
21.1 Right to Be Present

A. Basis of Right

Summary of law. A defendant's right to presence depends on several sources of law, and the cases occasionally combine and confuse them. This brief summary offers the authors' understanding of the basic legal principles.

Once the trial begins, a defendant has a right to be present at every stage of trial under the Confrontation Clause of the U.S. Constitution and its counterpart under the N.C. Constitution. The right to presence applies not only to stages of the trial in which the defendant is actually confronting witnesses but also to stages at which testimony is not being offered, such as jury selection. Under the state constitution, a capital defendant's right to presence at every stage of the trial cannot be waived.

Some matters that take place during trial may not be considered stages of the trial and so may not trigger a defendant's right to presence under the federal and state confrontation clauses. A defendant still may have a due process right to presence, which applies whenever the defendant's presence has a reasonably substantial relation to his or her opportunity to defend against the charges.

Before trial, a defendant's right to presence depends primarily on due process. The courts have recognized a defendant's right to presence at pretrial proceedings that implicate the defendant's confrontation rights—that is, proceedings at which witnesses are giving testimony or other evidence is being presented—or when the defendant's presence has a reasonably substantial relation to his or her opportunity to defend against the charges. The right is not absolute and depends on the particular proceedings at issue.

North Carolina statutes also may supplement the defendant's constitutional rights by guaranteeing the defendant a right to presence at particular proceedings, such as jury views (discussed in subsection C., below).

When the courts have found no violation of the right to presence, they sometimes hold specifically that a defendant does not have a right to presence at the proceeding—for

example, at grand jury proceedings before trial. Often, however, they base a finding of no violation, at least in part, on a form of waiver—that is, the failure of the defendant or counsel to request that the defendant be present during the proceeding. The courts also have engaged in harmless error analysis without specifically deciding whether the defendant had a right to presence and the trial judge erred. This analysis makes it difficult to say in some instances whether the defendant does or does not have a right to be present.

Practice note: If a proceeding or other matter begins without the defendant being present, and you believe that the defendant has a right to be present or that at least it is in the defendant's interest to be present, you should specifically request the defendant's presence in reliance on the constitutional and statutory authorities discussed below.

Federal constitution. The Confrontation Clause of the Sixth Amendment to the U.S. Constitution guarantees a defendant the right to personal presence at ***every stage of trial.*** *See Illinois v. Allen*, 397 U.S. 337 (1970); *see generally* 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.2(a), at 363 (4th ed. 2015) (recognizing principle); JEFFREY B. WELTY, NORTH CAROLINA CAPITAL CASE LAW HANDBOOK 74 (UNC School of Government, 3d ed. 2013) (recognizing principle in capital cases). Some North Carolina cases have stated that the Sixth Amendment right to presence under the U.S. Constitution applies only to *critical* stages of trial, in contrast to the broader state constitutional right to presence, discussed next, at *every* stage of trial. *See State v. Huff*, 325 N.C. 1, 29 (1989) (citing *Rushen v. Spain*, 464 U.S. 114 (1983)), *vacated on other grounds*, 497 U.S. 1021 (1990); *State v. Buchanan*, 330 N.C. 202 (1991) (repeating statement from *Huff*). The statement of the federal standard in these North Carolina decisions appears to be incorrect. *See State v. Golphin*, 352 N.C. 364, 389 (2000) (relying on *Illinois v. Allen*, 397 U.S. 337 (1970), and recognizing the defendant's right to be present at every stage of trial under the Sixth Amendment Confrontation Clause). As a practical matter, however, federal cases may construe the federal right to presence more narrowly than North Carolina courts have interpreted the state constitutional right to presence. Application of the right to various proceedings is discussed further in the succeeding sections.

The Confrontation Clause also may give the defendant a right to presence at ***pretrial proceedings*** at which testimony or other evidence is presented. *See State v. Seaberry*, 97 N.C. App. 203, 210–11 (1990) (in addressing whether defendant had right to be present at hearing on pretrial motions, court states in reliance on *Illinois v. Allen*, 397 U.S. 337 (1970), that "[t]he Confrontation Clause of the Sixth Amendment made applicable to the states by the Fourteenth Amendment grants defendants the right to be present at any stage of the proceedings at which witnesses are to be questioned"). *But cf. Kentucky v. Stincer*, 482 U.S. 730, 740 (1987) (finding in child sex abuse case that defendant did not have a constitutional right to presence at hearing to determine competency of child witnesses to testify). It is unclear what effect, if any, the U.S. Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), will have on a defendant's Sixth Amendment right to presence at pretrial proceedings in North Carolina. Courts from other jurisdictions have considered whether *Crawford* applies to pretrial proceedings and restricts the presentation of "testimonial" statements under the Sixth Amendment, and they have determined that it

does not apply in that respect. *See* Jessica Smith, *Does Crawford Apply in Pretrial Proceedings?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (August 31, 2015).

The defendant also has a due process right under the Fourteenth Amendment to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Snyder v. Massachusetts*, 291 U.S. 97, 105–06 (1934) (announcing test); *see also Kentucky v. Stincer*, 482 U.S. 730, 745 ("[A] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure."). This due process right gives the defendant the right to presence at various pretrial proceedings as well as at trial proceedings at which the right to confrontation may not apply. The right includes "situations where the defendant is not actually confronting witnesses or evidence against him." *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (per curiam).

State constitution. A defendant's right to presence under the Confrontation Clause of the N.C. Constitution (N.C. CONST. art. I, § 23) is broader than the right to presence under the federal constitution in two respects. First, the North Carolina courts have held that the state constitutional right is broader than its federal counterpart in that it guarantees the defendant's right to be present at *every* stage of his or her trial. *See State v. Badgett*, 361 N.C. 234 (2007); *State v. Huff*, 325 N.C. 1 (1989), *vacated on other grounds*, 497 U.S. 1021 (1990). While the U.S. Constitution also guarantees the right to presence at *every* stage of trial (in light of the cases discussed above), the state constitutional protection may be broader as applied to different trial proceedings (discussed in subsection C., below). The state right "extends to all times during the trial when anything is said or done which materially affects defendant as to the charge against him." *State v. Chapman*, 342 N.C. 330, 337–38 (1995). Although the defendant's right to presence is typically discussed in the context of proceedings inside the courtroom**,** the right to be present also can attach to proceedings outside the courtroom during the trial, such as if a judge communicates to jurors in the jury room or to counsel in the court's chambers. *See State v. Hudson*, 331 N.C. 122 (1992) (recognizing this principle but finding that chance meeting between judge and juror in corridor might not constitute "stage" of trial and, if error, it was harmless beyond a reasonable doubt); *State v. Buchanan*, 330 N.C. 202 (1991) (providing wide range of examples of stages).

Second, the state constitution offers greater protection to capital defendants than the federal constitution because a capital defendant's right to presence cannot be waived and the trial judge has the duty to ensure the defendant's presence at trial. *See infra* § 21.1E, Express and Inferred Waivers of Right.

The North Carolina courts have stated that in general the right to presence under the state constitution's confrontation clause does not guarantee the defendant's presence before the trial commences. *See, e.g.*, *State v. Golphin*, 352 N.C. 364, 389 (2000) (finding no violation of state constitutional right to presence at pretrial discussions with judge about possible venues for trial; defendants were present at later hearing at which their counsel stipulated to the venue change); *cf.* JEFFREY B. WELTY, NORTH CAROLINA CAPITAL CASE

LAW HANDBOOK 75 (UNC School of Government, 3d ed. 2013) (noting cases in which capital defendants did not have the right to be present at the pretrial proceedings at issue, but observing that the N.C. appellate courts "have not comprehensively analyzed" the extent to which the right to presence applies at pretrial stages of a capital case.).

