35.1 Appeals by the Defendant

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A. In General

After a defendant has been found guilty or has pled guilty or no contest, a trial judge has the power to do one of three things:

1. pronounce judgment and place it into immediate effect;
2. pronounce judgment and suspend or stay its execution; or

3. enter a prayer for judgment continued.

See State v. Griffin, 246 N.C. 680 (1957). A trial judge also has the power to arrest judgment in an appropriate case. *See State v. Pakulski*, 326 N.C. 434 (1990). A defendant in North Carolina has the right to appeal from a district or superior court judgment but not necessarily from a prayer for judgment continued (discussed *infra* in § 35.1L) or from a judgment that has been arrested (discussed *infra* in § 35.1P). In cases decided in superior court, the types of issues that may be appealed following judgment depend on whether the defendant pled guilty or was found guilty and on the type of sentence that was imposed (discussed *infra* in § 35.1C and D).

Basis of right to appellate review. A defendant's right to appeal from a criminal conviction in North Carolina is afforded by statute. *State v. Berryman*, 360 N.C. 209 (2006); *see also State v. Shoff*, 118 N.C. App. 724 (1995) (noting that G.S. 15A-1444(d) provides the exclusive statutory authority for appeals in criminal cases), *aff'd per curiam*, 342 N.C. 638 (1996).

There is no federal constitutional right to appeal to the appellate division in criminal cases. *See Abney v. United States*, 431 U.S. 651 (1977); *see also Halbert v. Michigan*, 545 U.S. 605 (2005); *State v. Pimental*, 153 N.C. App. 69 (2002). Likewise, the N.C. Constitution does not mandate appellate review of criminal convictions. *Berryman*, 360 N.C. 209, 213–14. However, if a state provides an appeal of right, as North Carolina has done, the procedures utilized in deciding the appeal must comply with the demands of the Due Process and Equal Protection Clauses of the U.S. Constitution. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Berryman*, 360 N.C. 209.

Finality of judgment generally required. Appeals in criminal actions are generally limited to those taken from final judgments. *See* G.S. 7A-27(b)(1); G.S. 15A-1444(a). *But see* G.S. 15A-1432(d) (setting out a statutory exception that authorizes a defendant to appeal from an interlocutory superior court order that reinstates charges that had been dismissed in district court). A judgment is final if it disposes of the case "as to the State and the defendant, leaving nothing to be judicially determined between them in the trial court." *State v. Joseph*, 92 N.C. App. 203, 204 (1988) (citations omitted); *see also* G.S. 15A-101(4a) ("Judgment is entered when sentence is pronounced."); *Berman v. United States*, 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentence.").

Appeals from interlocutory orders or rulings, other than those authorized by G.S. 15A-1432(d), will be dismissed. *See, e.g., State v. Shoff,* 118 N.C. App. 724 (1995) (holding that defendant had no statutory right to an interlocutory appeal from the trial judge's order denying defendant's motion to dismiss based on double jeopardy grounds); *Joseph*, 92 N.C. App. 203 (same); *State v. Howard*, 70 N.C. App. 487 (1984) (dismissing appeal from trial judge's denial of one claim in defendant's motion for appropriate relief because defendant's conviction was vacated on another ground and a new trial ordered; no final judgment existed from which defendant could appeal). Although a defendant does not have a statutory right to appeal from an interlocutory order or ruling (with the one exception noted above), he or she may seek review by filing a petition for writ of certiorari pursuant to N.C. R. APP. P.

21(a)(1) or N.C. GEN. R. PRAC. SUPER. & DIST. CT. 19. Writs of certiorari are discretionary and are discussed *infra* in § 35.7D, Certiorari of Trial Court Orders and Judgments. For additional discussion of interlocutory appeals under G.S 15A-1432(d), see *infra* § 35.1K, Interlocutory Appeals to Appellate Division.

Other methods of obtaining review. The discussion in the following sections addresses the right to appeal from a trial court's judgment. Other methods for obtaining review may exist apart from whether a defendant has a right to appeal and are discussed later in this chapter under the headings applicable to that method of review.

Practice note: For a discussion of district court trial counsel's obligations to file and pursue an appeal for a trial de novo following a district court conviction, see *infra* "District court counsel's obligations regarding defendant's right to appeal and to continue representation for trial de novo" in § 35.1B, Defendant's Right to Appeal from District Court Judgment. For a discussion of superior court trial counsel's obligations regarding the filing of appeal to the appellate division following a superior court conviction, see *infra* subsection O. of § 35.1, Trial Counsel's Obligations regarding Defendant's Right to Appeal after Superior Court Conviction.

B. Defendant's Right to Appeal from District Court Judgment

Right to appeal to superior court. A defendant has the right to appeal a district court misdemeanor conviction to superior court for a trial de novo before a jury. N.C. CONST. art. I, § 24; G.S. 15A-1431(b); *see also* G.S. 7A-196(b); G.S. 7A-271(b); G.S. 7A-290. This is true even if the district court trial was free from error (*State v. Spencer*, 276 N.C. 535 (1970)) or the defendant pled guilty in district court. *State v. Fox*, 34 N.C. App. 576 (1977). *But see* Shea Denning, *May a Defendant Appeal an Infraction to Superior Court?*, UNC CRIM. L., UNC SCH. OF GOV'T BLOG (Jul. 11, 2018) (discussing limited circumstances in which a person may appeal an infraction to superior court).

Practice note: A district court may take a guilty plea to (but not try) a Class H or I felony under G.S. 7A-272(c). If the defendant pleads guilty to a Class H or I felony in district court, the defendant does *not* have the right to appeal to superior court for a trial de novo. The defendant's appeal is to the appellate division. G.S. 7A-272(d); *see also State v. Goforth*, 130 N.C. App. 603 (1998) (finding that attorney erroneously advised defendant that she could appeal sentence to superior court after felony guilty plea in district court but that defendant was not prejudiced). For a discussion of the right to appeal a probation revocation decision in a case involving a felony guilty plea taken in district court, see *infra* "Appeal from a finding of violation of probation" in this subsection B.

Constitutionality of two-tier system. The U.S. Supreme Court has held that due process is not violated by a two-tier system in which a defendant convicted in an inferior court has an absolute right to a trial de novo in a court of general criminal jurisdiction because such a system does not penalize a defendant for seeking a new trial. *See Colten v. Kentucky*, 407 U.S. 104 (1972).

Article I, section 24 [formerly article I, section 13] of the N.C. Constitution authorizes a two-tier trial de novo system. It states: "No person shall be convicted of any crime but by the unanimous verdict of a jury in open court . . . . The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo." A defendant's constitutional right to a jury trial is not abridged by first having to submit to a trial without a jury in district court since the defendant has the absolute and "unfettered statutory right" to appeal to superior court for a jury trial. *See State v. Spencer*, 276 N.C. 535, 545 (1970); *accord State v. Pulliam*, 184 N.C. 681 (1922); *State v. Sherron*, 4 N.C. App. 386 (1969). *But cf. infra* "Withdrawal of appeal in cases involving an implied-consent offense" in this subsection B (discussing limits enacted by General Assembly on right to appeal in certain cases).

Form of notice of appeal. A defendant may give oral notice of appeal in open court after entry of judgment or file a written notice of appeal with the clerk within ten days of the entry of the district court judgment. *See* G.S. 7A-290 ("[n]otice of appeal may be given orally in open court, or to the clerk in writing within 10 days of entry of judgment"); *cf.* G.S. 15A-1431(c) ("[w]ithin 10 days of entry of judgment, notice of appeal may be given orally in open court or in writing to the clerk"). Judgment is entered when the sentence is pronounced. G.S. 15A-101(4a). There is some tension between the language of G.S. 7A-290 and G.S. 15A-1431(c) as to the timing of the oral notice of appeal. If notice of appeal is not given orally in open court immediately after sentencing, a defendant should file written notice of appeal within ten days to ensure proper preservation of the right to appeal. *Cf. State v. Oates*, 366 N.C. 264, 268 (2012) (Appellate Rule 4(a)(1) governs appeals from the superior court or district court to the N.C. Court of Appeals and "permits oral notice of appeal, but only if given at the time of trial . . .") (citation omitted); *State v. Holanek*, 242 N.C. App. 633 (2015) (finding that defendant lost the right to appeal from superior court to the N.C. Court of Appeals when her defense attorney waited six days after the trial was completed to give oral notice of appeal in open court). A sample notice of appeal can be found on the Office of Indigent Defense website in the Adult Criminal Motions, scroll down to Appeals, and click on Notice of Appeal from District to Superior Court.

Different rules apply to notices of appeal after compliance with a judgment by a defendant. *See infra* "Compliance does not bar appeal" in this subsection B.

Effect of notice of appeal. Criminal district courts are not "courts of record" (*State v. Gurganus*, 71 N.C. App. 95, 99 (1984)), and a trial de novo is not an "appeal on the record." *State v. Brooks*, 287 N.C. 392 (1975). An appeal from the district court judgment wipes the slate clean in the criminal case, and the trial in superior court is a new trial from beginning to end on both the law and the facts. *See State v. Spencer*, 276 N.C. 535 (1970) (holding that once a defendant appeals from district court to superior court, the plea, trial, and verdict entered in district court are completely disregarded). The district court record is not before the superior court and is totally irrelevant to its proceedings. *Brooks*, 287 N.C. 392 (citing *Colten v. Kentucky*, 407 U.S. 104 (1972)).

Scope of jurisdiction on appeal. If notice of appeal is given and not withdrawn within the ten-day period, the clerk must transfer the case to the superior court docket. G.S. 7A-290;

G.S. 15A-1431(c). Once an appeal is docketed, the superior court has the same jurisdiction over the charges for which the defendant was convicted as the district court had.

Ordinarily, offenses for which the defendant was charged but not convicted in district court (e.g., charges that were dismissed by the State or by the trial judge or for which the defendant was found not guilty) are not within the superior court's jurisdiction on the defendant's appeal of other charges. *See, e.g., State v. Reeves*, 218 N.C. App. 570 (2012) (vacating judgment for reckless driving to endanger based on lack of jurisdiction in superior court because record failed to show that the State's voluntary dismissal of the charge in district court was taken pursuant to a plea arrangement); *State v. Phillips*, 127 N.C. App. 391, 392 (1997) (noting that because the State's voluntary dismissal of the speeding charge in district court was not pursuant to a plea agreement, "that offense was not properly before the superior court for final disposition"). However, any charges that were dismissed, reduced, or modified pursuant to a plea arrangement in district court are reinstated if the defendant appeals. G.S. 7A-271(b); G.S. 15A-1431(b); *see also State v. Fox*, 34 N.C. App. 576 (1977) (the State is not bound by a plea agreement if the defendant elects to appeal and invoke the right to a trial de novo).

For further discussion of the scope of superior court jurisdiction on appeal from district court, including limitations on the bringing of new charges in superior court based on the same conduct, see 1 NORTH CAROLINA DEFENDER MANUAL § 10.7B, Misdemeanor Appeals from District Court (Jan. 2020).

Sentencing following appeal. A defendant may receive a lighter or a heavier sentence in superior court than he or she received in district court. The imposition of a more severe sentence does not violate a defendant's statutory rights or his or her federal or state constitutional rights to due process or to a trial by jury. *See State v. Spencer*, 276 N.C. 535 (1970); *State v. Sparrow*, 276 N.C. 499 (1970). A defendant's right to be free from double jeopardy is likewise not violated by the imposition of a more severe sentence in superior court. *See Colten v. Kentucky*, 407 U.S. 104 (1972).

