a part of the violations aggregated . . . occurs shall have concurrent venue as described in G.S. 15A-132.”<sup>82</sup> Venue generally refers to the proper place for a prosecution to proceed, usually because the place has some connection with the events that gave rise to the charges.<sup>83</sup> If joinable offenses occurred in more than one county, each county has concurrent venue as to all charged offenses.<sup>84</sup> When

75. Compare G.S. 15A-1340.16F(d) with, e.g., G.S. 15A-1340.16A(d).

76. G.S. 15A-1340.16F(d).

77. *Id.*

78. For each financial crime offense (FCO), considered individually, the value of the property taken determines the class of the felony. *E.g.*, G.S. 14-90(c) (embezzlement); 14-100 (false pretenses); 14-112.2(d) & (e) (exploitation of older adult). When aggregation is contemplated, it would be the better practice to allege the value of the property taken in each substantive count.

79. *Cf.* State v. Elder, 383 N.C. 578, 595 (2022) (“As a result of the manner in which the kidnapping indictment was written, the State was obligated to prove . . . that defendant had moved the victim . . . for the purpose” alleged).

80. G.S. 15A-1340.16F(e). The language used by other sentence enhancement statutes is virtually identical. See G.S. 15A-1340.16A(e); 15A-1340.16B(e); 15A-1340.16C(d); 15A-1340.16D(c).

81. The same legislation added a comparable venue provision to G.S. 14-56 (breaking and entering motor vehicles).

82. G.S. 15A-1340.16F(c).

83. *Venue*, BLACK’S LAW DICTIONARY (10th ed. 2009).

84. G.S. 15A-132(b).

counties have concurrent venue, the first county in which process is issued becomes the county with exclusive venue.<sup>85</sup> Allegations of venue become conclusive absent timely objection.<sup>86</sup> Finally, the place for returning an indictment is a matter of venue and not jurisdiction.<sup>87</sup>

The venue provision of G.S. 15A-1340.16F is largely descriptive of preexisting law. As noted above, if joinable offenses occurred in multiple counties, each county has concurrent venue in any event.<sup>88</sup> The “same trial” provision of G.S. 15A-1340.16F appears to contemplate a pretrial joinder of financial crime offenses, and the “same act or transaction” condition requires the same determination again.<sup>89</sup> Joinder, in other words, is essentially a condition for aggregation, and if the offenses are joinable then venue is settled, even without a specific venue provision.

## B. During the Same Trial

Unless the defendant pleads guilty, the State must prove *the aggregation issues* during the same trial in which the defendant is tried for the financial crime offenses.<sup>90</sup> The aggregation issues include (1) the conditions for aggregation and (2) the aggregated value of the property.<sup>91</sup> The standard of proof is beyond a reasonable doubt.<sup>92</sup>

### Conditions

The conditions for aggregation are discussed above.<sup>93</sup> These include that (1) the person committed the financial crime offenses against multiple victims or in multiple counties and (2) the financial crime offenses are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a common scheme or plan.<sup>94</sup>

Because the transactional connection test is the same as for pretrial joinder of offenses, submission of the “same act or transaction” condition to a jury could produce a verdict that appears contrary to a judge’s pretrial ruling on joinder of offenses. Caselaw on joinder recognizes, however, that the propriety of joinder must be determined as of the time the decision is made and not with the benefit of hindsight.<sup>95</sup> Just as a subsequent acquittal would not negate a prior joinder, so too a jury’s later rejection of a transactional connection would not render the judge’s pretrial ruling on joinder of offenses improper.<sup>96</sup>

85. G.S. 15A-132(c).

86. G.S. 15A-135.

87. G.S. 15A-631.

88. G.S. 15A-132(b).

89. G.S. 15A-1340.16F(e) (“during the same trial”); *id.* at (b)(2) (“based on the same act or transaction”).

90. G.S. 15A-1340.16F(e).

91. *Id.* (“the issues set out in subsections (b) and (f) of this section”).

92. *Id.*; *cf.* *Blakely v. Washington*, 542 U.S. 296, 301 (2004).

93. *See supra* Section IV. Conditions.

94. G.S. 15A-1340.16F(b). As noted above, another condition is that the person is convicted of two or more of the same FCOs. *Id.* Submission of this “issue” to the jury would seem unnecessary, as it will be apparent from the verdict whether the defendant has been convicted of two or more of the same FCOs.