Additionally, because a defendant's right to be present at every stage of trial also has a due process component, *State v. Seaberry*, 97 N.C. App. 203, 211 (1990) (citation omitted), article I, section 19 of the N.C. Constitution may also be applicable. *See State v. Tolley*, 290 N.C. 349, 364 (1976) (noting that the Law of the Land Clause of article I, section 19 of the N.C. Constitution is equivalent to the Due Process of Law Clause of the U.S. Constitution).

Practice note: Because the U.S. and N.C. Constitutions may provide different protections, be sure to ground any objection to a presence violation on both the federal and the state constitution.

B. Pretrial Proceedings

Generally, the defendant's right to be present at every stage of trial "does not arise prior to the commencement of trial." *State v. Chapman*, 342 N.C. 330, 338 (1995) (determining that a conference that took place before the jury panel was selected and sworn was not "a stage of the trial" and the defendant's right to be present at "every stage of his trial" was not implicated). However, if the subject matter of the hearing "implicates the defendant's confrontation rights, or is such that the defendant's presence would have a reasonably substantial relation to his opportunity to defend," then he or she has the right to be present. *See State v. Buchanan*, 330 N.C. 202, 223–24 (1991); *see also Kentucky v. Stincer*, 482 U.S. 730, 740 (1987) (rather than attempting to characterize a hearing on the competency of child witnesses as a "trial" or "pretrial proceeding," the Court found it to be "more useful to consider whether excluding the defendant from the hearing interfere[d] with his opportunity for effective cross-examination."). For a further discussion of the applicable constitutional principles, see *supra* § 21.1A, Basis of Right.

Evidentiary hearings. Under the above principles, a defendant generally has the right to be present at hearings involving the examination of witnesses, such as suppression hearings, voir dire determinations, and other proceedings involving the presentation of evidence or determination of the admissibility of evidence at trial. *See State v. Seaberry*, 97 N.C. App. 203 (1990); *see also State v. Trapper*, 48 N.C. App. 481 (1980) (finding no prejudice from sequestration of defendants during testimony of witnesses during suppression hearing because their exclusion was for a short period of time and trial judge soon after reversed his sequestration order); *State v. Braswell*, 312 N.C. 553 (1985) (recognizing defendant's right to be present during mid-trial voir dire of witness, but finding that defendant waived right); *State v. Jones*, 89 N.C. App. 584 (1988) (recognizing defendant's right to be present at proceeding to determine competency of child witness in sexual abuse case, but finding that defendant's right was not violated because defendant could see and hear testimony via closed-circuit television and had adequate opportunity to communicate with his attorney). *But cf. Kentucky v. Stincer*, 482

U.S. 730, 740 (1987) (finding under U.S. Constitution that defendant could be excluded from voir dire hearing to determine competency of child witness in sexual abuse case even without an opportunity to see and hear proceedings). [For a further discussion of the use of closed-circuit television for certain witnesses, see *infra* § 29.4D, Child Witnesses (exclusion of defendant from competency hearing involving child witness) and § 29.8, Remote Testimony.]

Non-evidentiary proceedings. A number of cases have found no violation of the defendant's right to presence during certain non-evidentiary pretrial proceedings or communications. Many of these cases involved housekeeping or administrative matters that did not implicate the defendant's constitutional rights. In some that involved more substantive proceedings, the courts did not definitively resolve whether the defendant had a right to be present, finding no violation based, in part, on the defendant's failure through counsel to request that the defendant be present or on the absence of prejudice to the defendant. The cases finding no presence violation include ones involving:

- A Rule 24 hearing on whether a case was to be tried capitally. *State v. Chapman*, 342 N.C. 330 (1995) (finding no violation of capital defendant's unwaivable right to presence at trial because Rule 24 hearing is pretrial proceeding and not stage of trial). Notwithstanding *Chapman*, the defendant in a capital case is typically present at a Rule 24 hearing.
- A meeting between prosecutors, defense attorneys, and the judge to discuss possible change of venue sites or special venire locations where the defendants were present at a later hearing at which their counsel stipulated to the venue change. *State v. Golphin*, 352 N.C. 364 (2000).
- A pretrial conference on "housekeeping matters," including the trial's daily schedule, the basics of publicity, security in the courtroom, the jury selection procedure (which had previously been discussed), and the availability of a jury questionnaire, as well as a brief, nonbinding review of pending motions and a discussion of the possibility of a motion to continue. *State v. Buckner*, 342 N.C. 198 (1995).
- A hearing on a pretrial motion for discovery where defense counsel was present, consented to the defendant's absence, and the defendant could show no resulting prejudice. *State v. Davis*, 290 N.C. 511 (1976).
- An announcement of a ruling in open court by the trial judge regarding a decision to partially release the defendant's prison records to the State. *State v. Rich*, 346 N.C. 50, 56 (1997) (finding that "[a]lthough a better practice in this case may have been for the judge to have summoned defendant and defense counsel prior to announcing his final ruling," there was no error and defendant's presence would have served no purpose).
- A routine communication between the judge and the prosecutor concerning scheduling matters. *State v. Locklear*, 349 N.C. 118 (1998) (defendant had no right to be present when prosecutor requested that the judge schedule an arraignment hearing).
- A hearing with defense counsel present on motions for a special venire, consolidation of the cases, sequestration of witnesses, and change in venue where "at no time did counsel suggest the absence of defendants or note exceptions to their absence." *State*

v. Richards, 21 N.C. App. 686, 690 (1974).

- An alleged in-chambers proceeding resulting in the trial judge changing the forensic psychiatrist assigned to evaluate the defendant. *State v. Davis*, 349 N.C. 1 (1998).
- The disinterment of the remains of the deceased. *State v. Bowman*, 80 N.C. 432 (1879).
- The grand jury's return of an indictment. *State v. Stanley*, 227 N.C. 650 (1947).

C. Trial Proceedings

Stages of a trial at which a defendant has a constitutional right to presence include, of course, any part of the trial involving the testimony of witnesses or other presentation of evidence. *See generally Illinois v. Allen*, 397 U.S. 337 (1970); *Snyder v. Massachusetts*, 291 U.S. 97 (1934); *Diaz v. United States*, 223 U.S. 442 (1912). The defendant also has a right to presence, as described below, at other aspects of the trial.

Jury selection. Once the defendant's case has been called for trial, the defendant's right to be present during the process of selecting and impaneling the jury attaches. *Diaz v. United States*, 223 U.S. 442, 455 (1912). A judge therefore may not have private, unrecorded communications with a prospective juror to determine whether or not the juror may be excused. *State v. Smith*, 326 N.C. 792, 794 (1990) ("The process of selecting and impaneling the jury is a stage of the trial at which the defendant has a right to be present."). Nor may a judge question jurors in the defendant's absence even if defense counsel is present and the proceedings are recorded. *State v. Payne*, 328 N.C. 377 (1991).

The defendant's right to be present during all stages of trial does not include the preliminary handling of jury venires before the defendant's case has been called. *State v. Workman*, 344 N.C. 482, 498 (1996) (defendant "had no right to be present when prospective jurors were preliminarily sworn, oriented and qualified for jury service in general, without regard to any particular case or trial"); *see also State v. Williams*, 363 N.C. 689, 710 (2009) (random splitting of jury pool for "defendant's proceeding and other matters being handled at the courthouse that day was a preliminary administrative matter at which defendant did not have a right to be present").

