

CREATIVE DISTRICT COURT MOTIONS

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I. **BRADY MATERIAL**

A. **INFORMATION “MATERIAL EITHER TO GUILT OR TO PUNISHMENT.”** *Brady v. State of Maryland*, 373 U.S. 83, 88 (1963).

1. **Definitions of Materiality**

- a. Information that could “...in any reasonable likelihood have affected the judgment of the jury.” *Giglio v. U.S.*, 405 U.S. 150, 154 (1972) (citing *Napue v. Illinois*, 360 U.S. 264, 271 (1959)).
- b. Information is also material “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (quoting *U.S. v. Bagley*, 473 U.S. 667, 682 (1985)).
- c. “Reasonable probability” of a different result exists when the State’s failure to disclose “undermines confidence in the outcome of the trial.” *Kyles* at 434.
- d. Question is whether, in the absence of the information at issue, the defendant received a fair trial with a verdict worthy of confidence, NOT whether the defendant would more likely than not have received a different verdict. *Kyles* at 434.
- e. Required showing is that the undisclosed evidence “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Kyles* at 435.
- f. Information must be considered in conjunction with other evidence, not on an isolated basis, so as to determine the cumulative effect the undisclosed information could have had on the jury. *Kyles* at 436-7.

B. **TYPES OF INFORMATION INCLUDED**

1. **Exculpatory.** *Brady* at 88; *Kyles* at 433 (quoting *Bagley* at 682)
 - a. Negate guilt. *Brady* at 88
 - b. Reduce the penalty. *Brady* at 88
2. **Impeachment.** *Kyles* at 433 (quoting *Bagley* at 682).
 - a. Evidence affecting the credibility of the State’s witnesses. *Giglio* at 154 (citing *Napue* at 269); *Giles v. Maryland*, 386 U.S. 66 (1967).
 - b. Must still satisfy test for materiality referenced above.

C. **BASIS IS DUE PROCESS.** *Brady* at 87.

D. **NO GOOD FAITH EXCEPTION.** *Brady* at 87.

Failure to produce material information results in a new trial “irrespective of the good faith or bad faith of the prosecution.”

E. **PROSECUTOR’S DUTY TO INQUIRE**

1. Prosecutor has “a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.” *Kyles* at 437.
2. Duty to disclose is triggered only if, in the prosecutor’s judgment, the information favorable to the defense is also material under the analysis described above. *Kyles* at 437. (Since there is no good faith exception to excuse a failure to disclose made with the belief that the information was not material, a reviewing court may find a *Brady* violation despite a prosecutor’s attempt to apply the requisite analysis).

F. SPECIFIC EXAMPLES – SEE SAMPLE MOTION ATTACHED.

II. NON-TESTIMONIAL IDENTIFICATION ORDER (AKA “LINEUPS”) UNDER N.C. GEN. STAT. 15A-281

(distinguish such orders issued at prosecutor’s request)

- A. **ELIGIBLE CHARGES: FELONIES AND CLASS A1 AND CLASS 1 MISDEMEANORS.**
- B. **PERSONS SUBJECT:** defendant may request the procedure be conducted upon himself (i.e., that he be included in the array to determine whether he can be identified), but he may not request such an order directed against anyone else. *State v. Tucker*, 329 N.C. 709 (1991).
- C. **REQUIRED SHOWING:** that results of lineup will be of “material aid” in determining whether the defendant committed the offense charged.
 1. If defendant makes the required showing, the judge **MUST** order the State to conduct the identification procedures.
 2. Cases interpreting “material aid”:
 3. a. *State vs. Yancey*, 58 N.C. App. 52 (1982) (upholding trial court’s finding that procedure would not be of material aid where there “was substantial evidence identifying the defendant which did not depend on [the witness’s] ability to recognize him at the trial,” including the defendant’s statement to an officer that he “was driving the vehicle at the time the evidence showed it was used in the breakin (sic),” the testimony of 2 officers that the defendant said he knew the witness had gotten his license number at the scene, and evidence that the defendant threw from the vehicle items that had been in the victim’s residence).
 4. b. *State vs. Abdullah*, 66 N.C. App. 173 (1984) (upholding trial court’s finding that procedure would not be of material aid where “identification of defendant did not depend upon just the victim’s testimony at trial” in that, along with other identification evidence, “immediately after the crime he was identified by a host of people who saw him at the scene of the robbery, during the chase, and upon his removal from the dumpster. These same people...saw the defendant throw away the stolen pocketbook and a distinctive jacket that he was wearing...”).
- D. **FORMS:** live visual or aural, photographic, or recorded voice samples will be most common for district court, but statute also applies to fingerprints, palm

prints, footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, or other reasonable physical examination, handwriting exemplars, or similar identification procedures requiring the presence of a suspect. N.C. Gen. Stat. 15A-271.