95. *See State v. Silva*, 304 N.C. 122, 127 (1981).

96. *State v. McCanless*, 234 N.C. App. 260, 264 (2014).

### *Aggregated Value*

In most cases, the value of stolen goods is determined by fair market value at the time of the taking, not replacement cost.<sup>97</sup> Fair market value is the price that a willing buyer would pay for the item in question on the open market.<sup>98</sup> The Court of Appeals has held that the term “value” for purposes of false pretenses likewise means fair market value of the item at the time it was taken.<sup>99</sup> A finding as to value may be based on evidence of the price that the owner paid for the property shortly before its theft.<sup>100</sup> The State is not required to produce direct evidence of value, but it must produce enough evidence so that the jury is not left to speculate about the property’s value.<sup>101</sup>

### *The Same Trial*

Absent a guilty plea, the State must prove the aggregation issues during the same trial in which the defendant is tried for the FCOs.<sup>102</sup> The statute, in other words, does not authorize a proceeding independent from the prosecution of an eligible substantive felony for the purpose of establishing conditions of aggregation and property value.<sup>103</sup>

If the “same trial” provision requires aggregation issues be submitted to the same factfinder as will determine the defendant’s guilt of the FCOs, it remains somewhat unclear whether *all* the FCOs to be aggregated must be submitted to the same factfinder. True, the offenses must be joinable, but must they be joined? Say a defendant pleads guilty to two FCOs and demands a trial on two others. In that case, the State might prove the aggregation issues *during the same trial* in which the defendant is tried for some—but not all—of the FCOs, apparently satisfying the statutory provision. That could work, however, only if judgment were continued on the FCOs to which the defendant pled guilty, as the aggregated convictions must be punished “as one” felony.<sup>104</sup>

## **C. Pleading Guilty**

A defendant tried for FCOs may elect to plead guilty to the aggregation issues.<sup>105</sup> Again, the aggregation issues include the conditions for aggregation—multiple victims or counties and transactional connection—and the aggregated value of the property.<sup>106</sup> Or a defendant may plead guilty to the FCOs and demand a trial on the aggregation issues.<sup>107</sup> If the defendant pleads not guilty to the aggregation issues, “then a jury shall be impaneled to determine the issues.”<sup>108</sup>

97. State v. Morris, 318 N.C. 643, 645 n.1 (1986).

98. State v. Haire, 96 N.C. App. 209, 210 (1989).

99. State v. Pierce, 279 N.C. App. 494, 502 (2021).

100. *Id.*

101. State v. Wright, 273 N.C. App. 188, 191 (2020), *aff’d per curiam*, 379 N.C. 93 (2021).

102. G.S. 15A-1340.16F. For a proposed jury instruction on aggregation issues, see Appendix C.

103. *Cf.* State v. Cheek, 339 N.C. 725, 727 (1995) (construing Habitual Felons Act); *see also*

G.S. 15A-1340.16(a1) (authorizing the court to conduct a separate sentencing proceeding when required by the interests of justice).

104. G.S. 15A-1340.16F(f); *see also infra* Section VII. Punishment.

105. G.S. 15A-1340.16F(e) (“or no contest”); *cf.* State v. Alston, 139 N.C. App. 787, 792 (2000).

106. G.S. 15A-1340.16F(e) (referring to subsections (b) and (f)).

107. *Id.*

108. *Id.*

If the defendant wishes to plead guilty to the aggregation issues, the trial court should conduct a thorough plea colloquy. The judge should follow a procedure analogous to that provided by G.S. 15A-1022.1. In particular, the judge should

- address the defendant personally and advise the defendant of his or her rights, including the right to a jury determination of the aggregation issues;
- determine that the defendant, if represented by counsel, is satisfied with his or her representation;
- inform the defendant of the maximum possible sentence and the mandatory minimum, if any; and
- determine that there is a factual basis for the admission.<sup>109</sup>

Absent explicit guidance, it appears the defendant could plead guilty to the aggregation issues before or after the trial of the FCOs.<sup>110</sup>

If the defendant pleads guilty to the FCOs but not guilty to the aggregation issues, then a jury shall be empaneled to determine the issues.<sup>111</sup> This—the only appearance of the word “jury” in the statute—appears to preclude the possibility of a bench trial on aggregation issues.<sup>112</sup> The standard of proof is beyond a reasonable doubt.<sup>113</sup>

## VII. Punishment

The purpose of sentence enhancement statutes is obviously to enhance punishment given proof or admission of additional facts. Still, the penalty provisions vary widely.<sup>114</sup> For aggregation under G.S. 15A-1340.16F, the level of punishment turns on the aggregated value of the property.<sup>115</sup> Once the total value is determined, the aggregated offenses must be punished as one felony.<sup>116</sup>

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109. G.S. 15A-1022.1(b); *see also* G.S. 15A-1022(a). The maximum possible sentence would be the most severe penalty that could be imposed if the convictions were aggregated as provided. *See* G.S. 15A-1340.16F(f).