Nor is a defendant's right to presence violated by a judge's private communications with prospective jurors if the defendant's case has not yet been called for trial. *State v. Rannels*, 333 N.C. 644 (1993) (no error where trial judge held unrecorded side bar conferences with jurors before any case on calendar was called and before oath was administered to jury pool); *State v. Cole*, 331 N.C. 272 (1992) (no error where judge held unrecorded bench conferences and excused prospective jurors before defendant's case was called for trial, but it was error to do so after the defendant's trial commenced).

Jury view. In an early U.S. Supreme Court decision, before many constitutional protections were made applicable to state criminal proceedings by incorporation through the Due Process Clause (such as the right of a defendant not to testify), the Court held that the Due Process Clause did not require the defendant's presence at a jury view

during trial unless a fair and just hearing would be thwarted by his or her absence. *See Snyder v. Massachusetts*, 291 U.S. 97, 107–08 (1934). Assuming this principle remains valid under the U.S. Constitution, a defendant in North Carolina nevertheless has a statutory and a state constitutional right to be present at that proceeding. *See* G.S. 15A-1229(a); *State v. Harris*, 333 N.C. 543 (1993) (recognizing state constitutional right to presence during jury view, but finding that right was not violated by permitting jurors to roam independently through the alleged crime scene during the jury view while the defendant was present).

In-chambers conferences with counsel. A defendant has the right to presence at an in-chambers conference during trial. *State v. Buchanan*, 330 N.C. 202 (1991) (finding that to the extent that federal courts do not treat in-chambers conferences as a "stage" of trial, the defendant's state constitutional right to presence is broader). It is error for a trial judge, during trial, to "conduct an in-chambers conference with the attorneys but without the defendant." *See State v. Exum*, 343 N.C. 291, 295 (1996) (characterizing an in-chambers conference as a "critical stage" of trial). *But cf. State v. Daniels*, 337 N.C. 243 (1994) (judge's telephone calls over the weekend to prosecutor and defense counsel after trial had commenced, in which trial judge merely informed them of the decision she had reached and heard no argument were not "such a stage" of the defendant's trial as to require the defendant's presence; judge announced ruling in open court the following day).

Although exclusion of the defendant is error, it will be found to be "harmless error" if nothing was done or said during the in-chambers conference that affects the defendant as to the charge against him or her "in any material respect." *See State v. Brogden*, 329 N.C. 534, 541–42 (1991) (finding harmless error where an informal meeting was held in chambers with only the attorneys to discuss the jury instructions before the formal charge conference held in open court); *see also State v. Boyd*, 343 N.C. 699 (1996) (harmless error found where a recorded in-chambers conference was held with the attorneys, outside the presence of defendant, to discuss proposed mitigating circumstances; defense counsel was given the opportunity to preserve on the record every objection to the trial judge's rulings and the reasons for their objections, and the substance of each of the defendant's requested mitigating circumstances discussed during the conference was later submitted to the jury).

Where the right to presence is not waived or is not waivable (*see infra* § 21.1E, Express and Inferred Waivers of Right) and the subject matter of the in-chambers conference cannot be gleaned from the record, the State cannot meet its burden of showing that the error was harmless beyond a reasonable doubt and the defendant is entitled to a new trial. *See, e.g., State v. Meyer*, 345 N.C. 619 (1997) (granting new capital sentencing hearing where trial judge held an in-chambers discussion with attorneys during jury selection, the substance of which was not summarized on the record in open court or otherwise gleanable from the record); *State v. Exum*, 343 N.C. 291 (capital defendant granted a new trial because the trial judge held a private in-chambers conference with the attorneys after a defense expert's testimony and the substance of the private discussions was not revealed in the record).

Bench conferences with counsel. The North Carolina courts have held that bench conferences are a stage of trial and that the defendant's state constitutional right to presence attaches; however, the defendant's rights are not necessarily violated if the defendant is not at the bench itself.

Generally, a defendant's constitutional right to be present is not violated "when, with defendant present in the courtroom, the trial court conducts bench conferences, even though unrecorded, with counsel for both parties." *See State v. Buchanan*, 330 N.C. 202, 223 (1991). Holding a bench conference without the defendant present is permissible if the subject of the bench conference is a point of law, a procedural matter, or an administrative matter, and the conference does not involve communication with the jury or testimony by a witness concerning the defendant's guilt. *See State v. Robinson*, 330 N.C. 1 (1991). "If, however, the subject matter of the conference implicates the defendant's confrontation rights, or is such that the defendant's presence would have a reasonably substantial relation to his opportunity to defend, the defendant would have a constitutional right to be present" at the bench conference itself. *Buchanan*, 330 N.C. 202, 223–24. The defendant bears the burden of showing the "usefulness" of his or her presence to prove a violation of the right to presence. "Once a violation of the right is apparent, the burden shifts to the State to show that it is harmless beyond a reasonable doubt." *Id.* at 224.

Although the defendant was not actually present at the bench with the attorneys in *Buchanan*, the N.C. Supreme Court reasoned that there was no constitutional violation of the right to presence since the defendant was personally present in the courtroom. By holding a bench conference with counsel for both sides, the trial judge did not "negate" the defendant's actual presence at all stages of the trial. *See Buchanan*, 330 N.C. 202, 223. According to the court, the defendant was able to observe the context of the conference and obtain first-hand knowledge of what transpired through his attorneys. Defense counsel was free to raise for the record any matters to which the defendant took exception. The court also found it relevant that conferences typically deal with nonprejudicial administrative matters or "legal matters with which an accused is likely unfamiliar and incapable of rendering meaningful assistance." *Id.*

Federal courts have generally interpreted the federal right to presence at bench conferences more narrowly than the state right is interpreted by North Carolina courts. Some federal cases, discussed in *Buchanan*, have found no right to presence on the ground that a bench conference is not a "stage" of the trial, but North Carolina courts have rejected that rationale in favor of the above approach.

Practice note: If the judge conducts a bench conference without the defendant present, and you believe that it implicates the defendant's confrontation rights or that the defendant's presence would have a reasonably substantial relation to his or her opportunity to defend against the charges, you should immediately object to the defendant's absence from the conference on state and federal constitutional grounds and assert for the record the reasons that the defendant's presence would be useful. Even in situations in which you do not object because you do not believe that the defendant's

presence would be useful, you should ask afterward that the subject matter of the bench conference be placed on the record to ensure a complete record for appellate purposes.

Voir dire of witnesses. A defendant has the right to be present during a voir dire to determine the admissibility of evidence. *See supra* § 21.1B, Pretrial Proceedings (discussing right to presence at evidentiary hearings). However, this right may not be absolute in voir dire hearings to determine the competency of a child witness. *See infra* § 29.4D, Child Witnesses (discussing constitutional implications of exclusion of defendant from voir dire examination of a child during competency hearing).

Summation. A defendant has the right to be present during closing arguments. *See Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934) (assuming that defendants have a right under the Due Process Clause to be present at the "summing up of counsel, for it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself"); *see also Larson v. Tansy*, 911 F.2d 392, 396 (10th Cir. 1990) (concluding that the defendant had a due process right to be present at the giving of jury instructions, closing statements, and rendering of the verdict; the denial of this right was not harmless error because there was "a reasonable possibility of prejudice to defendant in that his absence precluded him from providing any assistance to his attorney and from exerting any psychological influence on the jury"); *State v. Okumura*, 570 P.2d 848, 853 (Haw. 1977) (State failed to meet its burden of showing that defendant's absence from jury instructions, closing argument, and rendition of the verdict was harmless beyond a reasonable doubt; presence of defense counsel could not render error harmless per se because "'the presence of counsel is no substitute for the presence of the defendant himself'" (citation omitted)).