- E. **RESULTS:** The defendant, or his attorney, must be given a copy of the reports of results as soon as the reports are available. N.C. Gen. Stat. 15A-282. (Your motion should also ask that results be filed with the Court-see sample motion and order attached).
- F. **PROCEDURES:** they vary; move to have yours comport with the Witness Identification Procedure Recommendations promulgated by the N.C. Actual Innocence Commission in 2003 (attached).

III. MOTIONS FOR APPROPRIATE RELIEF

A. GENERAL PROCEDURAL REQUIREMENTS

1. **Grounds for motion by defendant made within 10 days after verdict.** 15A-1414.
2. **Grounds for motion by def. made more than 10 days after verdict.** 15A-1415(b). The most significant ones in district court include:
 - a. 15A-1415(b)(2) the trial court lacked jurisdiction over the person of the defendant or over the subject matter.
 - b. 15A-1415(b)(3) the conviction was obtained in violation of the Constitution of the United States of the Constitution of North Carolina. (e.g., defendant was not advised of his right to counsel or did not waive counsel – use to invalidate a prior conviction relevant to sentencing on new charge, or to invalidate conviction in probation violation proceeding).
 - c. 15A-1415(b)(7) There has been a significant change in law, either substantive or procedural, applied in the proceedings leading to the defendant’s conviction or sentence, and retroactive application of the changed legal standard is required. (e.g., probation violation on level 1 DWI – contend *Blakely* should be retroactively applied under the *Teague* analysis and that aggravating factors that are not prior convictions were improperly found and should be stricken, thereby reducing sentencing level.)
 - d. 15A-1415(b)(8) The sentence imposed was unauthorized at the time imposed, contained a type of sentence disposition or a term of imprisonment not authorized for the particular class of offense and prior record or conviction level was illegally imposed (sic), or is otherwise invalid as a matter of law. (see statute for limitation on judicial jurisdiction)
3. **Procedural requirements:** (these are highlighted provisions; see 15A-1420 for more detail)
 - a. in writing.
 - b. state the grounds for the motion and relief sought.

- c. serve in accordance with 15A-951(b); delivering a copy to the DA is sufficient.
- d. file in accordance with 15A-951(c); requires certificate of service and clerk's file stamp.
- e. requires supporting affidavit if motion is based upon facts not ascertainable from the records and any transcript or not within the knowledge of the judge who hears the motion. 15A-1420(b).

B. PROBATION VIOLATION CASES

1. Initial period of probation exceeds that authorized by statute

- a. 15A-1343.2(d) states, "Unless the court makes specific findings that longer or shorter periods of probation are necessary, the length of the original period of probation for offenders sentenced under Article 81B (Structured Sentencing) shall be as follows:
 - (1) For misdemeanants sentenced to community punishment, not less than six nor more than 18 months;
 - (2) For misdemeanants sentenced to intermediate punishment, not less than 12 nor more than 24 months;
 - (3) For felons sentenced to community punishment, not less than 12 nor more than 30 months; and
 - (4) For felons sentenced to intermediate punishment, not less than 18 nor more than 36 months."
- b. Box on judgment form finding longer period usually is not marked (checking this box is enough; no specific findings are required).
- c. File written MAR to reduce probationary period to one authorized by above statute (sample attached).
- d. Once you win the MAR and the probationary period is reduced, make an oral **Motion to Dismiss** if the probation violation report was not filed with the Clerk (not just signed by the probation officer) within the modified period of probation; basis is lack of jurisdiction to conduct the violation hearing. (sample attached)
- e. Under 15A-1344(f), the court may revoke probation after the expiration of the period of probation only if before the expiration of the period of probation the State has filed a written motion with the clerk indicating its intent to conduct a revocation hearing AND the court finds that the State has made reasonable efforts to notify the probation and to conduct the hearing earlier.
- f. State must prove jurisdiction to conduct the violation hearing beyond a reasonable doubt. *State v. Moore*, 148 N.C. App. 568 (2002) (finding court lacked jurisdiction to conduct a violation hearing where violation report was in the clerk's file but was not file stamped). *See also State v. Cannady*, 59 N.C. App. 212 (1982).

