

## 12.4 Stages of Criminal Case in which Right to Counsel Applies

The right to counsel in a criminal case encompasses various proceedings. The Sixth Amendment right to counsel attaches once adversarial judicial proceedings have commenced and applies to any critical stage thereafter. Other constitutional provisions and state statutes afford the defendant the right to counsel at additional proceedings, both before and after the initiation of judicial proceedings.

### A. When Right to Counsel Attaches

**Sixth Amendment right to counsel after commencement of judicial proceedings.** The Sixth Amendment right to counsel attaches on commencement of adversarial judicial proceedings against the defendant, “whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.” *Kirby v. Illinois*, 406 U.S. 682, 689 (1972); accord *State v. Tucker*, 331 N.C. 12, 33 (1992). The question of when judicial proceedings commence affects both the procedures for appointment of counsel (the subject of this chapter) and the lawfulness of police procedures—for example, whether the defendant has a Sixth Amendment right to counsel during interrogation or at a lineup. See *infra* Chapter 14, Suppression Motions.

Generally, when a defendant is arrested for a felony or misdemeanor (with or without a warrant), the Sixth Amendment right to counsel attaches at the defendant’s initial appearance before a judicial official—in North Carolina, usually before a magistrate under G.S. 15A-511. See *Rothgery v. Gillespie County*, 554 U.S. 191, 213 (2008) (so holding because “a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings”). The initial appearance itself is not a critical stage of the proceedings at which a defendant must have counsel. *Id.*, 554 U.S. at 212; see also *State v. Detter*, 298 N.C. 604 (1979) (first appearance before judge [at which courts formerly held that right to counsel attached] is not critical stage). The State, however, must afford counsel to the defendant within a reasonable time after the initial appearance to allow for adequate representation at any critical stage thereafter. *Rothgery*, 554 U.S. at 212. *Rothgery* effectively overruled earlier cases holding that the Sixth Amendment right to counsel attached at the defendant’s first appearance before a judge. See, e.g., *State v. Franklin*, 308 N.C. 682 (1983) (taking of statement after arrest and before first appearance did not violate Sixth Amendment). In felony cases in which the defendant is in custody, first appearances occur fairly quickly—under G.S. 15A-601, no later than 96 hours after arrest and in practice usually sooner. In misdemeanor cases in which the defendant is in custody, first appearances are not statutorily required. Some districts have a practice of holding first appearances in misdemeanor cases; but, in those districts that do not do so, a defendant’s first appearance in court may be on the arresting officer’s next court date, which could be weeks after arrest. By holding that adversary judicial proceedings commence on initial appearance, *Rothgery* may advance the attachment of the Sixth Amendment right to counsel in misdemeanor prosecutions in North Carolina.

If the defendant is indicted before being arrested, the Sixth Amendment right to counsel attaches on return of the indictment. *See Kirby*, 406 U.S. 682. *Rothgery* did not alter this principle.

**Statutory right to counsel before commencement of proceedings.** G.S. 7A-451(b) provides that the right to counsel attaches immediately after arrest, and it lists certain proceedings at which counsel must be provided. The North Carolina courts have interpreted the statute with respect to some of the listed proceedings, such as lineups, as not affording a defendant a greater right to counsel than provided by the Sixth Amendment. *See State v. Henderson*, 285 N.C. 1 (1974), *vacated on other grounds*, 428 U.S. 902 (1976). However, other statutes specifically provide a defendant with a statutory right to counsel at certain proceedings before attachment of the Sixth Amendment right to counsel. *See infra* § 12.4C, Particular Proceedings.

**Fifth Amendment right to counsel before commencement of proceedings.** Criminal defendants have a right under the Fifth and Fourteenth Amendments to the U.S. Constitution to have counsel present during a custodial interrogation. *See Miranda v. Arizona*, 384 U.S. 436 (1966). Once judicial proceedings have begun and the defendant invokes his or her right to counsel, the Sixth Amendment also protects the defendant from interrogation without counsel present. *See infra* § 12.4C, Particular Proceedings.