Charge conference. A defendant has a right to be present during the charge conference. *See State v. Brogden*, 329 N.C. 534 (1991) (error for judge to hold informal meeting to discuss jury instructions in chambers out of defendant's presence, but harmless because a formal charge conference was then held in open court where entire matter was entered into the record and counsel made legal arguments and took exceptions); *State v. Wise*, 326 N.C. 421 (1990) (holding that error, if any, in excluding defendant from the unrecorded charge conference was harmless where the trial judge subsequently announced the proposed instructions on the record and gave counsel an opportunity to be heard).

Judge instructions to or communications with jury. Once the defendant's case has been called for trial, the trial judge may not privately communicate with any member of the jury in the absence of the defendant. *See State v. Payne*, 320 N.C. 138 (1987) (right to presence violated where judge gave admonishments to the jury in the jury room); *State v. Buckom*, 100 N.C. App. 179 (1990) (reversible error occurred where judge engaged in ex parte communication with jury in jury room before the verdict and record did not disclose the content of the discussion); *cf. State v. Wilson*, 363 N.C. 478 (2009) (trial judge violated defendant's right to a unanimous verdict under N.C. Constitution article I, section 24 by holding unrecorded bench conferences with jury foreperson in which he gave instructions to that juror and not others; judge also told juror not to discuss those

issues with the other jurors when he returned to the jury room); *State v. Ashe*, 314 N.C. 28, 36 (1985) (it is a violation of a defendant's right to a unanimous verdict under N.C. Constitution article I, section 24 for a judge to communicate instructions privately to "a jury foreman, another individual juror, or anyone else" regarding matters material to the case and then have that person relay the instructions to the full jury because all twelve jurors must be instructed consistently). Moreover, it is a violation of the defendant's state constitutional right to presence for the trial judge to fail to disclose that the jury has sent a note to him or her even if the judge does not communicate with the jury regarding the note. *See State v. Mackey*, 241 N.C. App. 586 (2015).

Bailiff communications with jury. Cases have held that where the bailiff enters the jury room to give clerical instructions, such as permitting the jury to take a break, there is not a presence violation. *See, e.g.*, *State v. Gay*, 334 N.C. 467, 483 (1993) (finding no reversible error but acknowledging that trial judge's procedure in having the bailiff instruct the jury regarding breaks and reminding them to follow the judge's earlier instructions "may run the risk of violating defendant's right to be present"); *State v. May*, 334 N.C. 609 (1993) (no constitutional violation where judge instructed the bailiff to tell the jury to take a fifteen minute break); *State v. Coleman*, 161 N.C. App. 224 (2003) (no constitutional violation where trial judge had bailiff admonish a juror, outside the presence of the defendant, not to discuss the case with anyone).

Clerk communications with jury. There is not a presence violation when the court clerk, outside the presence of the defendant, speaks with the jury about administrative matters if the matters discussed are not substantive, they do not relate to the consideration of the defendant's guilt or innocence, and the defendant cannot show that his or her presence would have a reasonably substantial relation to his or her opportunity to defend. *See, e.g.*, *State v. Golphin*, 352 N.C. 364 (2000) (no constitutional violation where judge had clerk perform administrative duties outside defendant's presence, including providing logistical information to newly selected jurors); *State v. Bacon*, 337 N.C. 66 (1994) (no constitutional violation where trial judge had clerk, outside defendant's presence, perform the administrative duties of calling the jury roll and explaining to the jurors what time they needed to arrive at court).

Verdict. A defendant has the right to be present at the return of the verdict. *Diaz v. United States*, 223 U.S. 442, 455 (1912) (recognizing right); *State v. Harris*, 27 N.C. App. 15, 20 (1975) (holding that although the noncapital defendant had a right to be present at the rendition of the verdict, he waived this right where there was nothing in the record "to indicate that the absence of defendant and his counsel was other than voluntary"); *see also State v. Webster*, 111 N.C. App. 72 (1993) (any error in the acceptance of the verdict against defendant in her absence was harmless because the judge had already explained to the jury that defendant was absent for good cause shown, defense counsel was present, and defendant's presence at that stage of the proceedings could not have made a difference to the outcome of the trial), *aff'd*, 337 N.C. 674 (1994).

Sentencing. A defendant has the right to be present "'when evidence is introduced for the purpose of determining the amount of punishment to be imposed'" or when sentence is

actually imposed. *State v. Davis*, 186 N.C. App. 242, 249 (2007) (quoting *State v. Pope*, 257 N.C. 326, 330 (1962)); *see generally* G.S. 15A-1334 (setting out the requirements for a noncapital sentencing hearing). The right to presence at sentencing appears to apply to all felony and misdemeanor cases where a "corporal" sentence is imposed—i.e., one that includes a sentence of imprisonment, active or suspended. *See State v. Cherry*, 154 N.C. 624 (1911) (setting aside judgments sentencing defendants in absentia "to a term of twelve months on the roads" and remanding case for new sentencing hearing); *see also State v. Brooks*, 211 N.C. 702 (1937) (following *Cherry*). No right-to-presence violation appears to occur if the defendant is sentenced in absentia as long as he or she does not receive a sentence of imprisonment. *See State v. Ferebee*, 266 N.C. 606 (1966) (finding no error where judge pronounced judgment in defendant's absence imposing a fine and costs; no active or suspended sentence of imprisonment was imposed).

The right of a defendant to be present at the time "sentence or judgment is pronounced is a common law right, separate and apart from the constitutional or statutory right to be present at the trial." *Pope*, 257 N.C. 326, 330 (citing *Ball v. United States*, 140 U.S. 118, 129 (1891) ("At common law no judgment for corporal punishment could be pronounced against a man in his absence . . . ."). The principles behind this undeniable right to be personally present when sentence is imposed are that a defendant should be given a full opportunity to (1) rebut or explain all information coming to the notice of the court that tends to defame and condemn the defendant and aggravate punishment; (2) to give his or her version of the charged offense; and (3) to introduce any relevant mitigating facts. *Pope*, 257 N.C. 326, 334-35; *see also State v. Midyette*, 87 N.C. App. 199 (1987) (cautioning against in camera hearings such as the recorded one held here with attorneys and rape victim, but without defendant, to permit the victim to express her views about appropriate punishment and without an opportunity for defendant to rebut the information received by the court), *aff'd per curiam*, 322 N.C. 108 (1988).

Although the appellate courts of North Carolina have never specifically addressed whether a defendant has a constitutional right to be present at sentencing, some federal circuit courts have adopted the general view that a criminal defendant, in addition to having a right to presence at sentencing under Fed. R. Crim. P. 43(a)(3), also enjoys a federal constitutional right to be present at sentencing. *See, e.g., United States v. Santiago*, 769 F.3d 1 (1st Cir. 2014); *United States v. Williams*, 641 F.3d 758 (6th Cir. 2011); *United States v. DeMott*, 513 F.3d 55 (2d Cir. 2008); *United States v. Bigelow*, 462 F.3d 378 (5th Cir. 2006); *United States v. Agostino*, 132 F.3d 1183 (7th Cir. 1997); *United States v. Townsend*, 33 F.3d 1230 (10th Cir. 1994); *United States v. Jackson*, 923 F.2d 1494 (11th Cir. 1991). The source of a federal constitutional right to presence at sentencing is grounded in the Confrontation Clause of the Sixth Amendment and in the Due Process Clause of the Fifth and Fourteenth Amendments. *See United States v. Villano*, 816 F.2d 1448 (10th Cir. 1987) (citing generally to *United States v. Gagnon*, 470 U.S. 522 (1985), and *Illinois v. Allen*, 397 U.S. 337 (1970)); *see also State v. Forte*, 214 P.3d 1030 (Ariz. Ct. App. 2009) (finding that defendant had both a federal and a state constitutional right to presence at sentencing).