- g. *State v. Hall*, 160 N.C. App. 593 (2003) (holding no jurisdiction to conduct probation violation hearing without finding that the State made a reasonable effort to conduct the hearing before the expiration of defendant's period of probation).
2. **Initial period of probation lawfully exceeds 3 years but no 3-year review was conducted.**
- a. 15A-1342(d) is captioned "Mandatory Review of Probation" and reads, "Each probation officer must bring the cases of each probationer assigned to him before a court with jurisdiction to review the probation when the probationer has served three years of a probationary period greater than three years... The court must review the case file of a probationer so brought before it and determine whether to terminate his probation."
- b. File MAR contending that without such a review, your client has not lawfully been kept on probation after that three year period; then **move to dismiss** for lack of jurisdiction to conduct a revocation hearing. *See, e.g., Moore and Hall* above.
3. **Initial period probation was extended but unlawfully.**
- a. 15A-1342(a) allows a court to extend the initial period of probation, but only on certain conditions:
- purpose must be to pay restitution OR to continue medical or psychiatric treatment ordered as a condition of probation
 - extension may not exceed 3 years beyond original probation period
 - extension may be ordered only in the last 6 months of the original probationary period (unpublished opinion not yet final in Court of Appeals at the writing of this manuscript holds that extension entered outside the last six months of the original period of probation occurred without jurisdiction, that probation ended, and that as a result the court was now without jurisdiction to conduct a violation hearing. *State v. McNeil*, 2005 N.C. App. LEXIS 414)).
 - defendant must consent to extension (failure to object to extension of probationary period when court continued defendant on probation rather than activating sentence, and subsequent acceptance of the terms and benefits of the modification order, constitute consent. *State v. Rush*, 158 N.C. App. 738 (2003)).
- b. File written MAR contending extension of probationary period was invalid and that probation ended on the original expiration date.
- c. When you win the MAR, make an oral **Motion to Dismiss** the probation violation for lack of jurisdiction. *See, e.g., Moore and Hall* above.
4. **Conviction itself was unlawful – vacate conviction and sentence**
- a. Conviction obtained in violation of right to counsel

•“A suspended sentence that may ‘end up in the actual deprivation of a person's liberty’ may not be imposed unless the defendant was accorded ‘the guiding hand of counsel’ in the prosecution for the crime charged.” Only exception is that the defendant knowingly and intelligently waived that right. *Alabama v. Shelton*, 535 U.S. 654 (2002); *State v. Neeley*, 307 N.C. 247 (1982).

•Waiver of counsel may not be presumed from a silent record. *Neeley* at 252.

•Issue is constitutional; State must prove validity of conviction.

- b. Conviction not supported by charging document (sample)
“A criminal pleading must contain...a plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts fact supporting every element of a criminal offense...” 15A-924(a) and (e). For example, conviction is for class 1 possession of marijuana but pleading does not allege element of more than ½ but less than 1 ½ ounces, or judgment reflects sentence for Class 1 Injury to Personal Property over \$200 but the pleading does not allege that damage exceeds \$200 thereby charging only Class 2 Injury to Personal Property.

C. **ELIMINATING CONVICTIONS FOR STRUCTURED SENTENCING PURPOSES** (MAR to vacate conviction to prevent the State from using it in calculating sentencing level in the current case)

1. Conviction obtained in violation of right to counsel – see authority under Probation Violation Cases above.
2. Conviction not supported by charging document – see authority under Probation Violation Cases above.

IV. **RESTITUTION – MAKE THE STATE PROVE ENTITLEMENT AND AMOUNT**

A. **ENTITLEMENT:**

1. “**Victim,**” defined to be a person directly and proximately harmed as a result of the defendant’s commission of the criminal offense. 15A-1340.34(a)
2. “**Aggrieved Party,**” defined to include individuals, firms, corporations, associations, other organizations, and government agencies. 15A-1343(d).

B. **AMOUNT**

1. **Offense resulting in bodily injury** 15A-1340.35(a)(1)
2. **Offense resulting in damage, loss, or destruction of property of a victim of the offense** 15A-1340.35(a)(2)
 - a. return of the property
 - b. if return is impossible, impracticable, or inadequate, then EITHER the value of the property on the date of the damage, loss, or destruction, OR the value of the property on the date of sentencing, less the value of any part of the property that is

returned. THIS IS NOT A REPLACEMENT VALUE
STATUTE

3. Defendant's Ability to Pay

1. The Court must consider the defendant's ability to pay and may order partial restitution if the total loss exceeds the defendant's ability to pay. Factors are more particularly set out in 15A-1340.36(a).
2. Specific findings of fact are not required, but the amount ordered must be supported by the record. 15A-1340.36(a); *State v. Smith*, 90 N.C. App. 161 (1988) (citing *State v. Hunter*, 315 N.C. 371(1986)).
3. It is error to order the defendant to pay restitution in an amount that he clearly cannot pay. *Id.*

C. Request that the Clerk be ordered in the judgment to allocate receipts to restitution first and then to costs, fines, supervision fees, etc.