**Sixth Amendment right at critical stages at trial level.** After commencement of judicial proceedings, a defendant has a Sixth Amendment right to counsel at all critical stages. A “critical stage” includes any proceeding where potential substantial prejudice to the defendant’s rights inheres in the particular proceeding and the assistance of counsel would help avoid that prejudice. *See Coleman v. Alabama*, 399 U.S. 1 (1970); *State v. Robinson*, 290 N.C. 56 (1976). Critical stages include both pretrial and trial proceedings but generally end on judgment and sentence at the trial level. *But cf. Mempa v. Rhay*, 389 U.S. 128 (1967) (trial judge placed defendant on probation without fixing term of imprisonment; subsequent probation revocation proceeding at which judge determined and imposed sentence was form of deferred sentencing, and defendant had Sixth Amendment right to counsel); 3 LAFAVE, CRIMINAL PROCEDURE § 11.2(b), at 624 (certain post-verdict motions made immediately after conclusion of trial are extension of trial proceedings and should be treated as subject to Sixth Amendment).

**Other constitutional and statutory rights.** Constitutional provisions other than the Sixth Amendment afford defendants additional rights to counsel after judgment and sentence at trial. For example, a person has a due process right to counsel for a first appeal of right. A defendant has statutory rights to counsel after judgment and sentence at the trial level, including the right to counsel for probation revocation proceedings, postconviction motions, and additional appeals. *See infra* § 12.4C, Particular Proceedings.

### C. Particular Proceedings

Listed below are various criminal proceedings where, as a matter of constitutional law or state statute, a defendant in North Carolina is entitled to counsel.

**Lineup after judicial proceedings have commenced.** This is a critical stage, and the defendant has a Sixth Amendment right to counsel. *See United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *see also State v. Henderson*, 285 N.C. 1 (1974) (recognizing that defendant does not have Sixth Amendment right to counsel where lineup occurs before adversarial judicial proceedings have commenced; also stating that G.S. 7A-451(b)(2), which gives defendant right to counsel at pretrial identification procedures, was apparently intended to be consistent with U.S. Supreme Court's interpretation of Sixth Amendment), *vacated on other grounds*, 428 U.S. 902 (1976); ROBERT L. FARB, *ARREST, SEARCH, & INVESTIGATION IN NORTH CAROLINA* at 559 (UNC School of Government, 4th ed. 2011) (defendant has Sixth Amendment right to counsel when appearing in lineup or showup at or after adversary judicial proceedings have begun); *cf. United States v. Ash*, 413 U.S. 300 (1973) (no Sixth Amendment right to counsel at photographic identification procedure). In *Rothgery v. Gillespie County*, 554 U.S. 191 (2008), the Court held that the Sixth Amendment right to counsel attaches at initial appearance; therefore, defendants have a right to have counsel present at any live lineup following initial appearance.

If a violation occurs, the identification must be suppressed. Further, an in-court identification by a witness who took part in an unconstitutional pretrial lineup must be excluded unless the State demonstrates by clear and convincing evidence that the in-court identification is of independent origin and not tainted by the illegal pretrial procedure. *See State v. Hunt*, 339 N.C. 622, 646–47 (1994).

A pretrial identification procedure conducted before the commencement of judicial proceedings may violate Due Process and be subject to suppression if it was unduly suggestive and created a risk of misidentification. The procedure also may violate statutory requirements. *See infra* § 14.4A, Pretrial Identification Procedures: Constitutional and Statutory Requirements; § 14.4B, Statutory Requirements for Lineups; and §14.4C, Constitutional Requirements.

**Deliberate elicitation of information by police after judicial proceedings have commenced.** This is a critical stage, and the defendant has a Sixth Amendment right to counsel. *See Fellers v. United States*, 540 U.S. 519 (2004); *Massiah v. United States*, 377 U.S. 201 (1964); *State v. Tucker*, 331 N.C. 12 (1992) (taking of statement by police after first appearance [now, initial appearance] violated Sixth Amendment right to counsel); *see also* FARB at 550 (officers' deliberate efforts, by themselves or through informant, to elicit information, by interrogation or simple conversation, from defendant about pending charge after adversarial judicial proceedings have begun "is always a critical stage"). A defendant may waive the Sixth Amendment right to counsel during questioning by the police after judicial proceedings have begun, provided the waiver is knowing, intelligent, and voluntary. In *Montejo v. Louisiana*, 556 U.S. 778 (2009), the U.S. Supreme Court overruled *Michigan v. Jackson*, 475 U.S. 625 (1986), which held invalid any waiver of a defendant's right to counsel after the Sixth Amendment right to counsel attaches and the defendant requests counsel (typically, during his or her first appearance in court). *Montejo* continued to recognize that the Sixth Amendment protects against police interrogation once judicial proceedings have been initiated, whether the defendant is in