110. *Cf.* G.S. 15A-1022.1(d).

111. G.S. 15A-1340.16F(e).

112. *See* G.S. 15A-1201(b) (referring to factors under G.S. 15A-1340.16(a1) and (a3) but not G.S. 15A-1340.16F).

113. A defendant is constitutionally entitled to proof beyond a reasonable doubt of any fact needed to increase a sentence, other than the fact of a prior conviction. *Blakely v. Washington*, 542 U.S. 296, 301 (2004).

114. For the firearm enhancement, the minimum term of imprisonment is increased, depending on the class of the underlying felony. G.S. 15A-1340.16A(c). For a subsequent conviction of a Class B1 felony, the person is sentenced to life without parole. G.S. 15A-1340.16B(a). For possession of a bullet-proof vest, the person is guilty of a felony one class higher than the underlying felony. G.S. 15A-1340.16C(a). For manufacture of methamphetamine, the minimum term of imprisonment is increased as provided. G.S. 15A-1340.16D(a) & (a1). For criminal gang activity, the person is guilty of a felony one or two classes higher than the underlying felony. G.S. 15A-1340.16E(a) & (b).

115. G.S. 15A-1340.16F(f); *cf.* G.S. 14-56(a2) (breaking and entering motor vehicles); G.S. 14-86.6(a1) (organized retail theft).

116. G.S. 15A-1340.16F(f).



## A. What Is to Be Aggregated

In one place or another, the statute describes as “aggregated” the offenses, the violations, the convictions, and the property value.<sup>117</sup> The point is that when a defendant is convicted of more than one eligible offense, and the statutory conditions are satisfied, then the consolidated offenses shall be punished “as one” felony corresponding to the accumulated value of the property taken.<sup>118</sup> Thus, if the financial crime offenses are combined—by pleading and proof or admission—then the convictions must be combined for purposes of sentencing.<sup>119</sup>

## B. The Property

The punishment provision describes the property, the value of which may be aggregated, as “money, goods, property, services, chose in action, or other thing of value.”<sup>120</sup> This mirrors the statutory description of property that may be obtained by false pretenses.<sup>121</sup> Caselaw has defined the term “thing of value” very broadly.<sup>122</sup>

As noted above, a violation of G.S. 14-100 includes an attempt. Whether it makes sense to seek aggregation when one or more occurrences of false pretenses did not actually result in a taking of property will depend on the circumstances. Suppose a defendant has committed two counts of false pretenses, one valued at \$25,000 and the other at nothing. Absent aggregation, each violation is a Class H felony.<sup>123</sup> If, however, the offenses are aggregated, then the aggregated offenses must be punished as one Class G felony.<sup>124</sup> Thus, the wider array of sentencing options permitted by G.S. 15A-1340.16F does not depend on every substantive offense being assigned a positive value.

## C. Sentencing Scheme

If convictions are aggregated in accordance with G.S. 15A-1340.16F, the court must use the aggregated value of the property when determining the level of punishment. The statutory brackets are as follows:

Combined Value	Punished as
> \$1,500	one Class H felony
> \$20,000	one Class G felony
> \$50,000	one Class F felony
> \$100,000	one Class C felony <sup>a</sup>

<sup>a</sup> G.S. 15A-1340.16F(f).

117. G.S. 15A-1340.16F(b) (offenses); *id.* at (c) (violations); *id.* at (f) (convictions); *id.* at (f) (value).

118. *Id.* at (f).

119. *Id.* (“the court shall use”).

120. *Id.*

121. G.S. 14-100; *cf.* G.S. 14-112.2 (“funds, assets, or property”).

122. *See* State v. Golder, 374 N.C. 238, 253 (2020); State v. Brantley-Phillips, 278 N.C. App. 279, 284 (2021).