Sometimes a written judgment will differ from what was imposed orally by the trial judge in open court at the sentencing hearing. The announcement of a judgment in open court merely constitutes the "rendering" of judgment, not the "entry." It is the written judgment entered by the trial judge that constitutes the actual sentence imposed on a defendant. If the written judgment contains a "substantive change" from the sentence rendered in open court at the sentencing hearing, the defendant has the right to be present to give him or her an opportunity to be heard. *See State v. Crumbley*, 135 N.C. App. 59 (1999) (sentence vacated and the matter remanded for the entry of a new sentencing judgment where trial judge, in defendant's absence, substantively altered the original sentence when entering the written judgment to make the sentences run consecutively instead of concurrently); *see also State v. Leaks*, 240 N.C. App. 573 (2015) (substantive change found where the written judgment reflected a longer maximum sentence than that rendered in defendant's presence in open court); *State v. Dubose*, 208 N.C. App. 406 (2010) (although the sentence of imprisonment was not altered in written judgment, trial judge erroneously added a finding outside defendant's presence that defendant had engaged in street gang activity); *State v. Mims*, 180 N.C. App. 403 (2006) (written judgment erroneously included nine months of intensive probation that was not reflected in the transcript of the proceedings held in defendant's presence in open court). However, if the change is a "non-discretionary byproduct of the sentence that was imposed in defendant's presence in open court, it does not constitute a substantive change and vacation of the sentence imposed is not required. *See, e.g.*, *State v. Harp*, 244 N.C. App. 153 (2015) (unpublished) (imposition of jail fees in written judgment did not constitute a substantive change in defendant's sentence that would require his presence); *State v. Divinie*, 229 N.C. App. 197 (2013) (unpublished) (imposition of mandatory $100,000 fine in written judgment for trafficking did not require defendant's presence); *State v. Arrington*, 215 N.C. App. 161 (2011) (addition of court costs and community service fees in written judgment did not constitute a substantive change or infringe on defendant's right to presence).

The right to presence at sentencing, like the right to presence at trial and verdict, may be waived under certain conditions. *See infra* § 21.1E, Express and Inferred Waivers of Right (discussing requirements for express waivers and waivers inferred from a defendant's voluntary absence at sentencing); *see also infra* § 23.4I, Guilty Pleas through Counsel (discussing ability of defendants, through counsel, to plead guilty to relatively minor offenses without making a personal appearance).

Juvenile Proceedings. Juveniles have a state constitutional right to presence in delinquency hearings similar to that afforded to adult criminal defendants. *In re Lineberry*, 154 N.C. App. 246 (2002) (error, but harmless, for judge to hold an in-chambers discussion with defense counsel and prosecutor involving a conference call with the doctor who performed the court-ordered evaluation).

D. Post-Conviction Proceedings

The courts have found no constitutional right to presence on a motion for a new trial or similar motion. *See State v. Dry*, 152 N.C. 813 (1910) (so stating generally); *see also Barber v. United States*, 142 F.2d 805, 806 (4th Cir. 1944) (petitioner had no federal

constitutional right to be present at a hearing of his motion for a new trial, filed six years after conviction, because "[s]uch a hearing is in no sense a part of the criminal trial at which the Constitution requires the presence of the accused"). A defendant has a statutory right under G.S. 15A-1420(c) to be present at an evidentiary hearing on a motion for appropriate relief (and perhaps a due process and confrontation right because of the nature of the proceeding). However, if no evidentiary hearing is held and the judge is determining only questions of law, the defendant does not have a right to be present. *See* G.S. 15A-1420(c)(3).

The courts also have found no right to presence on appeal of asserted legal errors in the trial. *See State v. Jacobs*, 107 N.C. 772 (1890); *State v. Overton*, 77 N.C. 485 (1877); *see also Schwab v. Berggren*, 143 U.S. 442, 449 (1892) (neither reason nor public policy require that a defendant be personally present pending proceedings in an appellate court, especially where he or she has counsel to represent him in the court of review).

E. Express and Inferred Waivers of Right

This discussion concerns the waiver of presence at trial following a *not guilty* plea. A defendant may enter a guilty plea, without being present, to relatively minor offenses, such as traffic offenses or misdemeanors for which the judge has accepted a written waiver of appearance. For a discussion of a defendant's entry of a guilty plea through counsel, see *infra* § 23.4I, Guilty Pleas through Counsel.

Capital cases. Under the N.C. Constitution, a capital defendant's right to presence cannot be waived and the trial judge has the duty to insure his or her presence at trial. *State v. Badgett*, 361 N.C. 234 (2007). A capital defendant need not object—and can even consent to being absent—without waiving appellate review of the issue of a violation of the right to presence. *State v. Williams*, 363 N.C. 689 (2009).

A defendant's presence at trial for a capital felony "is a matter of public as well as private concern. Public policy requires his attendance at such a trial." *State v. Moore*, 275 N.C. 198, 209 (1969) (citation omitted); *see also State v. Huff*, 325 N.C. 1 (1989) (error, but harmless, for trial judge to honor distraught capital defendant's request to allow the trial to proceed in his absence), *vacated on other grounds*, 497 U.S. 1021 (1990); *State v. Ferebee*, 266 N.C. 606, 609 (1966) (citing *State v. Kelly*, 97 N.C. 404, 405 (1887)) (holding that not only does a capital defendant have "a right to be present; he must be present"); *compare infra* § 21.1F, Removal of Disruptive Defendant (discussing the removal of a disruptive defendant from the courtroom).

Noncapital cases. A noncapital defendant's right to be present at trial and related proceedings is a purely personal right and can be waived either expressly or by the failure to timely assert it. *State v. Richardson*, 330 N.C. 174 (1991); *State v. Braswell*, 312 N.C. 553 (1985). In noncapital felony cases, only the defendant may waive the right. In misdemeanor cases, the defendant may waive his or her right through counsel with the consent of the court. *State v. Shackleford*, 59 N.C. App. 357 (1982). *But see State v. Piland*, 58 N.C. App. 95 (1982) (holding that the defense attorney representing the

defendant in a noncapital *felony* case had the power to waive defendant's presence at a *pretrial* suppression hearing).

While it is the better practice for the trial judge to obtain an explicit waiver from the defendant before conducting any "important proceeding" in his or her absence, it is not necessarily error to fail to do so. *Braswell*, 312 N.C. 553, 559. Waiver of the right to presence may occur by the failure to assert it. *Id.*; *State v. Christian*, 150 N.C. App. 77, 81 (2002) (finding that the failure of defendant and his counsel to object to the removal of defendant from the courtroom during the judge's questioning of a juror who asked to be dismissed from the jury, followed by defense counsel's request to have that juror removed and replaced, amounted to a waiver of defendant's right to be present); *see also infra* "Waiver by failure to assert the right" in this subsection E.

Express waiver. A defendant charged with a misdemeanor or a noncapital felony may expressly waive the right to be present for the trial of his or her case by following the procedure set out in G.S. 15A-1011(d). Under this statute, if a defendant seeks to waive this right, he or she must execute a written waiver of appearance, plead not guilty, and designate legal counsel to appear on his or her behalf. The defendant also must agree in writing to

- waive the right to testify in person;
- waive the right to face his or her accusers in person; and
- be bound by the decision of the court and entry of judgment (subject to the right of appeal).