custody or out of custody. But, the Court held that officers may initiate contact with and question a defendant, even one who has been appointed counsel, if the officers advise the defendant of the right to have counsel present (through *Miranda*-style warnings) and the defendant knowingly and voluntarily waives the right to have counsel present. If a violation of the right to counsel occurs, the defendant's statements must be suppressed. *See also* 3 LAFAVE, CRIMINAL PROCEDURE § 9.5(b) at 476 (taking position that fruit-of-poisonous tree doctrine may bar evidence discovered as result of statements taken in violation of Sixth Amendment right to counsel).

For a further discussion of suppressing statements taken in violation of the Sixth Amendment right to counsel, see *infra* § 14.3C, Confessions in Violation of Sixth Amendment Right to Counsel.

**Custodial interrogation by police at any time.** The defendant has a right to counsel during custodial interrogation based on the Fifth Amendment. *See Miranda v. Arizona*, 384 U.S. 436 (1966); *State v. Buchanan*, 353 N.C. 332 (2001); G.S. 7A-451(b)(1). If a *Miranda* violation occurs, the defendant's statements must be suppressed. *See infra* § 14.3B, *Miranda* Violations. Derivative evidence obtained as the result of an unwarned but otherwise voluntary confession is generally admissible, however. *See infra* § 14.3E, Evidence Derived from Illegal Confession.

**Custodial interrogation of juvenile.** In addition to Fifth and Sixth Amendment protections, juvenile interrogation rights apply to any person under 18. *See* G.S. 7B-2101; *State v. Fincher*, 309 N.C. 1 (1983) (juvenile is defined as person under 18 years of age under former G.S. 7A-517(20) [now codified as G.S. 7B-101(14)]; juvenile interrogation rights therefore apply to a suspect 16 or 17 years of age even though the suspect is old enough to be prosecuted as adult in superior court); *see also infra* "Juvenile warnings" in § 14.3B, *Miranda* Violations. A juvenile's statements taken in violation of these statutory rights are subject to suppression. *See Fincher*, 309 N.C. at 11.

**Nontestimonial identification procedures.** The defendant has a statutory right to counsel at nontestimonial identification procedures conducted under G.S. 15A-271 through G.S. 15A-282, such as the taking of fingerprints or blood, and must be advised of this right before the procedure takes place. *See* G.S. 15A-279(d); *State v. Satterfield*, 300 N.C. 621 (1980) (recognizing right but finding no violation); *cf. Gilbert v. California*, 388 U.S. 263 (1967) (taking of handwriting exemplar not critical stage under Sixth Amendment); *Schmerber v. California*, 384 U.S. 757 (1966) (no Fifth Amendment right to counsel at taking of blood sample, which did not compel communications or testimony); *State v. Wright*, 274 N.C. 84 (1968) (nontestimonial identification procedures involving physical characteristics are generally not subject to Sixth Amendment; however, when accused is required to perform act, such as repeating of words, for purpose of identification by victim, procedure may be critical stage under Sixth Amendment). The statutory right does not apply to nontestimonial procedures lawfully conducted by law enforcement without a nontestimonial identification order. *See State v. Coplen*, 138 N.C. App. 48 (2000) (upholding denial of motion to suppress results of gunshot residue test that was based on probable cause and exigent circumstances and was conducted without a nontestimonial

identification order).

If the defendant's statutory right to counsel is violated, any statements made by the defendant during the proceeding must be suppressed; however, suppression of the results of the identification procedure is not required. *See* G.S. 15A-279(d); *Coplen*, 138 N.C. App. 48.

**Chemical analysis in impaired driving cases.** *See* G.S. 20-16.2(a)(6) (statutory right to confer with counsel if testing would not be delayed more than 30 minutes); *State v. Rasmussen*, 158 N.C. App. 544 (2003) (recognizing statutory right to counsel but finding no violation); *cf. State v. Howren*, 312 N.C. 454 (1984) (chemical test for impairment not critical stage under Sixth Amendment).

