There can be no trial, conviction or punishment without a formal and sufficient accusation. . . . [P]rosecuting officers should carefully read warrants and indictments before proceeding to trial.[1]

Introduction: Understanding Criminal Pleadings

Language matters. North Carolina has long adhered to the common law rule that a facial defect in an indictment deprives the trial court of jurisdiction.[2] Much of what makes this book vital is that so much depends on getting the language right. Challenges to an indictment may be raised at any time—despite a defendant's failure to object at trial and with no requirement to show prejudice—and a successful challenge justifies a court in vacating the judgment, despite years that may have passed since the conviction. Adherence to the forms prescribed preserves convictions.

Several recent North Carolina Supreme Court opinions seem to presage a coming change. In *In re J.U.*,[3] our Supreme Court criticized the common law rule that a defect in an indictment deprives the trial court of jurisdiction as "obsolete."[4] And in *State v. Lancaster*,[5] it cited with approval (apparently for the first time) the United States Supreme Court's decision in *United States v. Cotton*,[6] which abrogated the common law rule in the federal court system.[7]

Taken together, *J.U.* and *Lancaster* seem to be preparing the way for our Supreme Court to abolish the common law rule in state court as well. If using the proper language in an indictment is no longer necessary to confer jurisdiction, then strict adherence to prescribed forms is less important. To be sure, pleading defects might still qualify as errors of law, but it would be easier to fix them if timely raised, and they would be less likely to warrant relief years after a judgment is entered. The language would still matter—though somewhat less than it does now.

Arrest Warrant and Indictment Forms is about the language of criminal pleadings. Most of the manual consists of forms that may be used to draft pleadings that will withstand scrutiny. The forms are intended to be straightforward, but readers are more likely to use the forms correctly if they have a grasp of the applicable legal principles. Further, not every crime is included in the manual, so officers, prosecutors, and magistrates (and others) will sometimes need to draft criminal pleadings without a form to consult. This introduction is intended to cover the basics.

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1. State v. Best, 265 N.C. 477, 481 (1965).
2. State v. Rankin, 371 N.C. 885, 897 (2018).
3. 384 N.C. 618 (2023).
4. *Id.* at 623 (quoting *Rankin*, 371 N.C. at 919 (Martin, C.J., dissenting)); *cf.* Chapter 4, Section 1 of the North Carolina General Statutes (hereinafter G.S.) (common law declared to be in force within this state except where, among other things, it has become obsolete).
5. 385 N.C. 459 (2023).
6. 535 U.S. 625 (2002).
7. *Lancaster*, 385 N.C. at 462.

I. Sources and Types of Criminal Pleadings

A. Constitutional Entitlement

The Fifth Amendment to the United States Constitution provides that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury.[8] This provision reflects the founders' view that presentment or indictment represents a safeguard against abusive prosecution.[9] Unlike many provisions of the Bill of Rights, however, the Grand Jury Clause of the Fifth Amendment has never been incorporated against the states through the Due Process Clause of the Fourteenth Amendment.[10] There is therefore no federal constitutional guarantee of indictment for defendants charged in state court.[11]

The North Carolina Constitution provides that, except in misdemeanor cases initiated in the district court division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment.[12] As used here, the term "indictment" signifies a written accusation of a crime drawn up by the prosecutor and submitted to the grand jury, and by them found and presented on oath or affirmation as a true bill.[13] The term "presentment" denotes an accusation made by a grand jury of an offense upon their own knowledge or observation, or upon information from others, without any bill of indictment having been submitted by the prosecutor.[14]

B. Statutory Recognition

By statute, the pleading in felony and misdemeanor cases initiated in the superior court division must be a bill of indictment, unless the defendant waives the right to indictment.[15] If the defendant waives indictment, the pleading must be a bill of information.[16] "A presentment by the grand jury may not serve as the pleading in a criminal case."[17] For a misdemeanor prosecuted in the district court, the pleading of the State may consist of the citation, criminal summons, warrant for arrest, magistrate's order, or a statement of charges.[18]

The following chart summarizes the role of each type of pleading.[19]

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8. U.S. Const. amend. V.

9. *See* United States v. Calandra, 414 U.S. 338, 343 (1974) ("the protection of citizens against unfounded criminal prosecutions"); *cf.* John H. Langbein, Renee Lettow Lerner & Bruce P. Smith, History of the Common Law: The Development of Anglo-American Legal Institutions 216 (2019).

10. *See* State v. Hunt, 357 N.C. 257, 272 (2003); State v. Wallace, 351 N.C. 481, 508 (2000).

11. 1 Andrew D. Leipold, Federal Practice and Procedure: Criminal § 122 (5th ed. 2023). To be sure, the Sixth Amendment and the Due Process Clause require adequate notice of a criminal accusation, but such notice need not be endorsed by a grand jury.

12. N.C. Const. art. I, § 22. One who appeals from a misdemeanor conviction in district court may be tried in superior court on the original pleading, without an indictment. State v. Gay, 273 N.C. 125, 126 (1968).

13. State v. Thomas, 236 N.C. 454, 457 (1952).

14. *Id.* Impeachment initiates the process of disciplining an officeholder for malfeasance in office, and the punishment is limited to removal from office and disqualification from future office. *See* N.C. Const. art. IV, § 4.

15. G.S. 15A-923(a); *see also* G.S. 15A-642(c) (waiver of indictment must be (1) in writing, (2) signed by the defendant and his or her attorney, and (3) attached to or executed upon the bill of information).

16. G.S. 15A-923(a). Bills of information are generally subject to the same rules that govern indictments. *See* G.S. 15A-644(b).

17. G.S. 15A-923(a).

18. G.S. 15A-922(a). Except for the statement of charges, these instruments serve primarily as criminal process, requiring a person to come to court. *See* G.S. Ch. 15A, Art. 17 cmt.; *see also id.* Art. 19 cmt. (on misdemeanor pleadings).

19. Subject to the provisions of G.S. Chapter 15A, Article 49, each of these instruments may serve as pleadings of the State in criminal cases. G.S. 15A-921. But the pleading in felony cases initiated in the superior court must be a bill of indictment unless the right to indictment is waived. G.S. 15A-923(a); *cf.* G.S. 15A-642(a).

Name/Statute (G.S.)	Who May Issue	What Offenses May Be Charged	Notes
Citation 15A-302	Law enforcement officer	Misdemeanor or infraction	Directs a defendant to come to court on a specific day. A defendant may object to trial on a citation, and the prosecutor then must normally file a statement of charges. G.S. 15A-922(c).
Criminal Summons 15A-303	Justice, judge, magistrate, or clerk	Felony, misdemeanor, or infraction	Directs a defendant to come to court on a specific day.
Warrant for Arrest 15A-304	Justice, judge, magistrate, or clerk	Felony or misdemeanor	Orders that a defendant be arrested and held to answer a charge. Used when a judicial official determines "that the person named should be taken into custody." G.S. 15A-304(b)(1).
Magistrate's Order 15A-511(c)	Justice, judge, magistrate, or clerk	Felony or misdemeanor	Used when a defendant has been arrested without a warrant.
Statement of Charges 15A-922	Prosecutor	Misdemeanor or infraction	Used to supersede existing charges, not to initiate a new prosecution.
Information 15A-641, -644	Prosecutor	Felony and related misdemeanors	Requires consent of the defendant; information must contain or have attached a waiver of indictment signed by the defendant and his or her attorney.
Indictment 15A-641, -644	Grand jury	Felony and related misdemeanors	Requires concurrence of twelve or more grand jurors.