V. MOTION TO DISMISS CONDITION OF PROBATION FOR FAILURE TO SET FORTH IN WRITING (may use in violation hearing/contend condition invalid)

- A. **WRITING REQUIREMENT:** "A defendant released on supervised probation must be given a written statement explicitly setting forth the conditions on which he is being released. If any modification of the terms of that probations is subsequently made, he must be given a written statement setting forth the modifications." 15A-1343(c).
- B. **WRITING IS MANDATORY;** oral notice is not a satisfactory substitute. *State v. Seek*, 152 N.C. App. 237 (2002).
- C. **"REGULAR CONDITIONS":** "It is not necessary for the presiding judge to state each regular condition of probation in open court, but the conditions must be set forth in the judgment of the court." 15A-1343(b).
- D. **VACATE IF NOT WRITTEN:** Failure to give the required written notice results in that condition of probation being vacated. *State v. Lambert*, 2004 N.C. App. LEXIS 141 (unpublished).

VI. MOTION TO RECORD DISTRICT COURT PROCEEDINGS

15A-1241(b) allows any party to require that all proceedings be recorded. That provision is not limited to Superior Court. 15A-1101 states that trial procedure in District Court is in accordance with the provisions set forth for Superior Court. Subsection (2) does not prohibit recording in District Court, it simply provides that recording is not automatically required for District Court proceedings. See sample motion attached.

VII. MOTION TO DISMISS FOR VIOLATION OF STATUTE OF LIMITATIONS UNDER NCGS 15-1

- A. **REQUIREMENTS FOR APPLICABILITY IN DISTRICT COURT**
 1. misdemeanor charge except malicious or infamous ones
 2. offense date is more than 2 years prior to court date.

3. has not been tried in district court, regardless of the reason (OFA etc.); trial in District Court on a valid warrant tolls statute of limitations while the case is appealed. *State v. Hundley*, 272 N.C. 491 (1968); *State v. Underwood*, 244 N.C. 68 (1956).
4. no *indictment* or *presentment* has been issued.
5. for purposes of this argument, it does not matter if warrant/summons/magistrate's order was issued within 2 years of offense date.

B. MUST BE RAISED AS AN AFFIRMATIVE DEFENSE.

C. NOT REPEALED BY OTHER STATUTES: 15A-641 (re: indictments, informations, presentments) has been specifically held not to repeal/modify 15-1.

D. RED HERRING

Do not let the DA rely on the statement in *State v. Madry*, 140 N.C. App. 600, 603, (2000), that "Our Supreme Court has affirmatively stated that this statutory period is tolled upon the issuance of a *valid* warrant." In that case the issue was whether a District Court trial on a warrant later determined to be fatally defective was sufficient to toll the statute of limitations. The *Madry* Court's focus was the validity of the initial warrant, and so its analysis focused only on that portion of the test. Accordingly, their analysis did not address the remaining requirement, trial in district court, which was satisfied and therefore not part of the issue before the Court.

G. EXCEPTION TO THE RULE

A warrant or indictment issued more than two years after the alleged offense date does not violate the statute of limitations IF a presentment was issued within two years of the offense date. *See also State v. Whittle*, 118 N.C. App. 130, 454 S.E.2d 688 (1995).

H. DEPARTING FROM TRADITIONAL ANALYSIS – see bench brief attached.

The traditional analysis of statute of limitations for misdemeanors would be that as long as the defendant was charged by warrant (not indictment) within 2 years of the offense date, there is no violation. However, there is an argument that if the defendant is charged but not tried in district court within 2 years, there is a violation. 15-1 does not say that and no court has directly ruled on this issue, but the argument is worth a try. See attached bench brief. The point is that to rule otherwise would fly in the face of the obvious intention of our legislature and our courts to give some finality to the prosecution of misdemeanors.

VII. JOINDER/MOTION TO DISMISS FOR FAILURE TO JOIN

A. JOINDER OF RELATED OFFENSES

1. Offenses must be based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan. 15A-926(a).
2. Timely motion must be granted unless:
 - a. prosecutor lacks sufficient evidence to try some of the offense at that time; OR

- b. the ends of justice would be defeated is motion granted. 15A-926(c)(1).
3. Waived if not asserted. 15A-926(c)(1).
4. For form, visit www.nccourts.org, click on Forms, retrieve Form #AOC-CR-212.

B. MOTION TO DISMISS 15A-926(C)(2)

1. Make motion before second trial
2. must not have plead guilty or no contest to previous charge
3. must be granted unless motion for joinder was either waived or denied, or ends of justice would be defeated by dismissal

VIII. OTHER SAMPLE MOTIONS INCLUDED – SEE ATTACHED

- A. DEMAND FOR SPEEDY TRIAL PURSUANT TO N.C.G.S. 15A-711(C)**
- B. THIRD PARTY MOTION TO RECOVER SEIZED VEHICLE**