123. G.S. 14-100 (false pretenses < \$100,000 = Class H felony).

124. G.S. 15A-1340.16F(f)(2).

## D. As One Felony

The trial court generally has discretion to consolidate offenses for judgment and impose a single sentence for the consolidated offenses.<sup>125</sup> When, however, convictions are aggregated pursuant to G.S. 15A-1340.16F, then the offense(s) must be punished as one felony.<sup>126</sup> Thus the statute requires consolidation of the aggregated FCOs into one judgment for sentencing. Nothing in the statute precludes multiple groupings, but the prosecutor must have designated in the pleading which offenses are to be aggregated with one another.<sup>127</sup>

## VIII. Conclusion

Prior to the enactment of G.S. 15A-1340.16F, embezzlement and false pretenses were punishable as either of two classes of felony, the classification depending on the value of the property taken.<sup>128</sup> Now, given eligible convictions, embezzlement and false pretenses—as well as exploitation of an older adult—are punishable as one of four classes of felony, depending on the value of the property.<sup>129</sup> The wider range of possible sentence dispositions gives practitioners greater flexibility in tailoring their strategies at trial or plea negotiation to particular circumstances. All participants should take care, however, to comply with the pleading and procedure provisions of the new law.

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125. G.S. 15A-1340.15(b).

126. The provision variously uses the term “offense” (singular) and “offenses” (plural).  
G.S. 15A-1340.16F(f).

127. G.S. 15A-1340.16F(d).

128. G.S. 14-90 (C or H); 14-91 (C or F); 14-92 (C or F); 14-93 (C or H); 14-94 (C or H); 14-97 (C or H); 14-98 (C or H); 14-99 (C or F); 14-100 (C or H); *cf.* 14-112.2 (F, G, H, or I).

129. G.S. 15A-1340.16F(f).

## Appendix A. G.S. 15A-1340.16F

### § 15A-1340.16F. Aggregation of multiple financial crime offenses.

(a) Definition. – For purposes of this section, the term "financial crime offense" means any of the following:

- (1) Acts of embezzlement punishable under Article 18 of Chapter 14 of the General Statutes.
- (2) Acts of false pretenses punishable under G.S. 14-100.
- (3) Acts of exploitation of an older adult punishable under G.S. 14-112.2.

(b) Aggregation. – If a person is convicted of two or more of the same financial crime offenses, the financial crime offenses may be aggregated for sentencing if it is found that both of the following conditions are met:

- (1) The person committed the financial crime offenses against more than one victim or in more than one county.
- (2) The financial crime offenses are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a common scheme or plan.

(c) Venue. – Each county where a part of the violations aggregated under subsection (b) of this section occurs shall have concurrent venue as described in G.S. 15A-132.

(d) Pleading. – The pleading for financial crime offenses aggregated under this section shall allege the facts set out in subsection (b) of this section and identify the financial crime offenses to which the aggregation shall apply. The pleading is sufficient if it alleges that the defendant committed the financial crime offenses against more than one victim or in more than one county and that the financial crime offenses are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a common scheme or plan.

(e) Procedure. – The State shall prove the issues set out in subsections (b) and (f) of this section beyond a reasonable doubt during the same trial in which the defendant is tried for the financial crime offenses unless the defendant pleads guilty or no contest to the issues. If the defendant pleads guilty or no contest to the financial crime offenses but pleads not guilty to the issues set out in subsection (b) or subsection (f) of this section, then a jury shall be impaneled to determine the issues.

(f) Punishment. – If convictions for two or more of the same financial crime offenses are aggregated in accordance with this section, the court shall use the aggregated value of the money, goods, property, services, chose in action, or other thing of value when determining the level of punishment to be imposed. Notwithstanding any provision of law to the contrary, financial crime offenses aggregated under subsection (b) of this section are punishable as follows:

- (1) If the aggregated value of the money, goods, property, services, chose in action, or other thing of value exceeds one thousand five hundred dollars (\$1,500), then the aggregated offenses shall be punished as one Class H felony.
- (2) If the aggregated value of the money, goods, property, services, chose in action, or other thing of value exceeds twenty thousand dollars (\$20,000), then the aggregated offense shall be punished as one Class G felony.
- (3) If the aggregated value of the money, goods, property, services, chose in action, or other thing of value exceeds fifty thousand dollars (\$50,000), then the aggregated offenses shall be punished as one Class F felony.
- (4) If the aggregated value of the money, goods, property, services, chose in action, or other thing of value exceeds one hundred thousand dollars (\$100,000), then the aggregated offense shall be punished as one Class C felony. (2023-151, s. 2(a).)