G.S. 15A-1011(d)(1).

The defendant also must submit the following in writing:

- an enumeration of circumstances justifying the request; and
- a request to proceed under this section.

G.S. 15A-1011(d)(2). The judge may allow the defendant to be absent from his or her trial "because of distance, infirmity or other good cause." G.S. 15A-1011(d)(3). *Cf.* FED. R. CRIM. P. 43(b)(2) (allowing the court, in its discretion and with defendant's written consent, to conduct proceedings in misdemeanor cases in defendant's absence).

If the defendant's request to waive presence is granted, the trial will proceed as if he or she were actually present. The State will present its case, and the defense will be given the opportunity to cross-examine the witnesses against the defendant and to present its case if desired. *See* G.S. 15A-1011(e).

It is not an abuse of discretion for a trial judge to deny a defendant's motion to be allowed to waive his or her presence at trial if the defendant does not comply with the above procedures. *See State v. Forrest*, 168 N.C. App. 614 (2005) (no abuse of discretion by trial judge in denying defendant's *oral* motion to waive his right to appear at trial

made after the judge ordered defendant to appear at trial strapped to a chair, handcuffed, and masked from the eyes down). *But see State v. Whitted*, 209 N.C. App. 522 (2011) (rejecting the defendant's argument that the trial judge violated G.S. 15A-1011 by accepting defense counsel's oral waiver of the defendant's right to be present for certain parts of the trial after the trial had commenced; according to the court of appeals, G.S. 15A-1011 applies only when the defendant wants to waive the right to be present for entry of plea, not when the defendant wants to waive the right to be present at other parts of trial; the court of appeals went on to hold that the defendant waived her right to be present by refusing to leave her jail cell and return to the courtroom after the trial had commenced). [The limitation of G.S. 15A-1011 to the entry of plea by *Whitted* and its progeny appears to be inconsistent with the express provisions of the statute and other opinions interpreting it; that portion of the opinion was unnecessary to the ultimate holding in *Whitted*, which is consistent with the line of cases finding a waiver of the right to presence based on the defendant's voluntary absence after the trial commences, discussed below.]

No absolute "right to absence" at trial. The N.C. Court of Appeals has held that there is no absolute "right to absence"—i.e., there is no absolute right to waive one's presence at trial. *See State v. Shaw*, 218 N.C. App. 607 (2012); *see also Singer v. United States*, 380 U.S. 24, 34–35 (1965) ("[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right"). The *Shaw* court found that the N.C. Supreme Court, in *State v. Kelly*, 97 N.C. 404 (1887), had "contemplated a trial court's power to require a defendant's presence at his trial, even despite that defendant's attempted absence." *Shaw*, 218 N.C. App. 607, 609. The *Shaw* court rejected the defendant's argument that G.S. 15A-1011(d) provided support for his contention that he had an absolute right to waive his presence at trial. Citing *State v. Whitted*, 209 N.C. App. 522 (2011), the court stated that G.S. 15A-1011(d) applies only to a defendant's waiver of the right to be present for the entry of pleas and not to waivers of presence at trial. [As discussed under Express waiver, above, the *Whitted* opinion's limitation of G.S. 15A-1011 to the entry of pleas appears to be inconsistent with the statute and other opinions interpreting it; that portion of the opinion was unnecessary to the ultimate holding in *Whitted*.]

Practice note: Proceeding to trial without the defendant's presence is ordinarily not desirable since he or she will be unable to participate or assist in the defense. If the defendant indicates a desire to waive this right, you should strongly advise him or her not to do so except in extraordinary circumstances.

Voluntarily absent defendant at trial stage. In a noncapital case, a defendant's voluntary and unexplained absence from court *after his or her trial begins* constitutes a waiver of the right to be present. *State v. Richardson*, 330 N.C. 174 (1991); *State v. Davis*, 186 N.C. App. 242 (2007); *State v. Mulwee*, 27 N.C. App. 366 (1975); *see also State v. Montgomery*, 33 N.C. App. 693, 695 (1977) (once a trial for a noncapital felony has begun in defendant's presence, he or she waives the right to presence and the trial can be validly completed in his or her absence if the defendant is on bail and is voluntarily absent or if he or she escapes from custody and flees). To hold otherwise would allow a

defendant who is out on bond "'to break up a trial already commenced'" and "'to prevent any trial whatever until the accused person himself should be pleased to permit it.'" *Diaz v. United States*, 223 U.S. 442, 457 (1912) (citation omitted); *see also United States v. Taylor*, 414 U.S. 17 (1973) (defendant's voluntary absence from trial after lunch recess of first day of trial amounted to a waiver of the right to be present and continuation of trial in his absence was proper under Fed. R. Crim. P. 43).

Once trial has commenced, the defendant has the burden of explaining his or her absence to the satisfaction of the trial judge. *State v. Stockton*, 13 N.C. App. 287 (1971) (finding waiver where defendant voluntarily absented himself after the first day of trial and noting that defense counsel did not offer any explanation for defendant's absence). If this burden is not met, a waiver of the right to be present is inferable. *Richardson*, 330 N.C. 174 (defendant failed to meet burden of explaining his absence where explanation was uncorroborated, untimely, and initially offered by an unidentified friend of the defendant).

Where a defendant's absence is attributable to a lack of notice, his or her absence does not operate as a waiver. *See State v. Hayes*, 291 N.C. 293 (1976) (defendant did not waive his right to appear where defendant and counsel had been instructed by district attorney that they would receive one-half day's notice before the case would be called but received only two hours' notice).

While there are no North Carolina cases that deal specifically with *commencing* a trial in a defendant's absence, the implication from the above cases is that a defendant cannot be tried in absentia where the defendant was not present *when the trial began* unless he or she had expressly waived the right to presence. *See also Richardson*, 330 N.C. 174, 179 (after noting that "it is clear that trial had begun before defendant absented himself," court of appeals found no error in trial judge's denial of continuance where defendant voluntarily absented himself after jury selection but before the jury was empaneled); *State v. Kelly*, 97 N.C. 404, 408 (1887) (noting that when a prisoner is not in custody but is "under recognizance for his appearance, the court will not begin a trial in his absence, unless he expressly waives his right to be present. . . ."). The implicit rationale of the cases finding waiver after trial has commenced is that a defendant who is present when trial commences has due notice of the time that the trial is to recommence and, by absenting himself or herself, voluntarily waives the right to presence. *See, e.g.*, *Davis*, 186 N.C. App. 242; *Stockton*, 13 N.C. App. 287; *cf. Crosby v. United States*, 506 U.S. 255, 261–62 (1993) (holding that Fed. R. Crim. P. 43 "prohibits the trial *in absentia* of a defendant who is not present at the beginning of trial" and noting that there is a difference between flight before and flight during a trial because a defendant's initial presence at trial "serves to assure that any waiver is indeed knowing").