It bears repeating that a criminal defendant's right to indictment derives primarily from the state constitution—though that right is effectuated and supplemented by various statutes—and that the constitutional right to an indictment pertains to a grand jury's written accusation *of a crime*. Care must be taken to distinguish this right from a separate right to indictment created by statute.[20] Such purely statutory requirements do not implicate the state constitutional right to indictment.[21]

C. Related Instruments

Related instruments include presentments, juvenile petitions, and bills of particulars.

1. Presentments

As noted above, presentments are mentioned among the constitutionally permissible modes of prosecution in this state.[22] By statute, however, a presentment may not serve as a pleading.[23] In current practice, the prosecutor may solicit a presentment from the grand jury by submitting a draft

20. *See* G.S. 15A-924(a)(7); 15A-1340.16(a4) (nonstatutory aggravating factors must be alleged in indictment); *cf.* G.S. 15A-1340.16(a6) (requiring notice of all aggravating factors).

21. *See* State v. Roache, 358 N.C. 243, 267 (2004); *cf.* State v. Ross, 216 N.C. App. 337, 351 (2011) (failure to include aggravating factors in indictment was statutory, not constitutional, error).

22. N.C. Const. art. I, § 19. Historically, the terms "indictment" and "presentment" were used interchangeably, but by the eighteen century, the latter term was used to refer to an accusation presented by the grand jury upon its own motion. *See* Langbein, et al., *supra* note 9, at 215.

23. G.S. 15A-923(a).

presentment, followed by an indictment.[24] The benefit of doing so arises from the fact that, when a charge is initiated by presentment, the superior court has original jurisdiction to try a misdemeanor, allowing the State to bypass proceedings in the district court.[25]

2. Juvenile Petitions

In juvenile cases, the State's pleading is called a *petition*.[26] Because juvenile proceedings are civil rather than criminal, juvenile petitions are not criminal pleadings.[27] Still, petitions serve essentially the same function as indictments in providing notice to the accused, and juvenile petitions are generally held to the same standards as criminal indictments.[28]

3. Bills of Particulars

The function of a bill of particulars is to inform the defendant of the nature of the evidence which the State proposes to offer.[29] It is not part of the indictment, nor is it a substitute for or an amendment thereto.[30] Upon a defendant's motion, the trial court may order the State to file a bill of particulars containing "items of factual information . . . which pertain to the charge."[31] The trial court must order the State to file a bill of particulars if the information requested is necessary to enable the defendant adequately to prepare a defense.[32] Whether to order the State to file a bill of particulars is, however, within the sound discretion of the trial court.[33]

II. The Common Law and Statutes

A. English Antecedents

Although the state constitution is the source of a criminal defendant's right to indictment, most of the rules governing criminal pleadings may be found in statutes and caselaw. Determining the priority of these rules is not always easy.[34] Many of the rules advanced by the caselaw have their origin in the common law, that is, the law of England that the colonists were applying in this state at the time of the American Revolution.[35] Indeed, "[f]or many years, American courts demanded strict adherence to the technical niceties of common law pleading rules."[36]

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24. *See* G.S. 15A-628(a)(4) (grand jury investigation may be initiated upon request of prosecutor); 15A-641 (prosecutor is obligated to investigate every presentment); *see also* State v. Baker, 263 N.C. App. 221, 228 (2018) (presentment and indictment submitted *simultaneously* were invalid absent intervening investigation).

25. G.S. 7A-271(a)(2).

26. G.S. 7B-1801.

27. State v. Adams, 345 N.C. 745, 748 (1997).

28. *In re* J.U., 384 N.C. 618, 622 (2023).

29. State v. Cameron, 283 N.C. 191, 194 (1973).

30. State v. Parker, 119 N.C. App. 328, 336 (1995); *cf.* G.S. 15A-925(e) (bill of particulars may not supply an omission or cure a defect in a criminal pleading).

31. G.S. 15A-925(b).

32. G.S. 15A-925(c).

33. State v. Garcia, 358 N.C. 382, 390 (2004).

34. It is not always apparent whether a statute is intended to codify preexisting law or to change it. *Compare* State v. McLymore, 380 N.C. 185, 190 (2022) (statute abolished common law right to perfect self-defense), *with* State v. Moorman, 320 N.C. 387, 392 (1987) (rape statutes codify common law of rape).

35. *See* G.S. 4-1 (common law declared to be in force within this state); State v. Vance, 328 N.C. 613, 617 (1991) ("the common law of England.").

36. 5 Wayne R. LaFave et al., Criminal Procedure § 19.1(a) (4th ed. 2015).

The technical pleading requirements of the common law could produce anomalous results. It is easy to ridicule decisions like *State v. Owen*,[37] which overturned a defendant's murder conviction based on the failure of the indictment to specify the length and depth of the mortal wounds.[38] On the other hand, the requirement for such an allegation was plainly stated in the available authorities,[39] and it does not seem entirely unreasonable to demand a degree of precision from the State in the formal accusation of a defendant who is on trial for his or her life.[40] In any event, the legislature responded to such decisions by eliminating the most egregious technicalities of the common law pertaining to indictments.[41]

B. Legislative Innovations

Another legislative attempt to alleviate burdensome common law pleading requirements came with the enactment of statutes authorizing "short-form" pleadings, statutes that prescribed simplified charging language.[42] The State was thus relieved of the obligation of alleging each element for specified offenses, as the common law had required.[43] Our statutes now recognize short-form pleadings for murder and manslaughter,[44] rape,[45] sex offense,[46] perjury,[47] and subornation of perjury.[48] In addition, the North Carolina Supreme Court has recognized a short-form pleading for attempted murder.[49] The short-form language has been consistently upheld against constitutional challenge.[50]

The General Assembly struck yet another blow at common law pleading requirements with the enactment of the Criminal Procedure Act of 1975.[51] Following adoption of the Act, the North Carolina

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37. 5 N.C. (1 Mur.) 452 (1810).

38. *Id.* at 453; *see also* State v. Carter, 1 N.C. 406 (1801) (judgment arrested because indictment specified location of mortal wound as the left "brest," rather than breast); *cf.* Lawrence M. Friedman, A History of American Law 133–34 (1973) (discussing *Owen*). In their defense, the judges who formed the majority in *Owen* (the court split 3-2) frankly acknowledged their disapprobation of the rule but felt bound to apply the law as they found it and not as they wished it to be.

39. *E.g.*, 4 William Blackstone, Commentaries 302 ("in indictments for murder, the length and depth of the wound should in general be expressed").

40. Before the act of 1893 (now codified at G.S. 14-17) divided the offense into two degrees, there was but one offense of murder, and the penalty was death. State v. Gadberry, 117 N.C. 811, 813 (1895).

41. *See* G.S. 15-153 (pleading is sufficient "if it express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed . . . by reason of any informality or refinement."); 15-155 (pleading not vitiated by omission of, among other things, any matter unnecessary to be proved, the words "with force and arms," the time of the offense when time is not of the essence, or for want of proper and perfect venue).

42. *See* 5 LaFave et al., *supra* note 36, § 19.1(c).

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

44. G.S. 15-144.

45. G.S. 15-144.1.

46. G.S. 15-144.2.

47. G.S. 15-145.

48. G.S. 15-146; *see also* G.S. 20-138.1(c) (prescribing short-form pleading for misdemeanor impaired driving).

49. State v. Jones, 359 N.C. 832, 838 (2005).

50. *See e.g.*, State v. Hunt, 357 N.C. 257, 274 (2003) (upholding short-form murder indictment); State v. Roberts, 310 N.C. 428, 434 (1984) (upholding short-form rape indictment).