Release pending appeal. Unless modified, the original bail remains in effect during appeal to superior court. G.S. 7A-290; G.S. 15A-1431(e). The statutes conflict on the authority of a district court judge, as opposed to a superior court judge, to modify a defendant's bond after he or she appeals for a trial de novo. G.S. 15A-534(e)(1) indicates that a district court judge may not modify pretrial release conditions after the "noting of an appeal," while G.S. 7A-290 and G.S. 15A-1431(c) suggest that a district court judge has ten days from the date of judgment to modify pretrial release conditions because the statutes state that at the expiration of ten days the clerk transfers the case to superior court. For a thorough discussion of the applicable statutes, the limits on a district court judge's authority to modify bond after the giving of notice of appeal, and practical considerations for defense counsel in giving notice of appeal, see 1 NORTH CAROLINA DEFENDER MANUAL § 1.10A, Appeal from District Court Conviction (2d ed. 2013).

Once the case is in superior court, a superior court judge has the authority to modify the conditions of pretrial release. G.S. 15A-534(e). Before or after appeal to superior court, a

defendant may apply to the superior court to modify a bond set by or allowed to stand by the district court judge. *See* G.S. 15A-538; *see also* G.S. 15A-547 (recognizing defendant's right to habeas corpus).

District court judgment stayed. Entry of notice of appeal stays the execution of all portions of the district court judgment including:

- payment of costs;
- payment of a fine;
- probation or special probation (i.e., split sentences under G.S. 15A-1351); and
- active punishment.

G.S. 15A-1431(f1).

Compliance does not bar appeal. A defendant who has complied with a district court judgment is not barred from appealing from that judgment. However, notice of appeal after compliance must be made by the defendant in person to the judge who heard the case. G.S. 15A-1431(d). If that judge is not available, then the notice must be given in an open session of district court in the applicable district. G.S. 15A-1431(d)(2).

When a defendant receives a sentence of "time served," his or her pretrial confinement on that charge does not serve as "compliance" within the meaning of G.S. 15A-1431(d). *State v. Dudley*, ___ N.C. App. ___, 842 S.E.2d 163 (2020) (finding that defendant's notice of appeal was proper where he filed a written notice within ten days of entry of judgment of "time served"; his detention before trial was not voluntary and defendant was not required to give notice of appeal in person).

G.S. 15A-1431(d) directs the district court judge to review the case and set appropriate conditions of pretrial release. *Cf.* 1 NORTH CAROLINA DEFENDER MANUAL § 1.10A, Appeal from District Court Conviction (2d ed. 2013) (discussing district court's authority to modify bond after giving of notice of appeal). Any fine or costs paid by the defendant must be remitted to him or her unless the judge orders the remission delayed pending the determination of the appeal. G.S. 15A-1431(d).

Withdrawal of appeal in cases not involving an implied-consent offense. Within ten days of entry of judgment for an offense that is not an implied-consent offense, a defendant may withdraw his or her appeal and comply with the judgment. G.S. 15A-1431(c). No costs will be taxed to the defendant if he or she withdraws the appeal within this time period. G.S. 7A-304(b). At the end of this ten-day period, superior court costs will attach. *See id.*; *see also* G.S. 15A-1431 Official Commentary. These costs may be remitted by the superior court trial judge.

If a defendant withdraws his or her appeal after the ten-day period but before the case has been calendared in superior court, the case is automatically remanded to the district court for the execution of judgment. G.S. 15A-1431(g). If the case has already been calendared, a defendant may only withdraw his or her appeal with the superior court's consent. If consent

to withdraw the appeal is granted, the defendant will be taxed with court costs unless remitted in whole or in part by the court. The court then may order the case remanded to the district court for the execution of the judgment with any additional court costs that have attached and have not been remitted. G.S. 15A-1431(h).

A form for the remand of a case involving a non-implied-consent offense after it has been calendared in superior court can be found on the Administrative Office of the Courts website. *See* AOC-CR-321B, Side One, "Order of Remand in Non-Implied-Consent Offense Cases" (Mar. 2016) (effective for appeals filed on or after December 1, 2015).

Withdrawal of appeal in cases involving an implied-consent offense. Withdrawals of appeals from convictions in implied-consent cases (as defined in G.S. 20-16.2(a1)) are treated somewhat differently than withdrawals of appeals from convictions in other types of offenses. When an appeal in an implied-consent case is noted and then withdrawn within ten days of the entry of judgment, or when an appeal is withdrawn after ten days and the case is remanded to district court, a new sentencing hearing must be held and the district court judge must consider any new convictions unless one of the following conditions is met:

1. The defendant withdraws his or her appeal within ten days of judgment and the prosecutor certifies in writing to the clerk that there are no new sentencing factors to offer the court.
2. The appeal is withdrawn and the case is remanded before it has been calendared in superior court and the prosecutor certifies in writing to the clerk that there are no new sentencing factors to offer the court.
3. The appeal is withdrawn and remanded after calendaring in superior court with consent of the court and the prosecutor certifies in writing to the clerk that he or she consents to the withdrawal and remand and that there are no new sentencing factors to offer the court.

See G.S. 20-38.7(c); *see also* G.S. 20-179(c) (on remand to district court, judge must determine whether defendant was convicted of an offense that was not previously considered and sentence accordingly). If the withdrawal and remand occur after a case has been calendared in superior court, costs will attach unless the superior court remits them in whole or part. *See* G.S. 15A-1431(h).

Practice note: Before advising a client who has been convicted of any implied-consent offense in district court regarding the advantages and disadvantages of exercising his or her right to appeal the conviction to superior court, you should carefully review G.S. 20-38.7(c) and G.S. 20-179(c). While the appeal is pending, the defendant will not have an implied-consent conviction that could be used as a grossly aggravating factor (pursuant to G.S. 20-179(c)(1)c.) if the defendant is convicted of an additional implied-consent offense. However, a new sentencing hearing is required to be conducted in every implied-consent case returned to district court after a withdrawal of the notice of appeal or after a remand unless one of the above exceptions applies. If the client is convicted of a different driving while impaired charge (or other implied-consent offense) before the new sentencing hearing, the prosecutor will not be able to certify that there are no new sentencing factors to offer the

court so that the subsequent implied-consent offense conviction will be a grossly aggravating factor that must be considered by the district court judge at the new sentencing hearing on the first conviction.

G.S. 20-38.7(d) addresses a defendant's right to appeal following a new sentencing hearing in an implied-consent case after notice of appeal has been withdrawn or after a remand. It provides that a defendant has a right to appeal to the superior court only if:

1. the sentence is based on additional facts considered by the district court that were not considered in the previously vacated sentence; and
2. the defendant would be entitled to a jury determination of those facts pursuant to G.S. 20-179.

The above language may have a number of adverse effects on a defendant. First, although the General Assembly's apparent aim was for the court to take account of new convictions, as reflected in the requirement in G.S. 20-38.7(c) that the district court judge at resentencing "shall consider any new convictions," the language of G.S. 20-38.7(d) suggests that a district court judge may change a sentence based on facts other than a new conviction. Second, G.S. 20-38.7(d) may not afford a defendant the right to appeal if the district court increases a sentence in reliance on matters that would not be subject to a jury determination under G.S. 20-179. Third, in cases that are appealable under the statute, the language of G.S. 20-38.7(d) suggests that the defendant has a right to a de novo trial on the resentencing determination only, not on the entire case.

Practice note: No appellate cases appear to have considered the district court judge's sentencing authority following remand and the defendant's rights should the judge impose a greater sentence. This practice note addresses one scenario that has come to the authors' attention and suggests a possible response—that is, if on remand a district court judge imposes a longer sentence even though the defendant has had no intervening impaired driving convictions. Such an increase not only may exceed the authority the General Assembly intended to give the district court, but it also may violate *North Carolina v. Pearce*, 395 U.S. 711 (1969), in which the U.S. Supreme Court held that an increased sentence on remand may only be based on *identifiable matters*, shown in the record, *that occurred after* the initial sentencing determination to ensure that vindictiveness played no part in the increased sentence. *See infra* § 35.5A, Resentencing after Successful Appellate or Post-Conviction Review: In General (discussing constitutional restrictions on resentencing under *Pearce*). In such a case, counsel should consider the following approach. First, regardless whether the statute specifically gives the defendant the right to appeal, counsel still should consider filing a notice of appeal to superior court. Counsel should be prepared to argue that denial of the right to appeal would violate the constitutional requirements for a two-tiered trial de novo system. *See supra "*Constitutionality of two-tier system" in this subsection B. Second, if the appeal is dismissed, counsel should consider filing a motion for appropriate relief with the district court under G.S. 15A-1415. Constitutional grounds may include the lack of the right of appeal as well as the imposition of a presumptively vindictive sentence. If the district court denies the motion for appropriate relief, the defendant may

petition the superior court for certiorari review. *See infra* § 35.7D, Certiorari of Trial Court Orders and Judgments.

If the defendant appeals following a new sentencing hearing and subsequently withdraws the notice of appeal, the sentence will be imposed by the district court as a final judgment not subject to further appeal. G.S. 20-38.7(d).

A form for the withdrawal of an appeal from a conviction of an implied-consent offense and order for remand can be found on the Administrative Office of the Courts website. *See* AOC-CR-321B, Side Two, "Withdrawal of Appeal Order of Remand Implied-Consent Offenses" (Mar. 2016) (effective for appeals filed on or after December 1, 2015).

Appeal from a finding of violation of probation. Unless a defendant waives the revocation hearing in district court (for probation violations occurring on or after December 1, 2013), he or she may appeal the activation of a suspended sentence or the imposition of a condition of special probation (split sentence) to superior court for a de novo revocation hearing. G.S. 15A-1347(a), (b); *see also* Jamie Markham, *Waiving a Probation Violation Hearing*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Apr. 28, 2014) (discussing what constitutes a waiver of hearing). If, at the de novo hearing, the superior court judge finds a violation of probation and activates a defendant's sentence or imposes special probation, the defendant may appeal to the appellate division pursuant to G.S. 7A-27(b). *See* G.S. 15A-1347(a) (detailing authority of superior court to hear appeals).

G.S. 15A-1347 does not specifically address whether a defendant on probation for a misdemeanor has the right to appeal from the imposition of short periods of confinement described in G.S. 15A-1343(a1)(3) (colloquially known as "quick dips") or from the longer periods of confinement in response to violations (CRVs, colloquially known as "dunks") imposed under G.S. 15A-1344(d2) in driving while impaired cases (and in misdemeanor cases where the defendant was placed on probation before December 1, 2015). However, the N.C. Court of Appeals has ruled that a defendant does not have a statutory right to appeal from an imposition of confinement in response to violation (CRV) of probation. *See State v. Romero*, 228 N.C. App. 348 (2013) (granting State's motion to dismiss defendant's appeal from the imposition of CRV and declining to express any opinion on whether a "terminal CRV" that acts as a de facto revocation triggers a right to appeal since the time remaining on defendant's maximum imposed sentence far exceeded the 90-day CRV he received); *see also* Jamie Markham, *No Appeal of Confinement in Response to Violation*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 16, 2013) (noting that *Romero* involved an appeal from superior court to the Court of Appeals but opining that "the same rationale would seem to preclude de novo appeals from district to superior court" as well). Because the court failed to express an opinion on the appealability of "terminal CRVs," it remains an open question as to whether the defendant has the right to appeal from those. The appealability of "quick dips" was not addressed in *Romero* "but it seems safe to say that if there's no right to appeal a CRV, then there's likewise no right to appeal a quick dip." *See* Jamie Markham, *Some FAQ about Probation Violation Appeals*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 9, 2016). Although a defendant does not have a statutory right to appeal, he or she may be able to obtain review of the imposition of a period of confinement by petitioning the superior

court for a writ of certiorari. *See* N.C. GEN. R. PRAC. SUPER. & DIST. CT. 19 (superior court may grant the writ of certiorari in proper cases); *State v. McCurry*, 244 N.C. App. 544 (2015) (unpublished) (court granted defendant's petition for writ of certiorari and reviewed the denial of his motion to continue to obtain counsel and other alleged errors in trial judge's order imposing a 90-day non-terminal CRV); *see also* § 35.7D, Certiorari of Trial Court Orders and Judgments.