**Capacity evaluation.** The N.C. Supreme Court has held that the defendant does not have a Sixth Amendment right to have counsel present at a capacity evaluation (although the mental health facility or trial court may permit counsel to attend). *See State v. Davis*, 349 N.C. 1 (1998). Statements made by the defendant may still be subject to suppression under the Fifth and Sixth Amendments. *See supra* § 2.9, Admissibility at Trial of Results of Capacity Evaluation.

**Extradition proceedings.** A defendant has a statutory right to counsel at extradition proceedings. *See* G.S. 7A-451(a)(5) (appointed counsel must be provided to indigent person whose extradition to another state is sought); *cf. State v. Taylor*, 354 N.C. 28 (2001) (Sixth Amendment right to counsel did not attach to out-of-state extradition proceedings; adversary criminal judicial proceedings had not yet commenced).

**Interstate compact for adult offender supervision.** North Carolina is a party to this compact, which governs the supervision of probationers and parolees from other states who are residing in North Carolina. *See* G.S. 148-65.4 through G.S. 148-65.9. A probationer or parolee subject to the compact does not go through extradition proceedings; the compact has its own procedures, primarily in G.S. 148-65.8, for returning a person to the originating state, called the "sending state" in the compact. G.S. 148-65.8 does not explicitly provide for counsel for a probationer or parolee whom North Carolina, called the "receiving state" in the compact, wants to return to the sending state for an alleged violation. Nor has North Carolina's Interstate Compact Office adopted rules addressing the issue. *See* N.C. Department of Public Safety: Interstate Compact, [www.ncdps.gov/index2.cfm?a=000003,002223,002224](http://www.ncdps.gov/index2.cfm?a=000003,002223,002224). However, a probationer or parolee may have a due process right to counsel at a hearing in North Carolina for an alleged violation that may result in the person's return to the sending state. *See Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (defendant has right to counsel if necessary to ensure effectiveness of his or her hearing rights); *see also* Interstate Commission for Adult Offender Supervision, ICAOS BENCHMARK FOR JUDGES AND COURT PERSONNEL § 4.4.3.2, at 91–92 (Version 7.0, 2012) (recognizing possible right to counsel), *available at* [www.interstatecompact.org/](http://www.interstatecompact.org/).

**Bail hearing.** An indigent person is statutorily entitled to appointed counsel at a hearing

to reduce bail or fix bail if bail was earlier denied. *See* G.S. 7A-451(b)(3). If the bail hearing is conducted by audio-visual transmission, the defendant must be allowed to communicate fully and confidentially with his or her attorney. *See* G.S. 15A-532(b) (defendant who has counsel must be permitted to consult with counsel); *see also* Douglas L. Colbert, *Thirty-Five Years after Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1 (1998) (arguing that defendants should have right to counsel when bail is initially set).

**Probable cause hearing.** An indigent person has a Sixth Amendment right to appointed counsel at a probable cause hearing at which the court determines whether the State has sufficient evidence to proceed. *See Coleman v. Alabama*, 399 U.S. 1 (1970) (probable cause hearing is critical stage; although hearing is not constitutionally required, defendant has constitutional right to counsel if one is held); *State v. Cobb*, 295 N.C. 1 (1978) (probable cause hearing is critical stage); G.S. 7A-451(b)(4); G.S. 15A-611(c); *see also Moore v. Illinois*, 434 U.S. 220 (1977) (Sixth Amendment violated by identification of defendant at preliminary hearing in absence of counsel). A hearing before a magistrate to determine whether there was probable cause for an arrest (called an initial appearance in North Carolina) is not a critical stage. *See Gerstein v. Pugh*, 420 U.S. 103 (1975); G.S. 15A-511 (describing function of initial appearance). However, the right to counsel attaches at the defendant's initial appearance before a magistrate, and counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage thereafter. *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008); *see supra* § 12.4A, When Right to Counsel Attaches.