Forfeiture of right to presence by voluntary intoxication or impairment. A defendant charged with a misdemeanor or noncapital felony who voluntarily becomes intoxicated or impaired after trial has begun may be found to have waived his or her right to presence. *See State v. Minyard*, 231 N.C. App. 605 (2014). In *Minyard*, the defendant ingested a large quantity of sedative, hypnotic, or anxiolytic medications and alcohol during jury

deliberations and became lethargic, stuporous, and non-responsive. He was taken into custody and examined by emergency medical services. Deliberations continued and the verdict was returned in his absence. On appeal, the defendant argued that the trial judge erred in failing to conduct a competency hearing sua sponte. Although there was "ample evidence to raise a bona fide doubt" whether the defendant was competent to stand trial, the N.C. Court of Appeals found that the more appropriate analysis was whether the defendant had waived his right to be present during the proceedings. *Id.* at 626. The court likened the defendant's actions in ingesting the substances to those of defendants who are removed from the courtroom due to disruptive behavior or who choose to voluntarily absent themselves from trial. The court then held that the defendant waived his right to be present by his voluntary actions in ingesting the intoxicants. "To hold otherwise would create a rule where 'many persons, by their own acts, could effectively prevent themselves from ever being tried.'" *Id.* at 627 (citing *People v. Rogers*, 309 P.2d 949 (Cal. Dist. Ct. App. 1957) (defendant impliedly waived his right to be mentally present when he apparently injected himself with a large dose of insulin to induce insulin shock and avoid continuing with his trial)).

Practice note: If the defendant explicitly or implicitly waives his or her right to be present at trial, counsel should object to any prejudicial testimony presented about the absence or to any prejudicial references to the defendant's absence made by the prosecutor during closing argument or the issue will not be fully preserved for appellate review. *See State v. Britt*, ___ N.C. App. ___, 791 S.E.2d 666 (2016) (unpublished) (holding that even if the prosecutor improperly commented on defendant's absence from trial, the comments were not so grossly improper that the trial judge would have been compelled to strike the argument sua sponte); *State v. Wallace*, ___ N.C. App. ___, 787 S.E.2d 464 (2016) (unpublished) (where defendant voluntarily absented himself after the first day of trial, testimony by police officer that he had not seen defendant since that day and did not know defendant's whereabouts was irrelevant but did not amount to plain error).

Counsel should also consider whether it would be helpful for the jury to be instructed that the defendant has waived his or her right to be present and that the defendant's absence should not be considered with regard to his or her guilt or innocence. *See, e.g., State v. Webster*, 111 N.C. App. 72 (1993) (judge informed jury that the defendant had been excused from the day's proceedings for good cause), *aff'd*, 337 N.C. 674 (1994). If no instruction is requested, the failure of the judge to instruct on this subordinate feature of the case will not be held to be error. *See State v. Turner*, 11 N.C. App. 670 (1971) (so holding). The pattern jury instructions do not contain an instruction on this issue. If an instruction on the defendant's absence is desired, counsel should draft one that fits the facts of the case and request that it be submitted to the jury. Do not leave it up to the judge or prosecutor to draft the instruction. *See, e.g., State v. McNeil*, 209 N.C. App. 654, 666–67 (2011) (judge "merely explained defendant's absence for the record" and did not err in instructing the jury that "[t]he defendant, for whatever reason and only known to him, has refused to return after the lunch recess. We have given him ample opportunity to show up. He has failed to do so.").

Sample instruction: Below is a sample instruction on a defendant's absence from trial.

You may have noticed that Mr./Ms. _____ was not present during [part of] the trial of this case. A defendant charged with a noncapital felony may waive his or her constitutional right to be present for trial. Mr./Ms. _____'s absence may not be considered as evidence against him/her and you may not draw any inferences of guilt whatsoever from his/her absence. You must render a fair and impartial verdict based on the evidence that was presented at trial in open court and the fact that Mr./Ms. _____ was not present may not be considered by you in any way in arriving at that verdict.

Voluntarily absent defendant at sentencing. The N.C. appellate courts have long held that the defendant's presence, if voluntarily waived, is not necessary to a valid trial and conviction, but his or her presence at sentencing is essential if the sentence "involves and includes corporal punishment." *See, e.g.*, *State v. Cherry*, 154 N.C. 624, 627 (1911) (setting aside judgments sentencing defendants "to a term of twelve months on the roads" and remanding case for new sentencing hearing where defendants had voluntarily absented themselves from trial and sentencing after the first day); *State v. Brooks*, 211 N.C. 702, 704 (1937) (striking judgment entered against defendant in his absence that assigned defendant to two years on the roads; the "presence of the accused is essential" when corporal punishment is imposed); *State v. Stockton*, 13 N.C. App. 287, 292 (1971) (holding that even though defendant waived his right to be present during trial and at rendition of the verdict by voluntarily absenting himself from trial after the first day, the trial judge erred in sentencing defendant in absentia to a sentence of imprisonment because "when a sentence involving corporal punishment is imposed upon a verdict, either on a capital felony charge, a felony charge less than capital, or a misdemeanor, the defendant must be present"); *see also supra* § 21.1C, Trial Proceedings (discussing right to presence at sentencing).

Contrary to these decisions, however, North Carolina may no longer recognize an unwaivable right to be present at sentencing when corporal punishment is imposed. In *State v. Miller*, 142 N.C. App. 435 (2001), the N.C. Court of Appeals rejected the defendant's argument that the trial judge erred in conducting a sentencing hearing after the defendant had fled the courthouse during jury deliberations. In reaching its decision, the court relied on G.S. 15A-1334(a), which provides that a trial judge must hold a sentencing hearing "[u]nless the defendant waives the hearing." According to that statute, a trial judge may continue the hearing on a showing of "good cause." The *Miller* court held that the "defendant's flight and refusal to participate in the proceedings despite being a convicted felon did not constitute "good cause" to continue the hearing; therefore, the trial judge did not abuse his discretion in failing to continue the hearing until such time as the defendant could be located. *Id.* at 446.

Likewise, in *State v. Skipper*, 146 N.C. App. 532 (2001), the N.C. Court of Appeals found no error by the trial judge in going forward with the defendant's habitual felon proceeding after the defendant failed to return from a recess. The defendant's absence was unexplained so the trial judge was "correct to infer that defendant waived his right to be present for the remainder of the proceeding," which included the taking of the verdict

and sentencing the defendant to an active term of imprisonment of a minimum of 116 months and a maximum of 149 months. *Id.* at 536 (citing *Miller*); *see also State v. Moore*, 238 N.C. App. 364 (2014) (unpublished) (citing *Miller* and finding under the circumstances of that case that defendant waived her right to be present when active sentence in presumptive range was imposed after she voluntarily absented herself during trial and did not return; court held that by enacting G.S. 15A-1334(a) [in 1977], the General Assembly acknowledged that a right to presence at sentencing may be waived by the defendant and that the same reasoning that applies to voluntary absences *during trial* should apply to sentencing).

G.S. 15A-1011(d), discussed above under "Express waiver," allows a defendant to plead not guilty and waive the right to be present at trial in misdemeanor and noncapital felony cases in certain circumstances. This statute may override cases decided before the statute's enactment indicating that the defendant must be present if the court imposes a sentence of imprisonment; however, the statute requires an express waiver of the right to be present and does not provide support for the above decisions finding a waiver based on the defendant's failure to appear. Instead of sentencing in absentia a defendant who has not expressly waived the right to presence, the trial judge should enter a prayer for judgment continued until such time as the defendant can be brought to court. *See* Jessica Smith, *Trial in the Defendant's Absence*, N.C. SUPERIOR COURT JUDGES' BENCHBOOK (June 2009).