A defendant who has been found to be in criminal contempt for willfully violating a condition of probation may be imprisoned for up to thirty days. *See* G.S. 5A-12(a); G.S. 15A-1344(e1); *see also* G.S. 5A-11(a)(9a) (authorizing criminal contempt for a defendant's willful refusal to comply with a condition of probation). A defendant who has been found in contempt in district court for violating probation may appeal to the superior court for a hearing de novo. *See* G.S. 5A-17(a) ("A person found in criminal contempt may appeal in the manner provided for appeals in criminal actions, except appeal from a finding of contempt by a judicial official inferior to a superior court judge is by hearing de novo before a superior court judge"). A bail hearing must be held within a reasonable time period after imposition of the confinement. G.S. 5A-17(b), (c).

If the defendant pleads guilty to a felony in district court pursuant to G.S. 7A-272(c), is placed on probation, and has his or her probation revoked by the district court, the defendant has the right to appeal for a de novo revocation hearing in superior court. *State v. Hooper*, 358 N.C. 122 (2004). After the issuance of *Hooper*, the General Assembly added G.S. 7A-271(e) to limit the right to a de novo revocation hearing. That statute provides that the superior court has exclusive jurisdiction to hold probation revocation hearings on felony guilty pleas taken in district court unless the State and the defendant agree to have the revocation hearing in district court. A defendant's consent to the hearing being held in district court can be express or implied. *See State v. Matthews*, ___ N.C. App. ___, 832 S.E.2d 261 (2019) (finding that defendant's willing participation in the revocation hearing and her lack of objection evidenced her implied consent to the jurisdiction of the district court). If the revocation hearing is in district court, the defendant has the right to appeal for a de novo hearing in superior court as described in *Hooper.* If, however, the initial revocation hearing is in superior court, the defendant's appeal is to the appellate division as in other revocation cases heard in superior court. *See infra* § 35.1E, Appeal from a Finding of Violation of Probation in Superior Court.

The superior court also has exclusive jurisdiction to hold revocation hearings in all felony probation cases where the district court is supervising a drug treatment court or therapeutic court probation judgment unless the senior resident superior court judge and the chief district court judge agree that the interests of justice require that the proceedings be held in district court. Even if the defendant's probation is revoked in district court, the defendant's appeal is to the appellate division. *See* G.S. 7A-271(f); G.S. 7A-272(e).

When probation is revoked and a defendant appeals from the activation of a sentence of imprisonment in either district or superior court, the defendant may be released on bail during the pendency of the appeal. Probation supervision under the same conditions will continue until the expiration of the probationary period or until disposition of the appeal,

whichever comes first. G.S. 15A-1347(c) (revised in 2015 and 2016). For a discussion of the impact of the statutory revisions on continuation of probation upon appeal of revocation, see Jamie Markham, *Other 2016 Legislation Related to Probation, Post-Release Supervision, and Parole*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 20, 2016) (noting that the revised statute leaves the thousands of people placed on probation prior to December 1, 2016 in "interpretative limbo").

For further discussion of appeals from probation revocations, see James M. Markham, PROBATION VIOLATIONS IN NORTH CAROLINA 47 (UNC School of Government, 2018). *See also* Jamie Markham, *Some FAQ about Probation Violation Appeals*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 9, 2016) (including a comment citing cases where defendants have obtained certiorari review of various outcomes of probation violation hearings where there was no statutory right to appeal). Discussion of probation revocations in conditional discharge and deferred prosecution cases are discussed *infra* § 35.1Q, Appealability of Conditional Discharge Orders and of Orders Revoking Conditional Discharge and Deferred Prosecution Probations.

District court counsel's obligations regarding defendant's right to appeal and to continue representation for trial de novo. After a conviction in district court, trial counsel should advise the client of his or her right to appeal for a trial de novo with a jury in superior court. *See infra* Appendix A, N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL, Guideline 9.1(a) Appeal of Misdemeanor Conviction for Trial *de Novo* in Superior Court (Nov. 2004). "Counsel should also advise the client of the potential advantages and disadvantages of exercising that right." *Id.* If the client wishes to appeal, counsel must give notice of appeal on the client's behalf. N.C. Commission on Indigent Defense Services Rule 1.7(a) (May 29, 2015); *cf. Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000) (noting that "the better practice is for counsel routinely to consult with the defendant regarding the possibility of an appeal") (citing ABA Standards for Criminal Justice, Defense Function § 4-8.2(a) (3d. ed. 1993)).

If the client wants to appeal for a trial de novo, counsel is obligated to represent him or her until entry of final judgment in superior court unless relieved by the court. *See* G.S. 15A-143 (providing that counsel who makes a general appearance in a criminal proceeding undertakes to represent the defendant until entry of final judgment at the trial stage); N.C. Commission on Indigent Defense Services Rule 1.7(a) (May 29, 2015) (recognizing counsel's obligation to continue representation). Local appointment plans in a few districts may provide for substitution of district court counsel if a defendant appeals for a jury trial in superior court, but counsel who represented the defendant in district court presumably would have to obtain the court's permission to withdraw. Counsel from the district court proceedings remains obligated to advise the defendant of the right to appeal and enter notice of appeal at the client's request even if counsel intends to move to withdraw thereafter.

C. Defendant's Right to Appeal from Conviction after Jury or Bench Trial in Superior Court

Statutory right to appeal. A defendant who pleads not guilty and is found guilty of a crime may appeal from the final judgment as a matter of right. G.S. 15A-1444(a); *see also State v. Brown*, 170 N.C. App. 601 (2005). Judgment is entered when the sentence is pronounced. G.S. 15A-101(4a).

Appellate jurisdiction. A defendant's appeal from a final judgment of a superior court, other than a judgment imposing the death penalty, lies of right to the N.C. Court of Appeals. G.S. 7A-27(b); *see also* N.C. R. APP. P. 4(d). If the defendant is convicted of first-degree murder and sentenced to death, the appeal lies of right to the N.C. Supreme Court. G.S. 7A-27(a)(1); N.C. R. APP. P. 4(d).

Exclusion of right to appeal presumptive sentence. Defendants who are found guilty and are sentenced in the presumptive range have no right to appeal the issue of whether their sentences are supported by the evidence presented at trial or at the sentencing hearing. G.S. 15A-1444(a1); *see also State v. Hill*, 179 N.C. App. 1 (2006) (defendant sentenced in the presumptive range had no statutory right to appeal his sentence; court would not review whether the trial judge erred in failing to sentence defendant in the mitigated range when he presented evidence of mitigating factors and the State offered no evidence of aggravating factors). A presumptive sentence may be subject to appeal for other reasons, however. *See State v. Fuller*, 179 N.C. App. 61 (2006) (remanding for new sentencing hearing because trial judge imposed maximum presumptive sentence based, in part, on defendant's exercise of the right to a jury trial); *see also infra* "Limited right of appeal" in § 35.1D, Defendant's Right to Appeal from Guilty Plea in Superior Court (discussing right to appeal various sentencing errors, such as the miscalculation of the defendant's prior record level; the discussion concerns appeals after a guilty plea, but a defendant also would have the right to appeal these errors after a guilty verdict by a jury).

Requirements and procedures for giving notice of appeal. The procedural requirements for giving notice of appeal after a conviction in superior court are discussed *infra* in § 35.1F, Procedural Requirements for Appealing from Superior Court.

Correction of errors. The appellate division may correct the following errors:

1. lack of jurisdiction over the offense or the person;
2. failure of the criminal pleading to charge a crime;
3. insufficiency of the evidence as a matter of law;
4. prejudicial procedural errors, including the erroneous
   - denial of a pretrial, trial, or post-trial motion or other relief,
   - admission or exclusion of evidence, or
   - instructions to the jury;
5. state or federal constitutional violations resulting in an invalid conviction;
6. insufficiency of the evidence introduced at the trial and sentencing hearing to support the sentence imposed (if the defendant is sentenced outside the presumptive range as

described in G.S. 15A-1444(a1));
7. violations of structured sentencing, including
   - the improper calculation of the defendant's prior record level,
   - an unauthorized sentence disposition, or
   - an unauthorized minimum or maximum term of imprisonment; and
8. any other prejudicial error of law committed by the trial judge.

G.S. 15A-1442. Unless the error is one that is preserved automatically for appellate review by rule or law, a defendant must have made a timely motion or objection at the trial level. *See* G.S. 15A-1446; N.C. R. APP. P. 10(a); *see also State v. Wilson*, 363 N.C. 478 (2009). The preservation of errors for appellate review is discussed in detail *infra* in Appendix B, Preserving the Record on Appeal.

D. Defendant's Right to Appeal from Guilty Plea in Superior Court

Limited right of appeal. If a defendant pleads guilty or no contest to a misdemeanor or a felony in superior court, he or she has a very limited right to appeal. A defendant who has entered a plea of guilty or no contest is not entitled to appellate review as a matter of right unless he or she is appealing the following issues:

1. Whether the prior record level was properly calculated. G.S. 15A-1444(a2)(1).
2. Whether the sentence disposition was a type that was authorized for the defendant's class of offense and prior record level (e.g., the defendant received an active or intermediate sentence when only an intermediate or community sentence was authorized). G.S. 15A-1444(a2)(2).
3. Whether the lengths of the minimum and maximum sentences are outside those set by statute for the defendant's class of offense and prior record level. G.S. 15A-1444(a2)(3).
4. If the defendant pled guilty or no contest to a felony and was sentenced outside of the presumptive range, whether there were improper findings of aggravating circumstances or improper failures to find mitigating circumstances. *See* G.S. 15A-1444(a1); *see also State v. Davis*, 206 N.C. App. 545 (2010); *State v. Rogers*, 157 N.C. App. 127 (2003). The N.C. Court of Appeals has interpreted the governing statutory provision to mean that a defendant is entitled to an appeal when his or her sentence falls within the aggravated range *or* within the mitigated range. *See State v. Mabry*, 217 N.C. App. 465, 470 (2011) (holding that "a defendant receiving a mitigated sentence must, under the plain language of the statute, have a right to appeal the sufficiency of the evidence supporting his or her sentence").
5. Whether a motion to withdraw the plea of guilty or no contest was improperly denied. *See* G.S. 15A-1444(e); *see also State v. Handy*, 326 N.C. 532 (1990) (defendant entitled to an appeal as of right after the trial judge denied his motion to withdraw his plea of guilty; death sentence vacated because denial of the presentence motion was improper); *State v. Dickens*, 299 N.C. 76 (1980) (defendant entitled to appeal as a matter of right from the denial of his motion to withdraw his pleas of guilty when his motion was made during the term and on the day following pronouncement of judgment).
6. Whether there were evidentiary and procedural issues in a sentencing hearing before a jury on the existence of aggravating circumstances or sentence enhancements. *See, e.g.,*

State v. Hurt, 361 N.C. 325 (2007) (granting new sentencing hearing where trial judge's *Blakely* error in failing to submit an aggravating factor to the jury was not harmless beyond a reasonable doubt).