51. State v. Mostafavi, 370 N.C. 681, 686 (2018) (Criminal Procedure Act of 1975 "sought to eliminate the technical pleading requirements previously recognized for criminal pleadings"); State v. Spivey, 368 N.C. 739, 742 (2016) (the 1975 Act was intended to simplify criminal proceedings).

Supreme Court overruled several well-established precedents that had perpetuated common law pleading requirements.[52] The full effect of the Act on common law rules is still being debated.[53]

C. Statutory Requirements

By statute (G.S. 15A-924), a criminal pleading must contain

1. the defendant's name or other form of identification,
2. a separate count for each offense charged,
3. the county in which each offense was committed,
4. the date on which each offense was committed,
5. a statement of facts supporting each element of the offense,
6. a citation to the applicable law alleged to have been violated, and
7. any nonstatutory aggravating sentencing factors.

1. The Defendant's Name

The complete omission of the defendant's name renders a pleading fatally defective.[54] This does not mean that the defendant must be identified by name in each count.[55] Further, under the doctrine of *idem sonans*, a slight misspelling in the defendant's name is not a fatal defect.[56] Many spelling errors can be corrected by amendment of the pleading.[57]

2. A Separate Count for Each Offense Charged

"Generally speaking, a bill of indictment which charges two offenses in the same count is bad for duplicity."[58] This rule is subject to exceptions, however. Acts constituting a single and continuous transaction may be charged together as a single offense; and where a single offense may be committed in different ways, it may be charged in a single count if the ways are not repugnant and are component parts of a single transaction.[59] Significantly, duplicity has not been treated as a jurisdictional defect: an objection based on duplicity is waived if not made in apt time, i.e., before plea, and is cured by

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52. *See* State v. Oldroyd, 380 N.C. 613, 619 (2022) (indictment for armed robbery was not invalid for failure specifically to name the victim(s)); State v. Worsley, 336 N.C. 268, 280 (1994) (burglary indictment was not defective for failure to specify the felony that the defendant intended to commit within the victim's home); State v. Palmer, 293 N.C. 633, 640 (1977) (indictment for assault with a deadly weapon was sufficient even absent a detailed description of the weapon).

53. *Compare* State v. Lancaster, 385 N.C. 459, 462 (2023) ("the General Assembly's adoption of the Criminal Procedure Act represented a sharp departure from the demands of technical pleading."); *with* State v. Rankin, 371 N.C. 885, 898 (2018) ("The General Assembly acknowledged and approved of the common law remedy for invalid indictments with the enactment of the revised Criminal Procedure Act.").

54. State v. Simpson, 302 N.C. 613, 616 (1981) ("or a sufficient description if his name is unknown"); State v. Finch, 218 N.C. 511, 512 (1940) (when no name appears in the bill, judgment must be arrested).

55. G.S. 15A-924(a)(1) ("unless required for clarity"); *cf.* State v. Johnson, 77 N.C. App. 583, 584 (1985) (indictment that identified the defendant by name only in the caption was sufficient).

56. State v. Higgs, 270 N.C. 111, 113 (1967) (Buford Murril Higgs named in the indictment as Beauford Merrill Higgs); State v. Vincent, 222 N.C. 543, 544 (1943) ("'Vincent' and 'Vinson' sound almost alike"); *but see* State v. Overman, 257 N.C. 464, 468 (1962) (fatal variance when indictment identified the victim as Frank E. Nutley but evidence showed the victim was Frank E. Hatley).

57. *See* "Fixing Pleading Problems," *infra*.

58. State v. Dale, 218 N.C. 625 (1940); *cf.* 5 LaFave et al., *supra* note 36, § 19.3(d).

59. State v. O'Keefe, 263 N.C. 53, 56 (1964).

verdict.[60] And given timely objection, the prosecutor may elect to proceed with only one of the charges or may amend the pleading to separate the charges into separate counts.[61]

3. The County in Which Each Offense Was Committed

At common law, it was essential to name the county in which the offense was committed so that it might appear that the offense was within the jurisdiction of the court.[62] In North Carolina, venue likewise remains in the county where the crime was committed.[63] By statute, however, allegations of venue in a criminal pleading become conclusive absent timely objection.[64] Further, the place for returning an indictment is a matter of venue and not jurisdiction.[65] Accordingly, variances between the county alleged and the evidence at trial have been treated as immaterial.[66] And the prosecutor may amend a criminal pleading to reflect the proper county.[67]

4. The Date on Which Each Offense Was Committed

Except where time is of the essence of the offense, the date of offense set out in a pleading is immaterial and need not be proved, and a variance is not fatal, "the day being deemed merely a matter of form."[68] G.S. 15A-924(a)(4) did not change the law in this regard. The statute requires an allegation that the offense was committed on, or on or about, a designated date or during a designated period of time, but error as to a date or its omission is not grounds for dismissal of the charges or reversal of a conviction if time was not of the essence.[69] In cases involving sexual offenses against children, courts are particularly lenient with regard to the date of offense alleged.[70] Hence, the date alleged may generally be corrected by amendment.[71] Variance as to time becomes material when it deprives a defendant of the opportunity to prepare a defense. When a defendant relies on the date alleged to prepare his or her defense and the State's evidence substantially varies to the defendant's prejudice, a motion to dismiss will be granted.[72]

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60. State v. Green, 266 N.C. 785, 789 (1966); State v. Beal, 199 N.C. 278, 294 (1930).

61. State v. Williamson, 250 N.C. 204, 209 (1959); *cf.* State v. Stephens, 188 N.C. App. 286, 293 (2008) (no error in allowing amendment of indictment); *cf.* G.S. 15A-924(b) (if a single count charges more than one offense, defendant may by motion require the State to elect a single offense).

62. State v. Flowers, 318 N.C. 208, 213 (1986).

63. G.S. Ch. 15A, Art. 3 cmt.

64. G.S. 15A-135.

65. G.S. 15A-631; *cf. Flowers*, 318 N.C. at 213 (noting legislature's power to extend grand jury's power beyond territorial limitation imposed by the common law).

66. *See* State v. Spencer, 187 N.C. App. 605, 611 (2007); State v. Brown, 85 N.C. App. 583, 588 (1987); *cf.* State v. Gardner, 84 N.C. App. 616, 618 (no error in denying motion to dismiss charge of receiving stolen goods because G.S. 14-71 permits indictment for receiving stolen goods in any county in which the thief may be tried), *aff'd per curiam*, 320 N.C. 789 (1987).

67. State v. Hyder, 100 N.C. App. 270, 273 (1990).

68. State v. Wise, 66 N.C. 120, 123 (1872); *accord* State v. Francis, 157 N.C. 612 (1911).

69. G.S. 15A-924(a)(4); *cf.* G.S. 15-155 (no judgment shall be stayed or reversed "for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense.")

70. State v. Everett, 328 N.C. 72, 75 (1991).

71. *E.g.*, State v. Price, 310 N.C. 596, 600 (1984).