## Appendix B. Pleading Form

### G.S. 15A-1340.16F

#### Aggregation of Multiple Financial Crime Offenses

October 2024

#### Introductory Comment:

This charging form is to be used in preparing a bill of indictment or a criminal information—not an arrest warrant or the like—that alleges that two or more of the same financial crime offenses are subject to aggregation for sentencing under G.S. 15A-1340.16F. That statute provides that when convictions are aggregated in accordance with this section, the court shall use the aggregated value of the property when determining the level of punishment to be imposed.

#### Charging Language:

The defendant has committed financial crime offenses (*choose one*: against more than one victim; in more than one county) and the financial crime offenses are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a common scheme or plan. The financial crime offenses to which aggregation shall apply are alleged in this (*choose one*: bill of indictment; criminal information) at counts (*identify counts*) above.

#### Notes about Charging Language:

- G.S. 15A-1340.16F(d) provides that the charging language set out above is sufficient to allege aggregation of multiple financial crime offenses.
- The term “financial crime offense” means: (1) acts of embezzlement under General Statutes Chapter 14, Article 18; (2) acts of false pretenses under G.S. 14-100; and (3) acts of exploitation of an older adult under G.S. 14-112.2.
- For the procedure used in proving aggregation, see G.S. 15A-1340.16F(e).

#### Sample Charge:

The defendant has committed financial crime offenses against more than one victim and the financial crime offenses are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a common scheme or plan. The financial crime offenses to which aggregation shall apply are alleged in this bill of indictment at counts I, II, and III above.

#### AOC Forms for This Offense:

None.

#### Punishment:

If the aggregated value of the property exceeds one thousand five hundred dollars (\$1,500), then the aggregated offenses shall be punished as one Class H felony.

If the aggregated value of the property exceeds twenty thousand dollars (\$20,000), then the aggregated offense shall be punished as one Class G felony.

If the aggregated value of the property exceeds fifty thousand dollars (\$50,000), then the aggregated offenses shall be punished as one Class F felony.

If the aggregated value of the property exceeds one hundred thousand dollars (\$100,000), then the aggregated offense shall be punished as one Class C felony.

## Appendix C. Proposed Jury Instruction

Proposed Jury Instruction  
AGGREGATION OF MULTIPLE FINANCIAL CRIME OFFENSES  
G.S. 15A-1340.16F  
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### AGGREGATION OF MULTIPLE FINANCIAL CRIME OFFENSES.

The State is seeking aggregation of multiple financial crime offenses for sentencing. Acts of [embezzlement] [obtaining property by false pretenses] [exploitation of an older adult] constitute financial crime offenses.

In the event you have found the defendant guilty of two or more of the same financial crime offenses, you must then consider and answer the following questions:

Did the defendant commit the financial crime offenses [against more than one victim] [in more than one county]?

Were the financial crime offenses based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a common scheme or plan?

On these questions, the burden of proof is on the State to prove beyond a reasonable doubt that the defendant committed two or more of the same financial crime offenses [against more than one victim] [in more than one county] and that the financial crime offenses were based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a common scheme or plan.

If you find from the evidence beyond a reasonable doubt that the defendant committed two or more of the same financial crime offenses [against more than one victim] [in more than one county] and that the financial crime offenses were based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a common scheme or plan, it would be your duty to answer these questions "yes." If you do not so find, or have a reasonable doubt, it would be your duty to answer these questions "no."



Proposed Jury Instruction  
AGGREGATION OF MULTIPLE FINANCIAL CRIME OFFENSES  
G.S. 15A-1340.16F  
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If you answer both questions “yes,” you must then consider the aggregated value of the [money] [goods] [property] [services] [chose in action] [thing of value].

Does the aggregated value exceed [one hundred thousand dollars] [fifty thousand dollars] [twenty thousand dollars] [one thousand five hundred dollars]?

On this question, the burden of proof is on the State to prove beyond a reasonable doubt the aggregated value of the [money] [goods] [property] [services] [chose in action] [thing of value].

If you find from the evidence beyond a reasonable doubt that the aggregated value of the [money] [goods] [property] [services] [chose in action] [thing of value] exceeds the specified amount, it would be your duty to answer this question “yes.” If you do not so find, or have a reasonable doubt, it would be your duty to answer this question “no.”