7. Whether a motion to suppress evidence based on constitutional grounds or on a substantial violation of Chapter 15A was improperly denied. G.S. 15A-979(b); G.S. 15A-1444(e); *see also State v. Smith*, 193 N.C. App. 739 (2008).

Practice note: To preserve the right to appeal the denial of a motion to suppress when your client pleads guilty, you must notify the State and the trial judge ***before*** entering the guilty plea of your intention to appeal the denial of the motion or the right to do so is waived by the guilty plea. Giving notice of appeal ***after*** the plea has been entered will not suffice. *See State v. Tew*, 326 N.C. 732 (1990); *State v. Brown*, 142 N.C. App. 491 (2001); *State v. McBride*, 120 N.C. App. 623 (1995), *aff'd per curiam*, 344 N.C. 623 (1996). Additionally, a stipulation in the appellate record that the defendant intended to appeal the denial of a suppression motion is not sufficient to preserve the issue—the trial record itself must demonstrate the defendant's intention to appeal before entry of the plea. *See Brown*, 142 N.C. App. 491. The best way to proceed is to advise the State during plea negotiations of your intent to appeal and file a written "notice of intent to appeal" before entry of the plea. The written transcript of plea and the record from the in-court plea colloquy also should include a statement that the defendant intends to appeal the denial of a suppression motion under G.S. 15A-979.

The last step is to enter an oral or written "notice of appeal" from the judgment itself (not from the denial of the motion to suppress) ***after*** entry of final judgment in order to confer jurisdiction on the appellate court. *See State v. Miller*, 205 N.C. App. 724 (2010); N.C. R. APP. P. 4; *see also* 1 NORTH CAROLINA DEFENDER MANUAL § 14.7, Appeal of Suppression Motions (2d ed. 2013).

The issues set out above are the only issues that may be appealed after the entry of a guilty or no contest plea. No other issue can be raised on appeal as a matter of right. *See, e.g., State v. Rinehart*, 195 N.C. App. 774 (2009) (because defendant pled guilty, he had no right to appeal the denial of his motions to dismiss based on double jeopardy and violation of his right to a speedy trial); *State v. Evans*, 184 N.C. App. 736 (2007) (a defendant who pleads guilty has no statutory right to appeal the allowance of the order transferring the case from juvenile court to superior court); *State v. Jeffery*, 167 N.C. App. 575 (2004) (because the defendant pled guilty, he had no right to appeal (1) whether the bills of information were unconstitutionally vague and therefore violated the right against double jeopardy; and (2) whether the factual basis for the plea supported the bills of indictment); *State v. Bivens*, 155 N.C. App. 645 (2002) (after pleading guilty, defendant could not appeal as of right from the denial of his motion to continue); *State v. Pimental*, 153 N.C. App. 69 (2002) (defendant had no statutory right to appellate review of multiple issues at his trial before the entry of his guilty plea; defendant did have an appeal of right as to a sentencing issue); *see also* 1 NORTH CAROLINA DEFENDER MANUAL § 13.4B, Motion to Dismiss on Double Jeopardy Grounds (2d ed. 2013) (discussing difficulty of obtaining appellate review of double jeopardy issue after entry of guilty plea). Possible alternative remedies—writs of certiorari and motions for appropriate relief—are discussed below.

Practice note: If your client is considering pleading guilty or no contest in superior court, you should advise him or her about the consequences of the plea, including that the statutory right to appeal is extremely limited. *See infra* Appendix A, N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL, Guideline 6.1(c) The Plea Negotiation Process and the Duties of Counsel (Nov. 2004). If your client wants to appeal from a ruling on a pretrial motion other than a motion to suppress as discussed above, you will have to try the case to completion to ensure preservation of that right. (Alternative avenues of relief are discussed below in this subsection D.) Even a stipulation in a plea arrangement that allows for an appeal of the denial of a pretrial motion is not valid and will not confer jurisdiction on the appellate court if no statute authorizes that appeal. *See State v. Rinehart*, 195 N.C. App. 774 (2009); *State v. Smith*, 193 N.C. App. 739 (2008). An invalid stipulation assuring the right to appeal may give a defendant a basis for withdrawing a guilty plea because he or she cannot get the benefit of his or her bargain, but in some circumstances the defendant may have to proceed by motion for appropriate relief and not by appeal to obtain that relief. *Compare State v. White*, 213 N.C. App. 181 (2011) (where appellate court had jurisdiction over the case based on defendant's proper appeal from a denial of a motion to suppress, it could vacate the judgment and allow defendant on remand to withdraw a guilty plea that was given with the intent to preserve an appeal from the denial of defendant's pretrial motion to suppress *and* pretrial motion to dismiss), and *Smith*, 193 N.C. App. 739 (to same effect), *with Rinehart*, 195 N.C. App. 774 (distinguishing *Smith* and other decisions, in which it had vacated a guilty plea based on a plea agreement that included a reservation of the right to appeal that was ineffective, and holding that the defendant's recourse was to file a motion for appropriate relief where only issue he raised (denial of pretrial motion to dismiss) was not appealable).

Appellate jurisdiction ordinarily in N.C. Court of Appeals. If the defendant has the right to appeal from a plea of guilty (or no contest) taken in superior court, the appeal lies of right to the N.C. Court of Appeals unless the defendant received a sentence of death. If the defendant received the death penalty, the appeal lies of right to the N.C. Supreme Court. *See* G.S. 7A-27(a)(1), (b); N.C. R. APP. P. 4(d).

Requirements and procedures for giving notice of appeal. The procedural requirements for giving notice of appeal from a judgment after a guilty plea are the same as those after a conviction in superior court by a judge or jury and are discussed *infra* in § 35.1F.

Writ of certiorari. Although G.S. 15A-1444 limits a defendant's statutory right to appeal after pleading guilty, it also grants a defendant the right to petition the appellate division for review by writ of certiorari after pleading guilty. *See* G.S. 15A-1444(e), (g).

Appellate Rule 21 purports to limit writs of certiorari to review trial court orders and judgments to three instances only:

1. where the party lost the right to appeal by failing to take timely action;
2. where the order appealed from is interlocutory and there is no right of appeal; or

3. to review a trial judge's denial of a motion for appropriate relief.

See N.C. R. APP. P. 21(a)(1).

Faced with the conflicting provisions of G.S. 15A-1444 and Appellate Rule 21, the N.C. Court of Appeals reached the conclusion that, other than in the three instances set out above by Appellate Rule 21 (and one other exception carved out by the N.C. Supreme Court in *State v. Bolinger*, 320 N.C. 596 (1987)), they had no authority to issue a writ of certiorari if a defendant pled guilty. *See e.g., State v. Rinehart*, 195 N.C. App. 774 (2009) (court found that it did not have the authority to issue a writ of certiorari to review double jeopardy and speedy trial issues raised by defendant before pleading guilty).

However, the N.C. Supreme Court has made it clear that since the Court of Appeals has both jurisdiction and discretionary authority under G.S. 7A-32(c) to issue a writ of certiorari after a defendant's guilty plea, Appellate Rule 21 cannot take it away. *See State v. Ledbetter*, 371 N.C. 192, 195 (2018) (noting that G.S. 15A-1444(e) "specifically addresses review of a defendant's guilty plea through issuance of a writ of certiorari and contains no language limiting the Court of Appeals' jurisdiction or discretionary authority"); *see also State v. Stubbs*, 368 N.C. 40 (2015) (holding that absent any contravening statutory language, the Court of Appeals has jurisdiction to issue petitions for writs of certiorari). The Supreme Court further stated that Appellate Rule 21 "does not prevent the Court of Appeals from issuing writs of certiorari or have any bearing upon the decision as to whether a writ of certiorari should be issued." *Ledbetter,* 371 N.C. at 197 (remanding case for Court of Appeals to exercise its discretion in determining whether it should grant or deny defendant's petition for writ of certiorari seeking review of the denial of her motion to dismiss her driving while impaired charge even though defendant had pled guilty); *see also State v. Owenby*, 261 N.C. App. 774 (2018) (unpublished) (after citing *Ledbetter* and granting certiorari review, court found trial judge did not err when she accepted defendant's guilty plea since a sufficient factual basis existed for acceptance of the plea).

Notwithstanding *Ledbetter*, the N.C. Court of Appeals has found that Appellate Rule 21 precludes the court from granting certiorari in guilty plea cases where the defendant is seeking review of the denial of a motion to suppress and the defendant did not give notice of intent to appeal before entering the plea. *See State v. Killette*, ___ N.C. App. ___, 834 S.E.2d 696 (2019) (viewing *Ledbetter* and *Stubbs* as clarifying the court's jurisdiction to hear petitions for writ of certiorari but not as relieving the court of its obligation to follow binding substantive precedent that compelled it to deny the writ under Appellate Rule 21), *petition for mandamus and alternative petition for disc. rev. filed*, (N.C. Dec. 4, 2019) (No. 379PA18-2). A concurring judge disagreed with the majority's conclusion that precedent "foreclose[d] a full exercise of our authority and discretion" in reviewing the defendant's petition after *Ledbetter* and *Stubbs*, but would have nevertheless denied the defendant's petition after exercising her full discretion. *Id.* at 700. The defendant's petition for writ of mandamus and alternative petition for discretionary review of the Court of Appeals' decision are currently pending before the N.C. Supreme Court.

Practice note: *Ledbetter* represents a sea change, and defendants who plead guilty or no contest are no longer constrained by the limitations imposed by Appellate Rule 21. Defendants may now seek certiorari review of issues that arise from the denial of motions made before the entry of a guilty plea and issues relating to irregularities occurring during the plea procedure. But, since the writ is discretionary and requires a showing of good cause, the Court of Appeals is free to deny review after exercising that discretion and counsel should advise clients accordingly.

Counsel should be aware of the Court of Appeals' discussion in *Killette* that even if the court was not required by binding precedent to deny the defendant's petition based on the defendant's failure to give pre-plea notice of intent to appeal, it would have done so based on the reasoning of the prior cases—i.e., it would be unfair to allow a defendant to lock the State into an advantageous plea bargain without giving the State and the trial court notice of his or her intent to seek an appeal. The court warned that "[i]f defendants can so easily circumvent the fairness requirement that the State be informed of a defendant's intent to appeal prior to concluding the plea agreement, the State may offer fewer plea bargains." *Killette*, ___ N.C. App. at ___, 834 S.E.2d 696, 699. The concurring judge likewise acknowledged that, while the earlier cases cited by the majority were no longer binding after *Ledbetter* and *Stubbs*, the analysis in them "may be instructive to the exercise of our discretion when reviewing a petition for certiorari review of an appeal following a guilty plea . . . ." *Id*. at 700.

If trial counsel believes that there is a good appellate issue that the defendant would like raised after a guilty plea, counsel should consult with the Office of the Appellate Defender. *See infra* Appendix A, N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL, Guideline 9.3(c) Right to Appeal to the Appellate Division (Nov. 2004) (when a "defendant does not have a right to appeal and trial counsel believes there is a meritorious issue in the case that might be raised in the appellate division by means of a petition for writ of certiorari, counsel should inform the defendant of his or her opinion and consult with the Office of the Appellate Defender about the appropriate procedure").