72. State v. Stewart, 353 N.C. 516, 519 (2001).

5. A Statement of Facts Supporting Each Element of the Offense

The elements requirement is "clearly the most critical," and no pleading defect has resulted in more dismissals than failure to allege all the elements of the offense charged.[73] Assuming there is no authorized short-form pleading, a criminal pleading that omits an element will generally be deemed fatally defective.[74] Consistent with "traditional ideas," G.S. 15A-924(e) continues to require factual (but not evidentiary) allegations to support each element.[75] Thus, an indictment must allege lucidly and accurately all the essential elements of the offense charged.[76] While an indictment couched in the language of the statute is generally sufficient to charge a statutory offense,[77] if the words of the statute do not set forth all the elements, such elements must be alleged in the criminal pleading.[78] Still, the State is required to allege only the ultimate facts constituting each element of the crime; evidentiary matters need not be alleged.[79] There is conflicting authority on whether elements may be supplied by inference or implication, but the recent trend seems to be toward inferring elements from the facts alleged where possible.[80]

6. A Citation to the Applicable Law Alleged to Have Been Violated

By statute, a criminal pleading must contain, for each count, a citation of any applicable statute, rule, regulation, ordinance, or other provision of law alleged to have been violated.[81] But error in the citation or its omission is not grounds for dismissal of charges or reversal of a conviction.[82] On the other hand, citation to the proper statute will not cure a failure to allege each element of the offense charged.[83]

7. Any Nonstatutory Aggravating Sentencing Factors

Added in 2005, subdivision (a)(7) of G.S. 15A-924 requires the State to allege any nonstatutory aggravating sentencing factors it intends to use.[84] G.S. 15A-1340.16(d) prescribes aggravating factors that may be considered at sentencing in a felony case.[85] The last item in that subsection is a residual or catchall provision encompassing "[a]ny other aggravating factor reasonably related to the purposes of sentencing."[86] While the other factors need not be included in any indictment or other

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73. 5 LaFave et al., *supra* note 36, § 19.3(b).

74. *E.g.*, State v. Murrell, 370 N.C. 187, 193 (2017); State v. Ellis, 368 N.C. 342, 344 (2015). As explained under "Legislative Innovations," *supra*, if the State uses an authorized short-form pleading, it need not allege all the elements of the offense charged. Similarly, a citation is sufficient that complies with G.S. 15A-302(c), albeit omitting elements, as explained under "Special Rules for Citations," *infra*.

75. G.S. 15A-924 cmt.

76. State v. Lofton, 372 N.C. 216, 221 (2019).

77. State v. Mostafavi, 370 N.C. 681, 685 (2018).

78. State v. Rankin, 371 N.C. 885, 887 (2018).

79. State v. Coker, 312 N.C. 432, 437 (1984) (driving while impaired (DWI) charge not required to specify impairing substance); State v. Palmer, 293 N.C. 633, 638 (1977) (charges for assault with a deadly weapon need not describe the weapon beyond identifying it as "a deadly weapon").

80. *Compare* State v. Lancaster, 385 N.C. 459, 469 (2023) (elements "clearly inferable"); *with* State v. Edwards, 190 N.C. 322, 324 (1925) (no element should be left to inference or implication). Elements cannot be supplied by reference to extrinsic evidence. State v. White, 372 N.C. 248, 254 (2019).

81. G.S. 15A-924(a)(6).

82. *Id.*; *see also* State v. Barnes, 333 N.C. 666, 677 (1993) ("mistake in the citation of the statute does not affect the validity of the trial"); State v. Collins, 221 N.C. App. 604, 613 (2012).

83. State v. McBane, 276 N.C. 60, 65 (1969); State v. Billinger, 213 N.C. App. 249, 257 (2011).

84. G.S. 15A-924(a)(7).

85. G.S. 15A-1340.16(d).

86. G.S. 15A-1340.16(d)(20).

charging instrument, an aggravating factor alleged under subdivision (d)(20) must be included in any indictment or other charging instrument.[87] Noncompliance with this provision results in the State being unable to use the aggravating factor at sentencing, and, if the aggravating factor is used, the defendant is entitled to resentencing.[88]

Other statutes contain additional requirements for particular pleadings.[89]

III. Additional Drafting Requirements

A. Formal Requirements

1. Extensive Detail Is Unnecessary

Federal indictments can reach a hundred pages in length and contain detailed accounts of the offense(s) charged.[90] By contrast, North Carolina pleadings are usually brief and do not contain much detail about the way the crime charged was committed.[91] As the North Carolina Supreme Court has said, "a very detailed account is not necessary for legally sufficient indictments[.]"[92] Indeed, it may be counterproductive to provide extensive detail, as some appellate decisions have held that the State is bound to prove even those allegations that need not have been included in the first place.[93]

2. Plead in the Conjunctive

"The use of the conjunctive form to express alternative theories of conviction is proper."[94] Since charging disjunctively or alternatively may render the allegations uncertain, the proper way to connect the various allegations in a pleading is with the word "and," not with the word "or."[95] This is true even when the statute defining the offense uses the word "or."[96] However, the rule against disjunctive pleading is not absolute.[97] In any event, the use of the conjunctive does not require the State to prove the alternative matters alleged.[98] Although the use of "and/or" has been criticized, its use is not per se fatal to an indictment.[99]

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87. G.S. 15A-1340.16(a4).

88. *See* State v. Ortiz, 238 N.C. App. 508, 514 (2014).

89. *See* G.S. 15A-302 through -305 (misdemeanor pleadings); 15A-644 (indictment and information).

90. *See* James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. Legis. & Pub. Pol'y 177, 183 n.36 (2008).

91. *Compare* Fed. R. Crim. P. 7(c)(1) ("a plain, concise, and definite written statement of the essential facts."), *with* G.S. 15A-924(a)(5) ("[a] plain and concise factual statement [that] asserts facts supporting every element").

92. State v. Rambert, 341 N.C. 173, 176 (1995).

93. *E.g.*, State v. Silas, 360 N.C. 377, 383 (2006) (burglary indictment need not specify the felony intended to be committed inside, but, if felony is named, State is bound by the allegation); State v. Williams, 303 N.C. 507, 510 (1981) (first-degree sexual offense indictment need not specify the sexual acts, etc.).

94. State v. Birdsong, 325 N.C. 418, 422 (1989).

95. *Id.*; *see also* State v. Lofton, 372 N.C. 216, 222 (2019) (manufacturing marijuana).

96. State v. Swaney, 277 N.C. 602, 612 (1971) (armed robbery indictment properly alleged "endangered and threatened," though G.S. 14-87 reads "endangered or threatened.").

97. State v. Rozier, 69 N.C. App. 38, 45 (1984).

98. State v. Lofton, 372 N.C. 216, 222 (2019); State v. Montgomery, 331 N.C. 559, 569 (1992); State v. Mitchell, 234 N.C. App. 423, 429 (2014).

99. State v. Haddock, 191 N.C. App. 474, 476 (2008).

3. Alleging Multiple Offenses in a Single Pleading

While an indictment must contain a separate count for each offense charged, a single pleading may charge multiple offenses. Two or more offenses may be joined in one pleading when the offenses are based on the same act or transaction or on a series of acts or transactions connected or constituting parts of a single scheme or plan.[100] In determining whether offenses have the requisite transactional connection, courts consider several factors: (1) the nature of the offenses charged, (2) any commonality of facts, (3) the lapse of time between the offenses, and (4) the unique circumstances of each case.[101]

There is no constitutional or statutory limit to the number of charges a single pleading may contain. However, there is an administrative limit of two charges per citation, and there are technical limits in various computer systems that limit to three the number of charges that may be contained in a single warrant, summons, or magistrate's order. Additional pleadings may be used when it is appropriate to charge a defendant with more crimes than will fit on a single pleading.[102]

B. Offense-Specific Requirements

1. For Statutory Offenses, Track the Language of the Statute

North Carolina recognizes both common law crimes and crimes created by statute.[103] For statutory offenses, an indictment couched in the language of the statute is generally sufficient.[104] Tracking the language of the statute does not, however, relieve the State of the burden of alleging each element of the offense.[105]

2. For Short-Form Eligible Offenses, Use the Form

As noted above, for several offenses the legislature has provided simplified charging language.[106] Most of these statutes appear in G.S. Chapter 15, the precursor to the more recent Chapter 15A (Criminal Procedure).[107] Slight deviation from the prescribed language may not be fatal so long as substantially equivalent words are used.[108]

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100. G.S. 15A-926(a).