**Arraignment/entry of plea.** *See Hamilton v. Alabama*, 368 U.S. 52 (1961) (arraignment is critical stage); *White v. Maryland*, 373 U.S. 59 (1963) (per curiam) (plea of guilty made without counsel and then later revoked inadmissible at trial); *see also* G.S. 15A-942 (person who appears at arraignment must be informed of right to counsel); G.S. 15A-1012 (defendant may not be called on to plead until he or she has had opportunity to retain counsel, has been assigned counsel, or has waived counsel).

**Pretrial evidentiary hearing.** *See Pointer v. Texas*, 380 U.S. 400 (1965) (pretrial hearing where evidence is presented is critical stage).

**Suppression hearing.** *See State v. Frederick*, \_\_\_ N.C. App. \_\_\_, 730 S.E.2d 275 (2012) (suppression hearing is critical stage at which defendant has right to counsel; waiver of counsel not adequate).

**Trial and sentencing.** *See Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel for felonies); *Scott v. Illinois*, 440 U.S. 367 (1979) (right to counsel for trial of misdemeanor where actual imprisonment imposed); *Alabama v. Shelton*, 535 U.S. 654 (2002) (right to counsel for trial of misdemeanor where suspended sentence of imprisonment imposed); *see also* G.S. 7A-451(a)(1), (b)(5). Sentencing is a critical stage of these proceedings. *State v. Boyd*, 205 N.C. App. 450 (2010). For a further discussion of the right to counsel for felonies and misdemeanors, *see supra* § 12.3A, Felonies, and § 12.3B, Misdemeanors.

In *State v. Lambert*, 146 N.C. App. 360 (2001), the court of appeals held that a defendant did not have the right to counsel at a resentencing hearing at which the only issue was the modification of a condition of probation. This ruling is questionable, particularly in light of the holding in *Shelton* that a defendant has the right to counsel when a suspended sentence of imprisonment is imposed.

**Capital trial.** A defendant is statutorily entitled to two attorneys in a capital case. See G.S. 7A-450(b1); IDS Rule 2A.2(b)-(d) (describing when second lawyer is appointed). Failure to appoint a second attorney is reversible error. See *State v. Hucks*, 323 N.C. 574 (1988).

**Probation revocation hearing.** A defendant has a statutory right to counsel at a probation revocation hearing. See G.S. 7A-451(a)(4); G.S. 15A-1345(e); *State v. Coltrane*, 307 N.C. 511 (1983) (court finds that G.S. 15A-1345(e) was intended to go beyond federal constitutional right to counsel); *State v. Ramirez*, \_\_\_ N.C. App. \_\_\_, 724 S.E.2d 172 (2012) (recognizing right to counsel at probation revocation hearing and finding waiver of counsel inadequate); see also *State v. Neeley*, 307 N.C. 247 (1982) (judge may not activate suspended sentence if defendant was not represented by counsel and did not waive counsel when suspended sentence and probation were imposed). The failure to provide counsel for an indigent defendant may also violate due process. See *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (defendant has right to counsel if necessary to ensure effectiveness of his or her hearing rights).

**Direct appeal.** A defendant has a constitutional right, based on due process, to appointed counsel on a first appeal as of right. See *Evitts v. Lucey*, 469 U.S. 387 (1985); see also *Douglas v. California*, 372 U.S. 353 (1963) (denial of Equal Protection to fail to afford counsel to indigent defendant for first appeal of right). A defendant has broader statutory rights to counsel. See G.S. 7A-451(b)(6); IDS Rule 3.1 & Commentary.

**Certiorari petition.** The N.C. Supreme Court has held that appellate counsel has a duty to file a certiorari petition to the U.S. Supreme Court, at least in a capital case in which the defendant has been sentenced to death and has not received sentencing relief on appeal. See *In re Hunoval*, 294 N.C. 740 (1977) (court disciplines attorney for refusing to file cert. petition for client sentenced to death; court rejects attorney's argument that he was not an eleemosynary institution—that is, a charitable institution—and that he could not be required to file cert. petition without pay); IDS Rule 2B.4(a) (directing appointed counsel to file cert. petition in capital case unless relieved of responsibility by IDS).

Legislation enacted in 2007 extends the statutory right to counsel to cert. petitions in capital cases (G.S. 7A-451(b)(7)) and in some circumstances noncapital cases. G.S. 7A-451(b)(8). For a discussion of these changes, see IDS Rules 2B.4(a) and 3.2(i) and accompanying commentary.