For a further discussion of writs of certiorari, see *infra* § 35.7D, Certiorari of Trial Court Orders and Judgments.

Motion for appropriate relief. Although a defendant may not be entitled to an appeal of right after pleading guilty, he or she may be able to pursue a motion for appropriate relief under G.S. 15A-1414 and G.S. 15A-1415. *See infra* § 35.3, Motions for Appropriate Relief. Generally, a defendant who enters a guilty plea waives all errors in the proceeding, including constitutional violations that occurred before entry of the plea. One exception to this rule is that the defendant may challenge the power of the State to bring him or her into court. *See Blackledge v. Perry*, 417 U.S. 21, 30–31 (1974); *State v. Reynolds*, 298 N.C. 380 (1979) (discussing *Blackledge*). For example, a defendant who pled guilty may use a motion for appropriate relief to challenge a conviction based on a fatally defective indictment, which constitutes a jurisdictional defect under North Carolina law. A defendant also may challenge whether his or her guilty plea was voluntary and intelligent and whether he

received effective assistance of counsel in entering the plea. *See State v. Mercer*, 84 N.C. App. 623 (1987); *see also Blackledge v. Allison*, 431 U.S. 63 (1977). Additionally, a defendant may file a motion for appropriate relief seeking relief from a guilty plea if it was entered under the mistaken impression that he or she could preserve the right to appeal from the denial of pretrial motions (other than a motion to suppress from which there is a right to appeal). *See State v. Rinehart*, 195 N.C. App. 774, 777 (2009) (dismissing defendant's appeal for lack of appellate jurisdiction "without prejudice to defendant's right to file a motion for appropriate relief . . .").

For a further discussion of possible grounds for motions for appropriate relief after a guilty plea, see Jessica Smith, *Two Issues in MAR Procedures: Hearings and Showing Required to Succeed on a MAR*, ADMINISTRATION OF JUSTICE BULLETIN No. 2001/04 (UNC School of Government, Oct. 2001). For further discussion of grounds for motions for appropriate relief in general, see *infra* § 35.3, Motions for Appropriate Relief.

E. Appeal from a Finding of Violation of Probation in Superior Court

Generally. A defendant has the right to appeal under G.S. 7A-27 to the N.C. Court of Appeals from a superior court's finding of a violation of probation if the judge either activates the defendant's suspended sentence or imposes a condition of special probation (split sentence). This is true whether the superior court activates a sentence or imposes special probation in a case originating in superior court or after a de novo hearing of a ruling appealed from district court. G.S. 15A-1347(a). If the judge finds a violation but continues a defendant on probation or modifies the terms of probation without imposing a condition of special probation, there is no right to appeal that ruling under G.S. 15A-1347. *See State v. Edgerson*, 164 N.C. App. 712 (2004) (although trial judge found a violation of probation and modified defendant's probation to add four more conditions of probation, defendant had no right to appeal); *see also* James M. Markham, PROBATION VIOLATIONS IN NORTH CAROLINA 47 (UNC School of Government, 2018); Jamie Markham, *Some FAQ about Probation Violation Appeals*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 9, 2016).

Appeal from a finding of criminal contempt. A defendant who has been found to be in criminal contempt for willfully violating a condition of probation may be imprisoned for up to thirty days. *See* G.S. 5A-12(a); G.S. 15A-1344(e1); *see also* G.S. 5A-11(a)(9a) (authorizing criminal contempt for a defendant's willful refusal to comply with a condition of probation). A defendant who has been found in criminal contempt in superior court for violating probation has the right to appeal to the N.C. Court of Appeals. *See* G.S. 5A-17(a) ("A person found in criminal contempt may appeal in the manner provided for appeals in criminal actions"). A bail hearing must be held within a reasonable time after imposition of the confinement. G.S. 5A-17(b), (c).

No right to appeal from other periods of confinement. G.S. 15A-1347 does not specifically address whether a defendant has the right to appeal from the imposition of short periods of confinement described in G.S. 15A-1343(a1)(3) (colloquially known as "quick dips") or from the longer periods of confinement in response to violations imposed under

G.S. 15A-1344(d2) (CRVs, colloquially known as "dunks," which are ninety days unless the time remaining on the maximum sentence is less than that).

The N.C. Court of Appeals has ruled that a defendant does not have a statutory right to appeal from the imposition of a CRV. *See State v. Romero*, 228 N.C. App. 348 (2013) (granting State's motion to dismiss defendant's appeal from the imposition of a CRV and declining to express any opinion on whether a "terminal CRV" that acts as a de facto revocation triggers a right to appeal since the time remaining on defendant's maximum imposed sentence far exceeded the 90-day CRV he received); *see also* Jamie Markham, *No Appeal of Confinement in Response to Violation*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 16, 2013). Because the court in *Romero* failed to express an opinion on the appealability of "terminal CRVs," it remains an open question as to whether the defendant has the right to appeal from those. The appealability of "quick dips" was not addressed in *Romero*, "but it seems safe to say that if there's no right to appeal a CRV, then there's likewise no right to appeal a quick dip." *See* Jamie Markham, *Some FAQ about Probation Violation Appeals*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 9, 2016).

Alternate avenue of appellate review. Although the defendant has no statutory right to appeal from the outcomes of a probation violation hearing other than revocation or the imposition of special probation, a defendant can sometimes obtain appellate review through a petition for writ of certiorari. The N.C. Court of Appeals, in its discretion, has granted the writ in cases where there was an allegation of the denial of a constitutional right at the hearing or the trial judge lacked jurisdiction to hold the hearing. *See, e.g., State v. McCurry*, 244 N.C. App. 544 (2015) (unpublished) (granting certiorari review of the denial of a continuance to obtain counsel and other alleged errors in order imposing ninety-day confinement in response to violation); *State v. Hoskins*, 242 N.C. App. 168 (2015) (allowing certiorari and vacating probation termination orders because the trial judge lacked jurisdiction at the violation hearing); *State v. Sexton*, 141 N.C. App. 344 (2000) (granting certiorari review from a probation modification order to address denial of the assistance of counsel). These cases demonstrate that while there is no right of direct appeal, the proceedings are not completely immune from review. For further discussion of petitions for writ of certiorari, see *infra* § 35.7D, Certiorari of Trial Court Orders and Judgments.

Release pending appeal of the judgment revoking probation. When probation is revoked and a defendant appeals from the activation of a sentence of imprisonment in either district or superior court, the defendant may be released on bail during the pendency of the appeal. Probation supervision under the same conditions will continue until the expiration of the probationary period or until disposition of the appeal, whichever comes first. G.S. 15A-1347(c) (revised in 2015 and 2016). For a discussion of the impact of the statutory revisions on continuation of probation upon appeal of revocation, see Jamie Markham, *Other 2016 Legislation Related to Probation, Post-Release Supervision, and Parole*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 20, 2016) (noting that the revised statute leaves the thousands of people placed on probation before December 1, 2016 in "interpretative limbo.").

Appeals from revocation of conditional discharge or deferred prosecution probation. Discussion of appeals from this type of probation revocation are discussed *infra* § 35.1Q, Appealability of Conditional Discharge Orders and Orders Revoking Conditional Discharge and Deferred Prosecution Probations.

F. Procedural Requirements for Appealing from Superior Court

Manner and time. Notice of appeal from a judgment or order may be given orally at trial or may be filed in written form with the clerk of superior court. N.C. R. APP. P. 4(a); *see also* G.S. 15A-1448(b) ("Notice of appeal shall be given within the time, in the manner and with the effect provided in the rules of appellate procedure."). Judgment is entered when the sentence is pronounced. *See* G.S. 15A-101(4a).

Oral notice of appeal can only be given in open court after a defendant is sentenced. *See State v. Oates*, 366 N.C. 264, 268 (2012) (Appellate Rule 4(a)(1) "permits oral notice of appeal, but only if given at the time of trial . . . .") (citation omitted). If oral notice of appeal is not given in the courtroom after entry of judgment, a written notice of appeal must be filed. *See State v. Holanek*, 242 N.C. App. 633 (2015) (finding that defendant lost the right to appeal when her defense attorney waited six days after the trial was completed to give oral notice of appeal in open court). The written notice must be filed within fourteen days after entry of the judgment or order, and copies of the written notice must be served on all adverse parties. N.C. R. APP. P. 4(a)(2).

Failure to strictly comply with the requirements of Appellate Rule 4 amounts to a jurisdictional default and "precludes the appellate court from acting in any manner other than to dismiss the appeal." *See State v. Hammonds*, 218 N.C. App. 158, 162 (2012) (internal citation and quotation marks omitted); *see also State v. Rowe*, 231 N.C. App. 462 (2013) (court was without jurisdiction to hear appeal where defendant's written notice of appeal incorrectly designated the trial court from which the appeal was taken and the appellate court to which he was appealing, and the notice was not served on the State).

Contents of written notice of appeal. If written notice of appeal is given, the notice must

- specify the party taking the appeal;
- designate the judgment or order from which appeal is taken;
- designate the court to which the appeal is taken; and
- be signed by counsel of record or by the defendant if not represented by counsel.

N.C. R. APP. P. 4(b). Service of the copies of the written notice of appeal may be made as provided in Appellate Rule 26(c). *See* N.C. R. APP. P. 4(c). A sample notice of appeal can be found on the Office of Indigent Defense website in the Adult Criminal Motions; scroll down to Appeals and click on Notice of Appeal from Superior Court to Court of Appeals.

Manner of appeal from denials of motions to suppress. To preserve the right to appeal from the denial of a motion to suppress after a defendant is found guilty by a judge or jury, notice of appeal must be entered from the final judgment entered in the case, not from the

denial of the motion to suppress. *See State v. Miller*, 205 N.C. App. 724 (2010) (defendant's written notice of appeal "from the denial of Defendant's motion to suppress," was not an appeal from his judgment of conviction; Court of Appeals dismissed the appeal after finding it had no jurisdiction); *see also State v. Kelly*, 214 N.C. App. 562 (2011) (unpublished) (holding that the court lacked jurisdiction to hear appeal because defense counsel's oral statement in open court after conviction that defendant was entering notice of appeal from the denial of the pretrial motion to suppress failed to comply with the requirements of Appellate Rule 4). For a discussion of the procedure that must be followed when a defendant pleads guilty but wishes to preserve the right to appeal from the denial of a motion to suppress, see *supra* § 35.1D, Defendant's Right to Appeal from Guilty Plea in Superior Court (first practice note).

Divestiture of jurisdiction. As a general rule, once notice of appeal is given and the time for giving notice of appeal has expired, the superior court no longer has jurisdiction over the case. *See* G.S. 15A-1448(a)(3). The superior court retains authority over the case to determine limited matters, such as indigency and whether and on what conditions a defendant may be granted post-trial release. *Id.*; G.S. 15A-1453; *see also infra* § 35.1J, Release Pending Appeal from Superior Court Judgment; § 35.3B, Types of Motions for Appropriate Relief by Defendant; § 35.6, Trial Judges' Authority to Correct, Modify, or Amend Judgments. The court also "maintains jurisdiction to enter a written order after notice of appeal has been given where the order does not *'affect[] the merits*, but, rather, is a chronicle of the findings and conclusions' decided at a prior hearing." *See State v. Fields,* ___ N.C. App. ___, 836 S.E.2d 886, 889 (2019) (finding that the State's notice of appeal did not preclude the trial judge from later entering a written order recording the judge's previous oral findings and conclusions that supported the granting of defendant's motion to suppress) (emphasis in original and citation omitted).