101. State v. Herring, 74 N.C. App. 269, 273 (1985), *aff'd per curiam*, 316 N.C. 188 (1986); *accord* State v. Perry, 142 N.C. App. 177, 181 (2001).

102. *See* Jeff Welty, *How Many Charges Can One Charging Document Contain?*, N.C. Crim. L.: A UNC Sch. of Gov't Blog (Apr. 15, 2015), nccriminallaw.sog.unc.edu/how-many-charges-can-one-charging-document-contain/.

103. *See* G.S. 4-1 (common law declared to be in force within this state); *cf.* G.S. 14-51 ("two degrees in the crime of burglary as defined at the common law"); 14-58 ("two degrees of arson as defined at the common law").

104. State v. Mostafavi, 370 N.C. 681, 685 (2018); State v. Spivey, 368 N.C. 739, 742 (2016); State v. Williams, 368 N.C. 620, 626 (2016).

105. State v. Greer, 238 N.C. 325, 328 (1953) (general rule does not apply if the statute does not state all the elements of the offense); *accord* State v. Rankin, 371 N.C. 885, 887 (2018).

106. G.S. 15-144 (murder and manslaughter); 15-144.1 (rape); 15-144.2 (sex offense); 15-145 (perjury); 15-146 (subornation of perjury); *cf.* State v. Jones, 359 N.C. 832, 838 (2005) (attempted murder).

107. *See also* G.S. 14-76 (larceny of public records); 14-100 (false pretenses); 20-138.1(c) (impaired driving).

108. State v. Tart, 372 N.C. 73, 77 (2019) (upholding indictment for attempted murder that alleged that the defendant with malice did attempt to kill and *slay* the victim, as opposed to kill and *murder* the victim).

3. For Felonies, Include the Word "Feloniously"

The North Carolina Supreme Court has held that an indictment for a felony that fails to include the word "feloniously" is fatally defective.[109] This rule has been called into question by the North Carolina Court of Appeals, which has stated that the word "feloniously" is not required if the indictment references "the specific statute making the crime a felony."[110] Use of the word "feloniously" in a pleading charging a misdemeanor will be treated as surplusage.[111]

4. For Larceny, It Is Necessary to Identify the Victim

An indictment for larceny,[112] embezzlement,[113] injury to personal property,[114] and conversion by bailee[115] (but not armed robbery,[116] injury to real property,[117] or breaking and entering[118]) must allege an interest in the property by a natural person or a legal entity capable of owning property. A person named in the indictment may be either the person having a general interest in the property, i.e., the actual owner, or a person with a special interest in the property, i.e., the person who had possession and control of the property at the time it was stolen.[119] When alleging ownership in an entity, the indictment must specify that the owner is a corporation or otherwise capable of owning property, and the words "corporation," "incorporated," "limited," or "company," or their abbreviated forms, sufficiently identify a corporation.[120] Or the pleading may specifically identify the victim as "an entity capable of owning property."[121] For entities authorized by statute to own property, such as a church[122] or a university,[123] it is sufficient to name the entity or otherwise identify the entity as such.[124]

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109. State v. Fowler, 266 N.C. 528, 530 (1966); State v. Price, 265 N.C. 703 (1965); State v. Whaley, 262 N.C. 536, 537 (1964).

110. State v. Blakney, 156 N.C. App. 671, 673 (2003). In *Blakney*, however, the North Carolina Court of Appeals found the indictment invalid as satisfying neither rule. *Id.* Since the result would be the same under the old rule (i.e., state supreme court precedent), the new rule (adopted by the court of appeals in *Blakney*) cannot be deemed authoritative.

111. State v. Mayes, 31 N.C. App. 694, 697 (1976).

112. State v. Campbell, 368 N.C. 83, 86 (2015).

113. State v. Linney, 138 N.C. App. 169, 173 (2000).

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

115. State v. Falana, 254 N.C. App. 329, 333 (2017).

116. State v. Thompson, 359 N.C. 77, 107 (2004).

117. State v. Spivey, 368 N.C. 739, 744 (2016).

118. State v. Norman, 149 N.C. App. 588, 592 (2002).

119. State v. Redmond, 281 N.C. App. 283, 287 (2022); *see also* State v. Linney, 138 N.C. App. 169, 173 (2000) (persons with a special interest include a bailee, custodian, or one who otherwise has possession and control of the property).

120. State v. Campbell, 368 N.C. 83, 86 (2015); *see also* State v. Speas, 265 N.C. App. 351, 353 (2019) ("Sears Roebuck and Company" was sufficient); State v. Cave, 174 N.C. App. 580, 583 (2005) ("N.C. FYE, Inc." was sufficient); *but see* State v. Garner, 252 N.C. App. 393, 396 (2017) ("Pinewood Country Club" was insufficient); State v. Brown, 184 N.C. App. 539, 542 (2007) ("Smoker Friendly Store" was insufficient); State v. Price, 170 N.C. App. 672, 674 (2005) ("City of Asheville Transit and Parking Services" was insufficient); State v. Phillips, 162 N.C. App. 719, 721 (2004) ("Parker's Marine" was insufficient); State v. Norman, 149 N.C. App. 588, 593 (2002) ("Quail Run Homes Ross Dotson" was insufficient); State v. Woody, 132 N.C. App. 788, 791 (1999) ("P&R unlimited" was insufficient).

121. State v. Brawley, 256 N.C. App. 78, 84 (2017) (Arrowood, J. dissenting) ("Belk's Department Stores, an entity capable of owning property"), *rev'd for reasons in dissent*, 370 N.C. 626 (2018).

122. *Campbell*, 368 N.C. at 87 ("Manna Baptist Church").

123. State v. Ellis, 368 N.C. 342, 345 (2015) ("North Carolina State University" was sufficient); State v. Edwards, 286 N.C. App. 306, 310 (2022) ("Graham County Schools" was sufficient).

124. State v. McNair, 253 N.C. App. 178, 193 (2017) ("Vision," identified in other counts as a place of religious worship, was sufficient).

Several other crimes have particular naming rules. Victims of sex crimes (rape and sex offense,[125] indecent liberties,[126] incest[127]) may be identified by initials, but identifying a person as "Victim #1" is insufficient.[128] For drug offenses, it is necessary to name the buyer, if known.[129]

5. Special Rules for Citations

The North Carolina Supreme Court has held that a citation is sufficient when it (1) identifies the crime charged, (2) contains the name and address of the person cited, (3) identifies the issuing officer, and (4) directs the person cited to appear in court at a certain date and time.[130] Whatever identifying the crime means, it is not necessary to allege each element of the offense.[131]

C. Alleging Prior Convictions

In general, an indictment may not be read to a petit jury.[132] Pleadings that contain allegations of prior convictions in particular are subject to additional restrictions, as stated herein. In determining which rules apply, prior convictions used *as an element of the offense charged* should be distinguished from those used *for purposes of sentencing.* Though the General Statutes allow indictment for habitual felon status,[133] habitual felon status is not a crime; it is a sentencing enhancement.[134] In alleging a prior conviction, it is generally sufficient to state that the defendant was at a certain time and place convicted of the prior offense, without otherwise fully alleging all the elements.[135]

1. As an Element of the Offense

For some crimes, it is necessary to prove prior convictions as an element of the offense.[136] When such crimes are charged by indictment or information, the prior conviction must be alleged in a separate indictment or information or as a separate count in the principal indictment.[137] If the name of the

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125. State v. McKoy, 196 N.C. App. 650, 658 (2009).