**MAR in noncapital case.** In postconviction proceedings in noncapital cases, an indigent person has a statutory right to counsel if he or she has been convicted of a felony, fined \$500 or more, or been sentenced to a term of imprisonment. See G.S. 7A-451(a)(3) (setting forth general right); G.S. 15A-1420(b2)(2) (assigned judge shall review motion for appropriate

relief (MAR) in noncapital case and issue initial review order indicating whether counsel should be appointed unless the motion is dismissed); *cf. Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (“We have never held that prisoners [in noncapital cases] have a constitutional right to counsel when mounting collateral attacks upon their convictions, . . . and we decline to so hold today.”). Generally, counsel is not appointed to assist an indigent person in filing the initial MAR in a noncapital case, although judges sometimes appoint counsel to investigate and prepare the initial motion when they believe there are compelling circumstances. Nor will a judge typically appoint counsel if he or she summarily denies a pro se MAR. *See* Jessica Smith, *Motions for Appropriate Relief*, ADMINISTRATION OF JUSTICE BULLETIN No. 2010/03, at 21 (UNC School of Government, June 2010) (observing that “many judges do not appoint counsel unless the MAR passes a frivolity review”), available at <http://sogpubs.unc.edu/electronicversions/pdfs/aojb1003.pdf>. At a minimum, appointment of counsel would appear to be required for any hearing on a motion for appropriate relief, including hearings involving issues of law alone and evidentiary hearings. *See generally* G.S. 7A-451(a)(3) (right to counsel at “proceedings” in indicated cases); G.S. 15A-1420(c)(1) (party entitled to hearing on questions of law or fact arising from motion; judge may direct counsel for parties to appear for conference on any prehearing matter); G.S. 15A-1420(c)(4) (defendant entitled to counsel for evidentiary hearing).

If a defendant has postconviction counsel (appointed or otherwise) and the case is in superior court, a defendant has a right to open-file discovery from the State. *See supra* “Noncapital cases” in § 4.1G, Postconviction Cases.

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**Legislative note:** G.S. 15A-1420(b2), enacted in 2012, established deadlines for review of a noncapital MAR, including a determination whether to appoint counsel. Effective for motions filed on or after December 1, 2013, S.L. 2013-385 (S 182) repeals this statute.

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On direct appeal in a noncapital case, appellate counsel who has been appointed to represent an indigent defendant may apply to the N.C. Office of the Appellate Defender for authorization to litigate a MAR related to the appeal or for appointment of other counsel to file a MAR. *See* IDS Rule 3.2(g1).

IDS also provides legal representation in cases in which the State is obligated to provide legal assistance and access to the courts for inmates in the custody of the Division of Adult Correction in the Department of Public Safety. *See* G.S. 7A-498.3(a)(2a). IDS provides this representation through an agreement with North Carolina Prisoners Legal Services (PLS). PLS may handle cases pursuant to this agreement without a court determination of indigency or entitlement to counsel. *See* IDS Rule 4.2.

**MAR in capital case.** An indigent person convicted of a capital offense and sentenced to death is statutorily entitled to the appointment of two postconviction attorneys to prepare, file, and litigate a motion for appropriate relief. *See* G.S. 7A-451(c); *see also* IDS Rule 2C.2 (setting out the procedure for appointment of postconviction counsel in capital case and detailing the scope of representation); *cf. Murray v. Giarratano*, 492 U.S. 1 (1989) (four members of Court find no constitutional right to counsel to seek state postconviction relief in capital case; fifth member of Court concurs in judgment because

no prisoner had actually been denied counsel in such proceedings).

**State writ of habeas corpus.** An indigent person is entitled to have counsel for a hearing on a state writ of habeas corpus. *See* G.S. 7A-451(a)(2).

**Innocence Inquiry Commission.** A convicted person has the right to advice of appointed counsel before signing a waiver of rights related to the claim of innocence and, if a formal inquiry is granted, throughout the formal inquiry. *See* G.S. 15A-1467(b). The convicted person also has a right to be represented by counsel at the evidentiary hearing before the three-judge panel reviewing a Commission finding of innocence. G.S. 15A-1469(d). For further information about Commission proceedings, see 2 NORTH CAROLINA DEFENDER MANUAL § 35.8 (Innocence Inquiry Commission) (2d ed. 2012).