Practice note: The form used by superior court judges to note a defendant's appeal, set conditions of release if any, order the transcript, and appoint appellate counsel can be found on the Administrative Office of the Courts website. *See* AOC-CR-350, "Appellate Entries" (Mar. 2016). The completion of this form by the clerk, even though it states that the defendant has given notice of appeal, does ***not*** fulfill the defendant's requirement to file a written notice of appeal under Rule 4 of the N.C. Rules of Appellate Procedure. *See State v. Hughes*, 210 N.C. App. 482 (2011); *State v. Blue*, 115 N.C. App. 108 (1994). For a discussion of steps trial counsel should take to perfect a client's appeal, see *infra* subsection O. of § 35.1, Trial Counsel's Obligations regarding Defendant's Right to Appeal after Superior Court Conviction.

G. Stay of Superior Court Sentence

Generally. When a defendant gives notice of appeal from a superior court judgment,

- payment of costs is stayed;
- payment of any fine is stayed;
- confinement is stayed if the defendant is released pursuant to post-trial terms of release set by the judge (discussed *infra* in § 35.1J); and

- probation and special probation (i.e., split sentences under G.S. 15A-1351) are stayed.

G.S. 15A-1451(a); *see also* N.C. R. APP. P. 8(b) (when a defendant gives notice of appeal in a criminal case, the portion of the sentence that imposes fines or costs is automatically stayed pursuant to G.S. 15A-1451).

Satellite-based monitoring, sex offender registration, and no contact orders. Since North Carolina appellate courts consider the imposition of no contact orders, satellite-based monitoring, and sex offender registration to be civil matters, *see infra* § 35.1R, Appeals from Imposition of Satellite-Based Monitoring, Sex Offender Registration, and No Contact Orders, those requirements are not stayed by G.S. 15A-1451 when notice of appeal is given from the criminal judgment, even where a defendant receives a probationary sentence on the underlying charge. However, when a defendant has given notice of appeal from the criminal judgment and these civil orders, a trial judge may be amenable to signing an order staying their execution pending appeal.

Sentence of imprisonment. The entry of notice of appeal does not automatically stay a sentence of imprisonment. A stay of imprisonment or a stay of the execution of a death sentence must be sought under G.S. 15A-536 (release after conviction in superior court, discussed *infra* in § 35.1J) or Rule 23 of the N.C. Rules of Appellate Procedure (supersedeas).

Probationary sentences. Under G.S. 15A-1451(a)(4), probation is automatically stayed by the entry of notice of appeal. This includes any split sentence imposed as a condition of special probation. Although probation is stayed, the superior court retains the authority to impose conditions of release under G.S. 15A-536 pending the defendant's appeal. *See State v. Howell*, 166 N.C. App. 751 (2004) (after defendant gave notice of appeal from a probationary sentence, trial judge had authority to impose a new bond and set conditions, including the condition that defendant not possess a computer or reside in or visit any home where a computer was present); *see also infra* § 35.1J, Release Pending Appeal from Superior Court Judgment.

Practice note: Occasionally, the Division of Community Corrections (that is, the probation department) will mistakenly try to supervise a defendant who received a probationary sentence and entered notice of appeal. If your client receives a probationary sentence, you should stress to him or her that probation is stayed and that he or she is not required to comply with the conditions of probation (although he or she is required to comply with any conditions of release). If a probation officer tells your client that he or she has to comply with the conditions of probation during the pendency of the appeal, you should contact the officer (or his or her supervisor if the officer is uncooperative) and point out that G.S. 15A-1451(a)(4) automatically stays probation.

Release during State's appeal. If the State appeals from a dismissal of charges against the defendant, the effect of the dismissal is not stayed and the defendant is free from such charges unless they are reinstated after an appellate determination. G.S. 15A-1451(b).

H. Withdrawal of Notice of Appeal from Superior Court Judgment

Procedural requirements. A defendant who has entered notice of appeal may choose to withdraw his or her appeal at any time before a decision by the appellate court. To withdraw an appeal, the defendant must file a written notice of withdrawal with the clerk of superior court where the notice of appeal was filed. The notice of withdrawal must be signed by the defendant and, if represented, by his or her current attorney. The clerk must forward a copy of the notice of withdrawal to the appellate court where the case is pending. G.S. 15A-1450.

Withdrawal after record on appeal filed. If the record on appeal has already been filed in the appellate court, the defendant also must file a written notice of the withdrawal with the clerk of the appropriate appellate court. N.C. R. APP. P. 37(d). If the defendant withdraws his or her appeal after the record on appeal has been filed, he or she may be taxed with costs of the appeal. *See* G.S. 15A-1450; *see also* N.C. R. APP. P. Appendix F ("Court costs on appeal total $9.00 . . . and are imposed when a notice of appeal is withdrawn or dismissed . . . .").

Stay lifted on withdrawal. Any stay of costs, fines, confinement, or probation pursuant to G.S 15A-1451 will be terminated once the appeal is withdrawn. *See* G.S. 15A-1450 Official Commentary.

Reentry of notice of appeal. A defendant does not lose the right to appeal when he or she withdraws an appeal as long as notice of appeal is reentered within the fourteen-day period for taking an appeal from superior court. *See* G.S. 15A-1448(a)(5); *see also* N.C. R. APP. P. 4(a)(2). According to the Official Commentary to G.S. 15A-1448, a defendant "has free choice" within the time period for taking an appeal to enter and withdraw an appeal and then enter it again.

I. Compliance with Superior Court Judgment

If a defendant complies with all or a portion of a judgment imposed in superior court, he or she does not waive the right to appeal. If the defendant complies and then decides to enter notice of appeal, the superior court judge may enter an order remitting any fines or costs that have been paid by the defendant or the remission may be delayed until the appeal has been finally determined. G.S. 15A-1448(a)(6). According to the Official Commentary to G.S. 15A-1448, the judge has the discretion to delay the repayment of the fines or costs in order to simplify the collection and remission procedures.

J. Release Pending Appeal from Superior Court Judgment

Statutory authorization. A defendant who has been convicted in superior court and who has entered notice of appeal may be released pending appeal on appropriate conditions set by a superior court judge. *See* G.S. 15A-536(a). If the judge decides to release a defendant pending the resolution of his or her appeal, the judge must impose conditions that will reasonably assure the defendant's presence when required and that will adequately protect persons and the community. G.S. 15A-536(b).

The judge may impose the same conditions allowed for pretrial release in G.S. 15A-534(a). These conditions include

- releasing the defendant on his or her written promise to appear;
- releasing the defendant if he or she executes an unsecured appearance bond in the amount set by the judge;
- placing the defendant in the custody of a designated person or organization;
- requiring the defendant to post an appearance bond in an amount set by the judge;
- ordering the defendant to be placed under house arrest with electronic monitoring; and
- placing restrictions on the defendant's travel, associations, conduct, or abode.

See G.S. 15A-534(a); G.S. 15A-536(b). The judge must take into account all reliable evidence available to him or her in deciding on the conditions to impose and is not strictly bound by the rules of evidence in making the determination. G.S. 15A-536(f).

Procedural requirements. If post-trial release is granted, the trial judge must file an order with the clerk of court

- stating the conditions imposed, if any;
- informing the defendant of the penalties that will result from non-compliance; and
- advising the defendant that he or she will be arrested immediately if he or she violates the conditions.

A copy of the order must be served on the defendant. G.S. 15A-536(d).

Modifications and revocations. The release order may be modified or revoked. If a defendant is placed in custody based on a revocation or modification of a release order, he or she is entitled to an immediate hearing to determine whether he or she is entitled to release and, if so, on what conditions. G.S. 15A-536(e).

No constitutional right to post-trial release. The right to release pending appeal is statutory and does not arise from any provision in the state or federal constitution. *See State v. Parker*, 220 N.C. 416 (1941); *see also Reddy v. Snepp*, 357 F. Supp. 999 (W.D.N.C. 1973). The decision whether to grant or deny a post-trial bond and, if granted, in what amount are within the trial judge's discretion and will not be disturbed on appeal in the absence of a showing of an abuse of that discretion. *See State v. Sparks*, 297 N.C. 314 (1979); *State v. Keaton*, 61 N.C. App. 279 (1983); *In re Reddy*, 16 N.C. App. 520 (1972).

Release pending appeal from probationary sentence. Even though probationary sentences are automatically stayed when a defendant gives notice of appeal (*see* G.S. 15A-1451(a)(4)), trial judges still may set conditions of post-trial release under G.S. 15A-536 for defendants who receive probation. *State v. Howell*, 166 N.C. App. 751, 754 (2004) (to interpret G.S. 15A-536 as applying only to defendants who are in custody or who are facing custody "would lead to the absurd result that the court would have no oversight over defendants with probationary sentences on appeal"; legislative intent was "to address possible flight by the defendant and/or danger to the community").

Additional resources. A sample motion for an appeal bond can be found on the Office of Indigent Defense website in the Adult Criminal Motions; scroll down to Pretrial and Post-Conviction Release and click on Motion for Appeal Bond. For a discussion of the use of appeal bonds as a potential mechanism when seeking the release of inmates during a pandemic, see Ian A. Mance, *Securing the Release of People in Custody in North Carolina During the COVID-19 Pandemic*, ADMINISTRATION OF JUSTICE BULLETIN No. 2020/02 (UNC School of Government, June 2020).

K. Interlocutory Appeals to Appellate Division

Generally. As a general rule, appeals from interlocutory orders may not be taken in criminal cases. *See State v. Henry*, 318 N.C. 408 (1986); *see also* G.S. 7A-27 and G.S. 15A-1444(a) (providing for appellate review of final judgments only). The courts have observed that to allow appeals from every interlocutory order entered in the course of a criminal prosecution "would lead to interminable delay and render the enforcement of the criminal law well-nigh impossible." *State v. Howard*, 70 N.C. App. 487, 488 (1984) (quoting *State v. Webb*, 155 N.C. 426, 430 (1911)).

An exception to the general rule prohibiting appeals of interlocutory orders in criminal cases is found in G.S. 15A-1432(d). This statute authorizes an interlocutory appeal by the defendant when a superior court judge reverses a district court judge's dismissal of criminal charges. *See State v. Joseph*, 92 N.C. App. 203 (1988); *cf. infra* § 35.2A, State's Right to Appeal from District Court Judgment (discussing State's right to appeal from an interlocutory order of the superior court that affirms a district court's order dismissing criminal charges or granting a new trial on the grounds of newly discovered or available evidence). Pursuant to G.S. 15A-1432(d), the defendant must certify to the superior court judge who entered the order that the appeal is not taken for the purpose of delay and the judge must find that the cause is appropriately justiciable in the appellate division as an interlocutory matter. If these requirements are not met, the appeal will be dismissed. *See State v. Nichols*, 140 N.C. App. 597 (2000).

Although G.S. 1-277(a) and G.S. 7A-27(b)(3)a. both permit appeals to be taken from interlocutory orders that affect a substantial right, these statutes do not apply in criminal cases. *See State v. Doss*, ___ N.C. App. ___, 836 S.E.2d 856 (2019) (rejecting defendant's argument that he was entitled to appeal under G.S. 7A-27(b) from an interlocutory order because his substantial rights had been affected; defendant had no right to appeal because that statute only applies to interlocutory orders in civil cases); *Joseph*, 92 N.C. App. 203, 206 (the enactment of G.S. 15A-1444 as the exclusive authority for criminal appeals "precludes [a] defendant's resort to any 'substantial right' analysis" under G.S. 1-277).