126. State v. Sechrest, 277 N.C. App. 372, 377 (2021).

127. State v. Perkins, 286 N.C. App. 495, 503 (2022).

128. State v. Corey, 373 N.C. 225, 233 (2019); State v. White, 372 N.C. 248, 252 (2019); State v. Shuler, 263 N.C. App. 366, 369 (2018); *cf. In re* M.S., 199 N.C. App. 260, 266 (2009) (juvenile petition was invalid which alleged sexual offense with "a child.").

129. *See* State v. Bennett, 280 N.C. 167, 168 (1971) (under Uniform Narcotic Drug Act of 1935, where sale is prohibited it is necessary to allege the name of the person to whom the sale was made or that his or her name is unknown); State v. Ingram, 20 N.C. App. 464, 466 (1974) (applying *Bennett* to indictment under Controlled Substances Act of 1972); *accord* State v. Redd, 144 N.C. App. 248, 256 (2001).

130. State v. Jones, 371 N.C. 548, 555 (2018); *cf.* G.S. 15A-302(c).

131. *Jones*, 371 N.C. at 555 (citation for transporting an open container was sufficient even absent allegations that the defendant was driving, on a public road or highway, with a container in the passenger area of the vehicle); State v. Allen, 247 N.C. App. 179, 183 (2016) (citation for transporting an open container was sufficient even absent an allegation that the container was in the passenger area of defendant's vehicle).

132. G.S. 15A-1221(b). This statute applies only (1) during jury selection and the guilt phase of the trial and (2) to the indictment(s) for the case currently being tried. State v. Flowers, 347 N.C. 1, 35 (1997).

133. G.S. 14-7.3 (prosecutor may "charge" a person as an habitual felon; an indictment which charges a person with being an habitual felon must contain date of prior felonies, etc.).

134. State v. Patton, 342 N.C. 633, 635 (1996); State v. Roper, 328 N.C. 337, 363 (1991); State v. Allen, 292 N.C. 431, 435 (1977).

135. G.S. 15A-924(d).

136. *See e.g.*, G.S. 14-72(b)(6) (habitual larceny); 14-33.2 (habitual misdemeanor assault); 14-415.1 (possession of firearm by a felon); 20-138.5 (habitual impaired driving); 90-95(e) (certain drug offenses); State v. Howell, 370 N.C. 647, 655 (2018) (construing G.S. 90-95(e) to create greater offense not merely enhance punishment); *cf.* State v. Burch, 160 N.C. App. 394, 396 (2003) (regarding habitual offenses).

137. G.S. 15A-928(a) ("accompanied by a special indictment or information"), (b) (or "incorporated . . . as a separate count"); *cf.* G.S. 15A-645 (pleadings subject to G.S. 15A-928); 15A-924(c) (same).

offense refers to the prior conviction, the name may not be used in the indictment or information but should be altered to avoid reference to the prior conviction.[138] When a misdemeanor with such an element is tried de novo in superior court, the State must replace the pleading with a statement of charges that complies with these provisions.[139] But failure to comply with statutory separate-count provisions is not a jurisdictional defect.[140]

2. As an Aggravating Sentencing Factor

Even when a prior conviction is not an element of the offense charged, prior conviction(s) may justify a longer sentence. For the most part, prior convictions are factored into a determination of the defendant's prior record level or prior conviction level.[141] Under a few statutes, relevant prior convictions also constitute aggravating factors at sentencing, and the particular pleading requirements are set out in the pertinent statutes.[142]

3. As "Elements" of Habitual Felon Status

As noted above, being an habitual felon is not a crime.[143] "[T]he status of habitual felon merely enhances the punishment of another crime."[144] By statute, any person who has been previously convicted of three felony offenses may be charged as a status offender.[145] An habitual felon indictment must be separate from the indictment charging the principal felony.[146] Under G.S. 14-7.3, an habitual felon indictment must include (1) the date the prior felonies were committed, (2) the name of the state or sovereign against which the felonies were committed, (3) the dates the felony convictions were returned, and (4) the identity of the court where the convictions took place.[147] An habitual felon indictment is sufficient if it provides a defendant with notice of the prior felony convictions.[148] Hence, deviations from the requirements of G.S. 14-7.3 are not fatal so long as the defendant received adequate notice.[149]

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138. G.S. 15A-928(a) ("improvised name or title must be used"). This manual contains forms that comply with G.S. 15A-928. It also contains simplified language that may be used in pleadings not subject to G.S. 15A-928.

139. G.S. 15A-928(d); *cf.* G.S. 15A-922(h).

140. State v. Newborn, 384 N.C. 656, 661 (2023) (construing G.S. 14-415.1(c), State v. Brice, 370 N.C. 244, 253 (2017) (construing G.S. 15A-928).

141. G.S. 15A-1340.14 (felony sentencing); 15A-1340.21 (misdemeanor sentencing).

142. *See* G.S. 15A-1340.16B(d) (Class B1 felony, victim under 13, and prior conviction of Class B1 felony); 20-179(a1)(1) (DWI appeal to superior court, defendant entitled to notice of aggravating factors).

143. *E.g.*, State v. Patton, 342 N.C. 633, 635 (1996). Yet cases persist in referring to prior convictions as "elements of the offense." *E.g.*, State v. Hefner, 289 N.C. App. 223, 232 (2023); State v. Griffin, 213 N.C. App. 625, 629 (2011).

144. State v. Roper, 328 N.C. 337, 363 (1991).

145. G.S. 14-7.1.

146. G.S. 14-7.3. An habitual felon indictment may be returned before or after the substantive felony indictment. State v. Blakney, 156 N.C. App. 671, 675 (2003). But an habitual felon indictment returned before the defendant has committed the principal offense will not support habitual felon status for that offense. *See* State v. Ross, 221 N.C. App. 185, 191 (2012).

147. G.S. 14-7.3.

148. State v. Briggs, 137 N.C. App. 125, 131 (2000); State v. Williams, 99 N.C. App. 333, 335 (1990) ("notice to a defendant that he is being tried as a recidivist"); *cf.* State v. Marshburn, 173 N.C. App. 749, 753 (2005) (notice is "the critical issue").

149. *See* State v. Griffin, 213 N.C. App. 625, 629 (2011) (misidentifying prior conviction); State v. Taylor, 203 N.C. App. 448, 455 (2010) (incorrect date); State v. Sinclair, 191 N.C. App. 485, 495 (2008) (failed to name state or sovereign); State v. Lewis, 162 N.C. App. 277, 285 (2004) (incorrect date and county); State v. Montford, 137 N.C. App. 495, 501 (2000) (state or sovereign); State v. Mason, 126 N.C. App. 318, 322 (1997) (same); State v. Hodge, 112 N.C. App. 462, 467 (1993) (same); State v. Smith, 112 N.C. App. 512, 516 (1993) (omitted date); *see also* Jeffrey B. Welty, *North Carolina's Habitual Felon, Violent Habitual Felon, and Habitual Breaking and Entering Laws*, Admin. of Just. Bull. No. 2013/07 (UNC School of Government, Aug. 2013).

IV. Fixing Pleading Problems

A prosecutor confronted with pleading errors has four main choices: (1) do nothing, an approach best suited for very minor problems; (2) move to amend the pleading, best suited for relatively minor problems; (3) supersede with a new pleading, used to address even serious problems; and (4) dismiss the case and recharge the defendant, similar in effect to superseding with a new pleading. Each of these approaches is discussed in greater detail below.