**Clemency proceedings.** In *Harbison v. Bell*, 556 U.S. 180 (2009), the U.S. Supreme Court held that federal law authorizes federally appointed counsel in capital cases to represent their clients in state clemency proceedings.

**DNA testing and biological evidence.** An indigent convicted defendant who brings a motion for DNA testing is entitled to appointed counsel if the testing may be material to a claim of wrongful conviction. *See* G.S. 15A-269(c); *State v. Gardner*, \_\_\_ N.C. App. \_\_\_, 742 S.E.2d 352 (2013) (requiring showing of materiality for appointment of counsel and finding that defendant's conclusory statement of materiality insufficient). An indigent convicted defendant appealing an order denying a motion for DNA testing is entitled to appointed counsel. *See* G.S. 15A-270.1.

G.S. 15A-268 requires agencies with custody of biological evidence to retain the evidence in the manner and according to the schedule in that statute. If the State wants to destroy evidence earlier, the prosecutor must notify the defendant, counsel of record in the case in which the defendant was convicted, and the Office of Indigent Defense Services. G.S. 15A-268(b)(2). The statute does not explicitly give the defendant the right to have counsel appointed to oppose the request, but the notice requirement suggests that the defendant may have a right to counsel.

**Parole and post-release supervision revocation and contempt hearings.** The Post-Release Supervision and Parole Commission determines whether a parolee or post-release supervisee is entitled to appointed counsel at a revocation hearing. *See* G.S. 148-62.1; *see also* Memorandum from Danielle M. Carman, IDS Assistant Director, Appointment of Counsel in Post-Release Supervision and Parole Preliminary Revocation Hearings Before a Hearing Officer, and Post-Release Supervision and Parole Revocation Hearings and Criminal Contempt Proceedings Before the Post-Release Supervision and Parole Commission (Nov. 19, 2012), *available at* [www.ncids.org/Rules%20&%20Procedures/Other%20Policies/ParoleRevocationHearings.pdf](http://www.ncids.org/Rules%20&%20Procedures/Other%20Policies/ParoleRevocationHearings.pdf). Although the applicable statutes indicate that the determination of entitlement to counsel is in the Commission's discretion, due process may require appointment. *See Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (defendant has right to counsel if necessary to ensure effectiveness of his or her hearing rights).

G.S. 143B-720(a), amended in 2011, gives the Post-Release Supervision and Parole Commission authority to conduct contempt proceedings, in accordance with the requirements for plenary contempt proceedings under G.S. 5A-15, for a violation of post-release supervision by a person on post-release supervision for an offense subject to sex offender registration requirements. In plenary contempt proceedings, an indigent respondent is entitled to appointed counsel if imprisonment is imposed or likely to be imposed. *See* G.S. 7A-451(a)(1) (providing for the right to appointed counsel if imprisonment is likely to be imposed); *Hammock v. Bencini*, 98 N.C. App. 510 (1990) (recognizing the right to appointed counsel for criminal contempt if imprisonment is likely to be imposed); *McBride v. McBride*, 334 N.C. 124 (1993) (recognizing similar right for civil contempt); *see also generally supra* § 12.3D, Contempt.

**Satellite-based monitoring.** Ordinarily, the sentencing judge determines whether a person has been convicted of an offense requiring registration as a sex offender and warranting satellite-based monitoring (SBM). If a defendant is represented by an appointed attorney for the trial or plea, he or she will continue to be represented by that attorney at the SBM determination at sentencing. If the judge makes no determination at sentencing about the appropriateness of SBM, the Division of Adult Correction may request the prosecution to schedule another hearing for the court to make that determination, commonly called a “bring-back” hearing. Under G.S. 14-208.40B(b), an indigent defendant is entitled to have counsel appointed for a bring-back hearing. (The statutes do not provide for counsel to be appointed on a petition to terminate sex offender registration requirements and associated SBM obligations. G.S. 14-208.12A.) For a discussion of ineffective assistance of counsel for SBM determinations, *see infra* “Statutory right to effective assistance” in § 12.7A, Cases in which Right Arises.