Practice note: Proceeding with sentencing in the defendant's absence is not desirable since he or she will be unable to assist or participate. Unless the defendant has expressly waived the right to presence as permitted by G.S. 15A-1011(d), counsel should move to continue the sentencing hearing if the defendant is not present. If possible, offer an explanation for the defendant's absence and introduce any evidence or testimony that corroborates the explanation. If the motion is denied, counsel should object to the imposition of any sentence of imprisonment, active or suspended, and cite to the defendant's common law right to presence at sentencing. Although neither the U.S. Supreme Court nor the N.C. Supreme Court have specifically ruled on whether a defendant has a constitutional right to presence at sentencing, you should cite to the Sixth and Fourteenth Amendments to the U.S. Constitution and to article I, sections 19 and 23 of the N.C. Constitution. *See supra* § 21.1C, Trial Proceedings (discussing right to presence at sentencing and noting that some federal circuit courts have adopted the general view that a criminal defendant, in addition to having a right to presence at sentencing under the federal rules of criminal procedure, also has a federal constitutional right to be present at sentencing).

The decision in *State v. Miller*, 142 N.C. App. 435 (2001), discussed above, dealt only with the defendant's waiver of the sentencing hearing and whether good cause for a continuance had been shown under G.S. 15A-1334. The court did not directly address, nor was it asked to address, the trial judge's imposition of an active sentence in the defendant's absence in violation of the long-standing common law prohibition against such an action or in violation of the defendant's constitutional rights. The later decision in *State v. Skipper*, 146 N.C. App. 532 (2001), holding that the defendant waived the

right to presence at sentencing by his unexplained absence is contrary to controlling precedent by the N.C. Supreme Court in *State v. Cherry*, 154 N.C. 624 (1911), and *State v. Brooks*, 211 N.C. 702 (1937). *See also Dunn v. Pate*, 334 N.C. 115 (1993) (holding that Court of Appeals has no authority to overrule decisions of N.C. Supreme Court and must follow them until otherwise ordered to do so). Additionally, the previously discussed unpublished decision in *State v. Moore*, 238 N.C. App. 364 (2014), does not constitute controlling legal authority. *See* N.C. R. APP. P. 30(e)(3).

Waiver by failure to assert the right. In a noncapital case, a defendant's failure to assert his or her right to presence at certain proceedings may be treated as a waiver. For example, if a judge calls a juror to the bench, or conducts an in-chambers conference that the defendant knows about but does not ask to attend, the right to presence may be deemed waived. *See, e.g., State v. Watson*, 338 N.C. 168 (1994) (by failing to object to judge's directive to bailiff to instruct the jury to reduce its question to writing and then retrieve it, defendant waived his right to presence and could not assign as error the judge's alleged denial of the right); *State v. Pittman*, 332 N.C. 244 (1992) (finding waiver where defendant failed to request to be present at or object to his absence from bench and in-chambers conferences held by the judge with the attorneys); *State v. Braswell*, 312 N.C. 553 (1985) (defendant waived right to be present at a voir dire hearing on the admissibility of evidence where he knew or should have known about the hearing and failed to assert his right to attend).

F. Removal of Disruptive Defendant

Notwithstanding the constitutional right to presence at trial, a noncapital defendant may "waive" this right and be removed from the courtroom if he or she becomes so disruptive that the trial cannot proceed in an orderly fashion. *See State v. Brown*, 19 N.C. App. 480 (1973); *see also Illinois v. Allen*, 397 U.S. 337, 344 (1970) (in order to maintain a proper courtroom atmosphere when the defendant is acting disruptively, the trial judge may constitutionally "(1) bind and gag him, thereby keeping him present; (2) cite him for contempt; [or] (3) take him out of the courtroom until he promises to conduct himself properly").

Practice note: Removal of the defendant is a drastic measure because it undermines the defendant's rights to effective assistance of counsel and to confront the witnesses and evidence against him or her. Counsel should ask for a recess first to give the client an opportunity to collect himself or herself. If the judge opts for physical restraints of a disruptive defendant instead of removal, the restraints should be unobtrusive and not viewable by the jury. *See generally State v. Woodard*, 102 N.C. App. 687 (1991) (trial judge did not err by refusing to remove the defendant where the defendant ceased to be disruptive once shackled). For a discussion of the use of physical restraints and potential interference with the defendant's rights, see *infra* § 21.6, Right to Appear Free of Physical Restraints.

Statutory authorization and procedure for removal of noncapital defendant. After warning a disruptive noncapital defendant, the trial judge may order the defendant

removed from the trial if he or she continues to interrupt the proceedings. Unless impracticable, this warning and any subsequent order of removal must be made outside the presence of the jury. G.S. 15A-1032(a); *see also State v. Rowe*, 33 N.C. App. 611 (1977) (trial judge had no opportunity to warn defendant before removal where defendant violently threw counsel's table, shouted obscenities at the judge, and continued shouting after he was physically restrained by officers and dragged to a corner of courtroom).

The judge must set forth on the record the reasons for the defendant's removal and instruct the jury not to consider the defendant's removal from the proceedings when weighing the evidence or determining the issue of guilt. G.S. 15A-1032(b); *see also State v. Callahan*, 93 N.C. App. 579, 584 (1989) (trial judge did not err by instructing jury on defendant's "removal from the courtroom" rather than his "absence").

After removal, the defendant must be given the opportunity to learn of the proceedings through counsel and to confer with counsel at reasonable intervals as directed by the court. G.S 15A-1032(b); *see also State v. Brown*, 19 N.C. App. 480 (1973) (defendant removed to an adjoining room from which he could listen to proceedings by intercom and speak with counsel by telephone). He or she must be given the opportunity to return to the courtroom "upon assurance of his [or her] good behavior." G.S 15A-1032(b).

Removal of disruptive capital defendant constitutionally prohibited. It is a constitutional violation to remove a disruptive defendant from the courtroom during a capital trial if the trial is continued in his or her absence. *State v. Huff*, 325 N.C. 1 (1989), *vacated on other grounds*, 497 U.S. 1021 (1990). However, a new trial need not be granted for such a violation if the State can show that the error was harmless beyond a reasonable doubt. *State v. Cunningham*, 344 N.C. 341 (1996) (defendant's exclusions from the courtroom were harmless beyond a reasonable doubt where he was able to observe all proceedings through an audio-video hookup and upon his return to the courtroom was able to object to anything that occurred in his absence).

Practice note: If your client is removed from trial for being disruptive, you should specifically object to the removal on statutory and state and federal constitutional grounds or the issue will be waived on appeal. *See State v. Watson*, 338 N.C. 168 (1994) (defendant's failure to object to the alleged denial of his constitutional right to presence constituted a waiver of the right to argue the issue on appeal); *State v. Miller*, 146 N.C. App. 494 (2001) (same). You also should consider whether an instruction on the removal or absence would be helpful to your client's case or whether it would call more attention to his or her absence. If you determine that you do not want the judge to instruct on the removal pursuant to G.S. 15A-1032(b)(2), you should inform the judge that you wish to waive that instruction. *See State v. Ash*, 169 N.C. App. 715, 726 (2005) (defense counsel specifically waived the instruction required by G.S. 15A-1032(b)(2) because they felt "it will just call more attention to the fact that [defendant's] not here"). If you want the instruction to be given and the judge fails to give it, you must object to the failure to instruct or the error will be waived.

G. Standard of Review on Appeal

The right to be present at all critical stages of the prosecution is subject to harmless error analysis. If the defendant's constitutional right to presence is violated and the error is preserved, the State bears the burden of showing that the error was harmless beyond a reasonable doubt. *See State v. Braswell*, 312 N.C. 553 (1985); *see also Rushen v. Spain*, 464 U.S. 114 (1983). "[T]he presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt." *State v. Autry*, 321 N.C. 392, 400 (1988).