A. Doing Nothing

Minor problems that do not affect the validity of the pleading may be safely ignored. Examples of this type include slight misspellings in the name of the defendant[150] or the victim[151] or an error regarding the date or time of the offense when time is not of the essence.[152] Of course, a prosecutor is not obliged to ignore even minor issues, and these can be corrected by amendment.

B. Moving to Amend

In general, errors that may safely be ignored may also be corrected by amendment, whereas defects that render a pleading defective cannot be remedied by merely amending the pleading.[153] Obviously, this makes amendment a procedure of only limited utility. The text that follows summarizes the sorts of errors that might be addressed by amendment—the rules for indictments are ostensibly stricter than the rules for misdemeanor pleadings (see below)—and then considers the procedure a prosecutor should follow in amending a pleading.

By statute, a bill of indictment may not be amended.[154] The North Carolina Supreme Court has construed this to mean that a bill of indictment may not be amended in a manner that substantially

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150. State v. Stroud, 259 N.C. App. 411, 417 (2018) (indictment listed the defendant's middle name as Rashawn, but his actual middle name was Rashaun; the defendant failed to show prejudice); State v. Spooner, 28 N.C. App. 203, 204 (1975) (indictment named the defendant as Mike Spooner, but the defendant said his name was Michael Charles Irwin Spooner; variance was "immaterial").

151. State v. Pender, 243 N.C. App. 142, 151 (2015) (indictment named the victim as Vera Alston, but the victim was Vera Pierson; no fatal variance); State v. Mason, 222 N.C. App. 223, 227 (2012) (indictment named the victim as You Xing Lin, but the victim's name was Lin You Xing; variance was immaterial); State v. Bailey, 97 N.C. App. 472, 475 (1990) (indictment named the victim as Pettress Cebron, but the victim's name was Cebron Pettress; no error in allowing amendment); State v. Isom, 65 N.C. App. 223, 226 (1983) (indictment named the victim as Eldred Allison, but the victim's name was Elton Alison; variance was "wholly immaterial"); *but see* State v. Abraham, 338 N.C. 315, 340 (1994) (trial court erred by allowing the prosecutor to amend the victim's name from Carlose Antoine Latter to Joice Hardin).

152. State v. Jones, 248 N.C. App. 418, 425 (2016) (indictment listed date of offense as 17 December 2009, but State's evidence showed that date of offense was 18 October 2009; defendant failed to show prejudice); State v. Avent, 222 N.C. App. 147, 151 (2012) (indictment listed date of offense as 28 December 2009, but evidence showed that date of offense was 27 December 2009; no error in allowing amendment); State v. Riggs, 100 N.C. App. 149, 153 (1990) (indictment listed date of offense as 17 May 1989, but State's evidence showed date of offense was 15 May 1989; defendant was not deprived of any defense).

153. *See* State v. Brinson, 337 N.C. 764, 767 (1994) (amendment was permissible to specify items were "deadly weapons" where original indictment was sufficient to identify the items as deadly weapons); State v. Madry, 140 N.C. App. 600, 603 (2000) (defective warrant could not be cured by amendment); *cf.* State v. White, 202 N.C. App. 524, 529 (2010) (surplusage could be amended).

154. G.S. 15A-923(e). This seems to have codified the common law rule. *See* State v. Jackson, 280 N.C. 563 (1972); 1 Leipold, *supra* note 11, § 128 ("the historic rule"); *cf.* G.S. 15A-923(d) (information may be amended only with consent of the defendant).

alters the charged offense.[155] Undoubtedly, a fatally defective indictment cannot be cured by amendment.[156]

In considering whether an amendment otherwise constitutes a substantial alteration, courts consider the purposes served by indictments, including enabling a defendant to prepare for trial.[157] Where time is not of the essence and the defendant has not been prejudiced, an amendment relating to the date of offense charged is permissible.[158] Likewise, an amendment that does not implicate the elements of the offense is less objectionable.[159] By contrast, an amendment that alters allegations relied on by the defendant in preparing a defense is prohibited.[160] Similarly, an amendment that results in a misdemeanor being elevated to a felony is a substantial alteration.[161] Whether changing a victim's name substantially alters the charge seems to depend on how drastically the name is changed.[162]

Misdemeanor pleadings may be amended at any time "when the amendment does not change the nature of the offense."[163] The substantial-alteration standard for indictments and the changed-nature standard for misdemeanor pleadings have been treated as essentially identical.[164] It should be noted, however, that by statute a warrant may be amended to correct allegations pertaining to the ownership of property.[165] This would seem to permit amendment of the victim's name in a larceny case to specify an entity capable of owning property, whereas such amendment may not be permissible for

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155. State v. Farrar, 361 N.C. 675, 677 (2007).

156. State v. Maloney, 253 N.C. App. 563, 570 (2017); *see also* State v. De la Sancha Cobos, 211 N.C. App. 536, 541 (2011) (adding an element is substantially altering the indictment).

157. State v. Silas, 360 N.C. 377, 380 (2006).

158. State v. Price, 310 N.C. 596, 600 (1984) (murder); State v. Avent, 222 N.C. App. 147, 151 (2012) (murder); State v. Riffe, 191 N.C. App. 86, 94 (2008) (sexual exploitation of a minor); State v. Coltrane, 188 N.C. App. 498, 501 (2008) (possession of a firearm by a felon).

159. State v. Lawson, 285 N.C. App. 404, 411 (2022) (animal cruelty indictment properly amended to strike name of horse); State v. Stith, 246 N.C. App. 714, 717 (2016) (drug possession indictment amended to strike "Schedule II"), *aff'd per curiam*, 369 N.C. 516 (2017); State v. Tucker, 227 N.C. App. 627, 632 (2013) (embezzlement indictment amended to add "or agent"); State v. McCallum, 187 N.C. App. 628, 636 (2007) (robbery indictment amended to remove value of property); State v. Brady, 147 N.C. App. 755, 759 (2001) (indictment for obtaining controlled substance by fraud amended to change drug); State v. Parker, 146 N.C. App. 715, 719 (2001) (indictment for false pretenses amended to change items pawned); *but see* State v. Hill, 262 N.C. App. 113, 117 (2018) (kidnapping indictment impermissibly amended to add felony facilitated); State v. Simmons, 256 N.C. App. 347, 355 (2017) (drug trafficking indictment impermissibly amended from heroin to opiates); State v. Maloney, 253 N.C. App. 563, 570 (2017) (possession of precursor chemicals indictment impermissibly amended to add mens rea).

160. *Silas*, 360 N.C. at 383 (breaking and entering, changing the intended felony); State v. Frazier, 251 N.C. App. 840, 842 (2017) (negligent child abuse, changing the nature of the negligent conduct); State v. Morris, 185 N.C. App. 481, 484 (2007) (kidnapping, changing the alleged purpose of the confinement, restraint, or removal); State v. Moore, 162 N.C. App. 268, 274 (2004) (drug paraphernalia, changing "a can designed as a smoking device" to "a brown paper container").

161. State v. Winslow, 169 N.C. App. 137 (Hunter, J. dissenting in part), *rev'd based on dissent*, 360 N.C. 161, 623 S.E.2d 11 (2005); State v. Moses, 154 N.C. App. 332, 338 (2002).