Writs of certiorari. Although a criminal defendant may not be entitled to an appeal of right from an interlocutory order, he or she may petition the appellate division for review by writ of certiorari. *See* G.S. 15A-1444(g). Writs of certiorari are allowed by the N.C. Rules of Appellate Procedure "when no right of appeal from an interlocutory order exists." N.C. R. APP. P. 21(a)(1); *see also* G.S. 7A-32(b) (supreme court has jurisdiction to issue a writ of certiorari "in exercise of its general power to supervise and control the proceedings" of any

of the lower courts); G.S. 7A-32(c) (court of appeals has jurisdiction to issue writ of certiorari "to supervise and control the proceedings of any of the trial courts").

The application for the writ of certiorari is addressed to the court of the appellate division to which appeal of right might lie if there was a final judgment in the case. N.C. R. APP. P. 21(b). For further discussion of the writ of certiorari, see *infra* § 35.7D, Certiorari of Trial Court Orders and Judgments.

L. Appeals from Prayers for Judgment Continued

Generally. If a trial judge finds it necessary, desirable, or expedient "not to pass judgment immediately," he or she can enter an order suspending the imposition of judgment and sentence, i.e., a prayer for judgment continued (PJC). *See State v. Griffin*, 246 N.C. 680, 682 (1957) (stating that a trial judge has the power to do one of three things after a defendant is convicted: (1) pronounce judgment and place it into immediate effect; (2) pronounce judgment and suspend or stay its execution; or (3) enter a PJC); *see also* Dionne R. Gonder-Stanley, *Facing a Legislative Straitjacket in the 21st Century: North Carolina Courts and the Prayer for Judgment Continued*, 40 N.C. CENT. L. REV. 32, 35 (2017) [hereinafter Gonder-Stanley] ("The prayer for judgment continued is a procedural device where, in the exercise of discretionary authority, trial judges may refrain from entering a final judgment in any case they deem appropriate."). This unique remedial measure has been imposed by judges in North Carolina since the nineteenth century and continues to be used today. *See* Gonder-Stanley at 35; *see also State v. Van Trusell,* 170 N.C. App. 33 (2005) (rejecting defendant's argument that the practice of entering PJCs is archaic and violates a defendant's rights under the state and federal constitutions and, as such, is an abuse of discretion).

The practice of imposing PJCs is different from probation, which was first codified in North Carolina in 1937. *See In re Greene*, 297 N.C. 305 (1979) (discussing the history and the power of the courts to impose PJCs on conditions and to suspend the execution of sentences on conditions). In probation cases, the trial judge pronounces judgment imposing an active sentence, then suspends the execution of the sentence on conditions for a determinate period as set by statute. *See generally* G.S. 15A-1342(c) (when placing a defendant on probation, the trial judge must determine conditions of probation and impose a suspended sentence of imprisonment, which may be activated if the defendant violates the conditions of probation); G.S. 15A-1343.2(d) (delineating the lengths of probation terms under Structured Sentencing). Unlike probation, no statutory scheme regulating PJCs has been implemented, although some piecemeal statutes prohibit or limit the practice for certain offenses. *See, e.g.,* G.S. 14-205.1(a) (prohibiting PJCs in solicitation of prostitution cases); G.S. 15A-1331.2 (imposing time limits on PJCs in Class B1, B2, C, D, or E felony cases); G.S. 20-141(p) (drivers who speed in excess of 25 mph over the speed limit are ineligible for PJCs); G.S. 20-179 (PJCs prohibited in driving while impaired cases as interpreted in *Greene*, 297 N.C. 305, 310–12); G.S. 20-217(e) (PJCs not allowed for defendants who pass stopped school buses).

PJCs can be for a definite or indefinite period of time. *State v. Degree*, 110 N.C. App. 638 (1993); *see also State v. Marino*, ___ N.C. App. ___, 828 S.E.2d 689, 694 (2019) (finding

that the enactment of G.S. 15A-1331.2 was to ensure that defendants convicted of the highest levels of offenses "do not escape punishment by receiving an indefinite PJC"). The trial court retains jurisdiction to impose sentence later "[a]s long as a prayer for judgment is not continued for an unreasonable period . . . and the defendant was not prejudiced." *State v. Absher*, 335 N.C. 155, 156 (1993).

A PJC can "continue 'from term to term' for some specified period on condition of the defendant's good behavior, with the understanding that the State will pray judgment and the court will sentence the defendant in response to any reported misconduct." Jamie Markham, *Limits on PJCs*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (May 31, 2018); *see also* G.S. 15A-1416(b)(1) (authorizing the State to move for appropriate relief to enter a final judgment where a PJC had been previously granted); *State v. Thompson*, 267 N.C. 653 (1966) (trial judge imposed a PJC for three years without conditions or costs; State prayed judgment almost two years later and N.C. Supreme Court affirmed entry of judgment sentencing defendant to active imprisonment based on his subsequent misconduct); *cf. State v. Burnett*, 174 N.C. 796, 797 (1917) (State prayed judgment three months after an indefinite PJC with costs was entered; appellate court affirmed trial judge's imposition of a twelve-month term of imprisonment based on findings that before and after defendant's plea of nolo contendere "she had been guilty of continuously keeping a bawdy-house at the same place and practically in the same manner as before the submission of the plea, and that she bears a bad reputation in that respect, and also for selling whiskey").

Different Types of PJCs. Neither North Carolina case law nor statutes label the various ways that PJCs are used by trial judges. *See* Dionne R. Gonder-Stanley, *Facing a Legislative Straitjacket in the 21st Century: North Carolina Courts and the Prayer for Judgment Continued*, 40 N.C. CENT. L. REV. 32, 38–39 (2017). In her article, Gonder-Stanley identifies three PJC categories: (1) temporary PJC; (2) unconditional PJC; and (3) conditional PJC. *See id*.

A "temporary" PJC is when the trial judge, after a conviction or a plea, does not immediately pronounce judgment and sentence "but, instead, continues the sentencing hearing for a short, determinate period of time, with the intent to impose a judgment and sentence in the near future." Gonder-Stanley at 39 (noting that a trial judge may want to use a temporary PJC "for judicial purposes . . . so as to afford time to consider post-trial motions, to prevent a miscarriage of justice, and for other like purposes contemplated by law and justice") (citation omitted); *see also State v. Graham*, 225 N.C. 217, 219 (1945) (holding that "[i]n the absence of a statute to the contrary, sentence does not necessarily have to be imposed at the same term of court at which the verdict or plea of guilty was had"); *State v. Watkins*, 229 N.C. App. 628, 631 (2013) (stating that sentencing may be continued to a subsequent date and a "continuance of this type vests a trial judge presiding at a subsequent session of court with the jurisdiction to sentence a defendant for crimes previously adjudicated") (citations omitted); Jamie Markham, *Limits on PJCs*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (May 31, 2018) (a PJC "can be a mere continuance of sentencing in the case, allowing the court to obtain additional information about the defendant before entering judgment"). G.S. 15A-1334(a) also authorizes a trial judge to continue the sentencing hearing on a showing of good cause by the State or the defendant.

When the continuance is over, the sentence will be pronounced and judgment will be entered. Gonder-Stanley at 40.

Unlike a temporary PJC, a trial judge may impose a PJC with the intent that, barring unforeseen or changed circumstances, no further sentencing will occur. *See* Jessica Smith, *Sentencing: Prayer for Judgment Continued* (Dec. 2013), NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK; Gonder-Stanley at 40; *see also* Jamie Markham, *Limits on PJCs*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (May 31, 2018) (stating that it is often "everyone's understanding that a PJC will be the last thing that happens in a case—an exercise of judicial mercy that will leave the defendant with a conviction but no punishment for it"). This "dispositional" type of PJC may be imposed with or without attached conditions, are "long-term or indefinite in duration, and may become the permanent disposition of the cases in which they are used." Gonder-Stanley at 40–41. "The precise legal underpinnings of the dispositional PJC are hard to pinpoint." Jamie Markham, *Limits on PJCs*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (May 31, 2018).

As its name implies, an "unconditional" PJC "occurs when a judge imposes no conditions on a defendant, but purposely does not enter a final judgment and sentence." Gonder-Stanley at 43 (citation omitted). This type of PJC may be entered "with or without the defendant's consent." *See State v. Griffin*, 246 N.C. 680, 682 (1957) (citations omitted); *see also State v. Van Trusell*, 170 N.C. App. 33, 38 (2005) ("North Carolina courts have the power to continue prayer for judgment without the defendant's consent, as long as no conditions are imposed on the defendant."). Nevertheless, a defendant who does not want an unconditional PJC should object to it immediately and request entry of a final judgment since no statute specifically authorizes a defendant to move later for imposition of judgment. *See State v. Doss*, ___ N.C. App. ___, 836 S.E.2d 856, 858 n.4 (2019) (noting that the State is authorized by G.S. 15A-1416(b)(1) to move for appropriate relief for entry of a final judgment after a PJC has been previously granted but "the General Assembly has not granted a defendant this same right."); *see also* Jamie Markham, *The Unwelcome Prayer for Judgment Continued*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 18, 2009) (discussing a possible due process argument that could be made by a defendant who does not want an unconditional PJC to be imposed).

"Conditional" PJCs are used by trial judges "to provide defendants with an opportunity to mitigate or avoid the statutorily defined punishment for the offenses by requiring the defendants to satisfy certain explicit conditions." Gonder-Stanley at 41 (citation omitted). While a trial judge may enter an unconditional PJC with or without the defendant's consent, "[i]t is otherwise when conditions are imposed . . . ." *State v. Graham*, 225 N.C. 217, 219 (1945) (citing *State v. Jaynes*, 198 N.C. 728 (1930), which held that a PJC with any condition attached may not be imposed if a defendant objects); *see also State v. Burgess*, 192 N.C. 668 (1926) (finding error where trial judge entered a PJC with costs over defendant's objection; a prayer for judgment imposing terms may only be continued with a defendant's express or implied consent). Although costs do not constitute punishment and do not convert a purported PJC into a final judgment (see discussion of meaning of punishment, below), the cases treat costs as a condition requiring express or implied consent.

Appealability of PJCs. Whether a defendant has a right to appeal when a district court or superior court judge has entered a PJC depends on whether the judge's order is a "true" PJC or whether it is in the nature of a "final judgment." *See generally supra* "Finality of judgment generally required" in § 35.1A, In General; *see also* G.S. 15A- 1431 (appeal from district court); G.S. 15A-1444 (setting out the circumstances when a defendant may appeal as a matter of right from a superior court judgment); John Rubin, *Does a "Prayer for Judgment Continued" Differ Very Much from a "Prayer for Judgment Granted"?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (March 3, 2020) (noting that "a true PJC . . . [is] one in which a judge finds a person guilty after a plea or trial and indefinitely continues the entry of judgment without imposing punishment (court costs are not considered punishment)"). The general rule is that when a prayer for judgment is continued and it imposes no terms or conditions amounting to punishment, i.e., a "true" PJC, there is no right to appeal because "'there is no judgment—only a motion or prayer by the prosecuting officer for judgment.'" *See State v. Popp*, 197 N.C. App. 226, 228 (2009) (quoting *State v. Griffin*, 246 N.C. 680, 683 (1957)). What constitutes the imposition of punishment is discussed later in this subsection.