162. State v. Abraham, 338 N.C. 315, 340 (1994) (impermissible amendment to change name from Carlose Antoine Latter to Joice Hardin); State v. Abbott, 217 N.C. App. 614, 618 (2011) (impermissible amendment struck "incorporated" from name of larceny victim); *but see* State v. McNair, 146 N.C. App. 674, 678 (2001) (no error in allowing amendment of victim's name from Donald Cook to Ronald Cook); State v. Hewson, 182 N.C. App. 196, 212 (2007) (Gail Hewson Tice to Gail Tice Hewson); State v. Holliman, 155 N.C. App. 120, 126 (2002) (Tamika to Tanika); *cf.* State v. Ingram, 160 N.C. App. 224, 226 (2003) (deleting one robbery victim's name), *aff'd per curiam*, 358 N.C. 147 (2004).

163. G.S. 15A-922(f) (statement of charges, criminal summons, warrant for arrest, citation, or magistrate's order).

164. State v. Reavis, 287 N.C. App. 322, 328 n.2 (2022) ("neither an indictment nor a statement of charges may be amended in a manner that changes the nature of the offense"); *but see* State v. Bohannon, 26 N.C. App. 486, 487 (1975) (distinguishing warrant defect cases from indictment defect cases).

165. G.S. 15-24.1 (abrogating State v. Cooke, 246 N.C. 518, 521 (1957)).

indictments.[166] As with indictments, misdemeanor charging documents may not be amended so as to charge the defendant with committing an entirely different offense.[167]

Assuming amendment is permissible, the amendment should be made in writing.[168] The usual practice is for the prosecutor to move to amend, for the court to rule on the motion, and for someone—the prosecutor, the clerk, or the judge—to mark the amendment on the court's copy of the pleading and to initial it. As for timing, North Carolina courts have permitted amendments to indictments as late as during trial.[169] By statute, misdemeanor pleadings may be amended at any time.[170]

C. Superseding with a New Pleading

Even fatal defects in an indictment or information can be remedied by obtaining a superseding indictment or information that correctly charges the offense.[171] It has long been the law in this state that prior indictment constitutes no legal impediment to putting the defendant on trial upon a later and more perfect bill.[172] By statute, if, before trial or plea, another indictment or information is filed in the same court charging the defendant with an offense charged or attempted to be charged in the first instrument, the first is superseded by the second "with respect to the offense."[173] But the first instrument is not superseded with respect to any count not charged in the second.[174] A superseding indictment may be used to eliminate unnecessary details in the original pleading upon which the defendant might rely to his or her prejudice.[175] A superseding indictment should not, however, be used to add unnecessary details to an otherwise valid pleading.[176]

In the district court, misdemeanor pleadings may be superseded by a statement of charges. By statute, when a statement of charges is filed, it supersedes all previous pleadings and constitutes the pleading of the State.[177] Because a statement of charges entirely supersedes the prior pleading (i.e., not only with respect to an offense previously charged[178]), a prosecutor must take care to include in the statement of charges any offenses he or she wishes to retain from a prior pleading. A statement of charges filed prior to arraignment in district court may charge the same offenses as a prior

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166. *Compare* State v. Capps, 374 N.C. 621, 627 (2020) (no error in allowing amendment to victim's name in warrant for larceny from "Loves Truck Stop" to "Love's Truck Stops & Country Stores, Inc."); *with* State v. Cathey, 162 N.C. App. 350, 354 (2004) (larceny indictment could not be amended to add "Incorporated"), *overruled in part on other grounds by* State v. Campbell, 368 N.C. 83 (2015).

167. State v. Bryant, 267 N.C. App. 575, 578 (2019) (larceny to shoplifting); State v. Carlton, 232 N.C. App. 62, 66 (2014) (representative of an illegal lottery to possession of lottery tickets); *cf. In re* Davis, 114 N.C. App. 253, 256 (1994) (burning real property to burning personal property).

168. G.S. 15A-951 (in general, a motion must: (1) be in writing, (2) state the grounds, (3) set forth relief sought).

169. State v. Snyder, 343 N.C. 61, 64 (1996) (no error in allowing amendment at the close of the State's evidence); State v. Kamtsiklis, 94 N.C. App. 250, 255 (1989) (no error in allowing amendment on the morning of trial).

170. G.S. 15A-922(f) ("at any time prior to or after final judgment").

171. *See* State v. Camacho, 329 N.C. 589, 596 (1991) ("incomplete or defective"); State v. Bailey, 145 N.C. App. 13, 21 (2001) ("an error in the form"); State v. Allen, 144 N.C. App. 386, 391 n.5 (2001) (fatal defect).

172. State v. Carson, 320 N.C. 328, 333 (1987).

173. G.S. 15A-646; *cf.* State v. Stallings, 271 N.C. App. 148, 156 (2020) (rejecting the argument that the trial court lacked jurisdiction because a superseding information was not filed prior to the first day of trial).

174. G.S. 15A-646; State v. Bailey, 145 N.C. App. 13, 21 (2001) (charges not superseded).

175. State v. Silas, 360 N.C. 377, 381 (2006) (indictment for felony breaking and entering need not allege the felony that the defendant intended to commit inside the dwelling).

176. *See* State v. Fuller, 179 N.C. App. 61, 67 (2006) (aiding and abetting need not be alleged).

177. G.S. 15A-922(a) (statement of charges "supersedes all previous pleadings").

178. *Cf.* G.S. 15A-646.

misdemeanor pleading or charge additional or different offenses.[179] Unless the statement of charges makes no material change in the pleadings, a defendant, upon motion, is entitled to a continuance of three days after a statement of charges is filed or the defendant is first notified.[180]

D. Dismissing the Case and Re-Charging

When it is not practical or possible to amend or supersede an existing charging document, the prosecutor may choose to dismiss and recharge the defendant.[181] There is no double jeopardy problem with this procedure so long as the State dismisses the pleading before jeopardy attaches.[182] Even if trial has begun, there is no double jeopardy problem if the original pleading was fatally defective.[183] Later misdemeanor charges may, however, be barred by the statute of limitations.[184]

The new charge may be initiated in any way that is permissible for the offense in question. For a misdemeanor, an officer could issue a new citation or a judicial official could issue a new summons or warrant.[185] New felony charges could also be initiated by a new summons or warrant but would eventually require a new indictment or a waiver of indictment and information.[186] If the defendant posted bond on the original charge and appeared in court as required, the prosecutor should consider using a form of pleading that will not result in a new arrest.

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179. G.S. 15A-922(d); *cf.* State v. Capps, 374 N.C. 621, 628 (2020) ("before arraignment a prosecutor may file a statement of charges that changes the nature of the offense, but after arraignment the prosecutor may only file a statement of charges that does not change the nature of the offense").

180. G.S. 15A-922(b)(2).

181. State v. Friend, 219 N.C. App. 338, 343 (2012) (no due process violation in refiling charges).

182. In superior court, jeopardy attaches when the jury is impaneled. State v. Schalow, 251 N.C. App. 334, 343 (2016). In district court, jeopardy attaches when the first witness begins to testify. State v. Ward, 127 N.C. App. 115, 121 (1997).

183. *See* State v. Brunson, 327 N.C. 244, 246 (1990).

184. G.S. 15-1 (establishing two-year statute of limitations for most misdemeanors but allowing one year from abandonment of defective charge); *cf.* G.S. 15A-931(b) (statute of limitations not tolled by voluntary dismissal).

185. G.S. 15A-922(a). Use of a statement of charges to initiate a prosecution is not authorized by statute. *Id.*

186. G.S. 15A-923(a); *cf.* State v. Fields, 374 N.C. 629, 636 (2020) (when judgment is arrested due to a fatally defective indictment, the State may seek a new indictment).