Since unconditional PJCs do not impose any conditions at all, they are true PJCs and are not appealable final judgments. *See, e.g., State v. Pledger*, 257 N.C. 634 (1962) (finding no appeal was permissible from convictions where trial judge imposed a PJC without any conditions); *see also State v. Perry*, 316 N.C. 87 (1986). Likewise, conditional PJCs imposing conditions that do not "amount to punishment" constitute true PJCs and are likewise not appealable. *See, e.g., State v. Cheek*, 31 N.C. App. 379 (1976) (since the conditions that defendant not escape from prison and not break the law did not amount to punishment, the PJC entered on the guilty verdict was not an appealable final judgment). Since conditional PJCs require a defendant's consent, a defendant who wants to appeal should not consent to the entry of a conditional PJC that does not impose punishment; if the defendant consents, he or she will have no right to appeal since no "final judgment" will be entered. *See Griffin*, 246 N.C. at 682 (stating that when a defendant "consents to the conditions upon which judgment is suspended, he thereby waives or abandons his right of appeal" and "may not be heard thereafter to complain that his conviction was not in accord with due process of law") (citations omitted); *State v. Doss*, ___ N.C. App. ___, 836 S.E.2d 856, 858 (2019) (finding that "defendant consented to the entry of the PJC, as he agreed to pay, and did pay, costs as a condition"; while the requirement to pay costs does not convert a PJC into a final judgment, a defendant's consent is required and "where a defendant has consented to the PJC, he 'waives or abandons his right to appeal'") (citation omitted). Should the State later pray judgment on a true PJC, and the trial judge enter a final judgment on the conviction, the defendant may then appeal if he or she otherwise has a statutory right to do so. *See Pledger*, 257 N.C. 634; *see also State v. Escoto*, 162 N.C. App. 419, 432 (2004) (refusing to review defendant's insufficiency argument on armed robbery charges where the trial judge had entered a PJC with costs but noting that "should the State move the trial court to impose judgment on the convictions . . . and the trial court does impose judgment, defendant may raise the objection in an assignment of error on appeal").

On the other hand, when the trial judge "enters an order continuing the prayer for judgment and at the same time imposes conditions amounting to punishment . . . the order is in the

nature of a final judgment, from which the defendant may appeal." *Griffin*, 246 N.C. 680, 683 (judge's statement that "the prayer be continued" was inconsistent with the judge's imposition of a condition amounting to punishment and was treated as surplusage; State's motion to remand to superior court on grounds that no final judgment had been entered was denied); *cf.* John Rubin, *Relief from a Criminal Conviction: Frequently Asked Questions (Prayer for Judgment Continued (PJC))* (2018) (noting that "[a] court sometimes will call its order a PJC when it imposes conditions amounting to punishment or briefly continues the case for later sentencing" but these orders are not true PJCs). Once punishment has been inflicted, "the court has exhausted its power and cannot thereafter impose additional punishment." *Griffin*, 246 N.C. at 683; *see also State v. Brown*, 110 N.C. App. 658, 660 (1993) (finding error where the trial judge, after having imposed a PJC with conditions inflicting punishment, later sentenced defendant to a six-month term of imprisonment, suspended for five years, for violating a condition of the PJC; the original "entry was a final judgment, the violation of which subjected the defendant to criminal contempt of court" punishable by imprisonment and/or fine but not to additional punishment) (citations omitted). Even though a conditional PJC cannot be entered without a defendant's consent, a defendant's consent does not act as a waiver of the right to appeal when the conditional PJC is in the nature of a final judgment. *See State v. Patton*, 221 N.C. 117, 117 (1942) (holding that defendant did not waive his right to appeal when he consented to the twelve-month PJC on condition that he "be of general good behaviour and that he pay into the office of the clerk of Superior Court a fine of $25.00 and costs").

A defendant's right to appeal from a final judgment may not be denied or abridged and a trial judge cannot strike a PJC imposing punitive conditions and impose a harsher sentence or additional penalty based on the defendant's entry of notice of appeal. *See Patton*, 221 N.C. 117 (finding error where the trial judge originally imposed a PJC on the conditions of paying a fine and costs but then struck it when defendant sought to appeal and sentenced defendant to an active term of imprisonment). While a judge generally had a right to change his judgment at any time during the same term of court, the change cannot be induced by the defendant's exercise of his right to appeal. *Id.*; *see also In re Moses*, 17 N.C. App. 104 (1972) (finding error where trial judge originally entered a PJC imposing probationary conditions and ordering that respondent shave his face and cut his hair but then entered a new order committing respondent to a juvenile detention center after respondent gave notice of appeal).

What constitutes "punishment." "Prayer for judgment continued upon payment of costs, without more, does not constitute the entry of judgment." G.S. 15A-101(4a); *see also State v. Brown*, 110 N.C. App. 658 (1993); *Whedbee v. Powell*, 41 N.C. App. 250 (1979). Imposing a condition that the defendant must obey the law likewise does not constitute the entry of judgment. *See State v. Cheek*, 31 N.C. App. 379, 382 (1976) (requirements that defendant not escape from prison and not break the law did not transform the PJC into a final judgment; "[t]hese are requirements to obey the law, an obligation which he already had as a citizen"); *see also Little v. Little*, 226 N.C. App. 499 (2013) (trial judge erred in finding defendant had been convicted of assault where no "final judgment" had been entered on that charge; the PJC only imposed the conditions that defendant pay costs and obey a preexisting temporary restraining order); *Florence v. Hiatt*, 101 N.C. App. 539 (1991) (PJC

on condition that driver not violate any motor vehicle laws did not amount to punishment; DMV's revocation of driver's license was invalid since no final judgment had been entered).

N.C. appellate courts have also found that no punitive condition was imposed when the trial judge ordered a PJC upon payment of costs and attorney fees and on the condition that the plaintiff have no contact with the victim or her immediate family. *See Walters v. Cooper*, 226 N.C. App. 166, 169 (2013) (concluding that plaintiff did not have to register as a sex offender since the "true PJC" he received in that case was not a final conviction), *aff'd per curiam*, 367 N.C. 117 (2013). For further discussion of *Walters*, see Jamie Markham, *Walters Affirmed: No Sex Offender Registration for a PJC*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Oct. 10, 2013) (questioning whether the affirmance of *Walters* by the N.C. Supreme Court may "be viewed as setting a slightly higher floor for what constitutes a non-punitive condition").

The appellate courts have found that the imposition of the following conditions "amounted to punishment"; therefore, the order lost its character as a true PJC and was transformed into a final judgment:

- Payment of a fine. *State v. Griffin*, 246 N.C. 680 (1957).
- Imprisonment. *Id.*
- Continuation of mental health treatment. *State v. Brown*, 110 N.C. App. 658 (1993) (court did not reach the question of whether the order that defendant not contact his ex-wife, the prosecuting witness, was punishment).
- Completion of a high school education. *State v. Popp*, 197 N.C. App. 226 (2009).
- Enrollment in an institution of higher education or enlistment in the armed forces. *Id.*
- Compliance with a curfew. *Id.*
- Submission to monthly drug testing. *Id.*
- Performance of community service and payment of a community service fee. *Id.*
- Preparation of a letter of apology. *Id.*
- Continued employment. *Id.*
- Confinement to a residence 24 hours a day. *State v. Bonner*, 203 N.C. App. 149 (2010) (unpublished).
- Prohibition of possession of a cellphone or pager. *Id.*

The above examples of punitive conditions should not be considered exhaustive.

Additional resources. For further discussion of PJCs, see Jessica Smith, *Sentencing: Prayer for Judgment Continued* (Dec. 2013), NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK; and John Rubin, *Relief from a Criminal Conviction: Frequently Asked Questions (Prayer for Judgment Continued (PJC))* (2018). *See also* John Rubin, *Does a "Prayer for Judgment Continued" Differ Very Much from a "Prayer for Judgment Granted"?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (March 3, 2020); Jamie Markham, *PJCs for Serious Felonies*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (May 30, 2019); Jamie Markham, *Limits on PJCs*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG

(May 31, 2018); Jamie Markham, *The Unwelcome Prayer for Judgment Continued*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 18, 2009).

M. Death of Defendant While Appeal Is Pending

If a defendant dies while his or her North Carolina state criminal conviction is on appeal, the action is abated and the appeal will be dismissed. *See State v. Dixon*, 265 N.C. 561 (1965); *State v. Young*, 27 N.C. App. 308 (1975); *State v. Boyette*, 24 N.C. App. 587 (1975); *see also State v. Revels*, 369 N.C. 480 (2017) (allowing defense counsel's motion to abate proceeding based on defendant-appellant's death). Although not explicitly stated, it appears that the *Dixon* Court implicitly adopted the doctrine of abatement ab initio. *See State v. Nicholson*, 255 N.C. App. 665, 675 n.18 (2017) (citing *Dixon* and finding that an entire prosecution in another case was abated ab initio when the defendant passed away), *rev'd on other grounds*, 371 N.C. 284 (2018); *see also Alaska v. Carlin*, 249 P.3d 752 (Ak. 2011) (asserting that North Carolina is among the nineteen states that strictly apply the doctrine of abatement ab initio); *People v. Robinson*, 699 N.E.2d 1086 (Ill. App. Ct. 1998) (listing North Carolina as a jurisdiction that abates a deceased defendant's appeal ab initio and citing *Dixon*, 265 N.C. 561), *vacated on other grounds*, 719 N.E.2d 662 (Ill. 1999). Under that doctrine, when a criminal defendant dies, not only is his or her appeal dismissed, but the conviction is also vacated and the indictment is dismissed because the appeal had not been, and now can never be, resolved. Abatement ab initio acts to restore the pre-indictment presumption of innocence to the defendant. *See* Rosanna Cavallaro, *Better Off Dead: Abatement, Innocence, and the Evolving Right of Appeal*, 73 U. COLO. L. REV. 943 (2002).

N. Right to Appeal from Denial of Defendant's Post-Conviction Motion for DNA Testing

Right to appeal from denial of request to test. A defendant who has been convicted or pled guilty may request that DNA testing be performed if the biological evidence "[i]s material to the defendant's defense." *See* G.S. 15A-269; *State v. Randall*, 259 N.C. App. 885 (2018). If the motion for testing is denied, the defendant may appeal the order and is entitled to the appointment of counsel for the appeal if indigent. G.S 15A-270.1. Although the statute does not specify the time period for taking the appeal, the N.C. Court of Appeals has determined that an appeal "pursuant to G.S. 15A-270.1 is an appeal from a criminal proceeding." *See State v. Velasquez-Cardenas*, 259 N.C. App. 211, 217 (2018). Therefore, notice of appeal must comply with Rule 4(a) of the N.C. Rules of Appellate Procedure and be given in open court at the time the motion is denied or filed in writing within fourteen days of the denial of the defendant's motion. *See, e.g., State v. Patton*, 224 N.C. App. 399 (2012) (unpublished) (court had jurisdiction to hear defendant's appeal where he orally entered notice of appeal in open court immediately after the denial of his motion for DNA testing); *State v. Carroll*, 252 N.C. App. 528 (2017) (unpublished) (applying N.C.R. App. P. 4(a)(2) and finding that defendant's notice of appeal from an order denying his motion for DNA testing was untimely filed where it was filed outside the fourteen-day period for taking appeal).

No right to appeal from denial of relief after testing. If the defendant's motion for DNA testing is granted, the trial judge must hold a hearing once the testing results are received in order to determine whether the results are favorable or unfavorable to the defendant. G.S.

15A-270(a). If the trial judge determines that the results are unfavorable and denies the defendant any relief, the defendant does not have the right to appeal from this ruling. *See State v. Norman*, 202 N.C. App. 329, 333 (2010) (stating that "'[t]he General Assembly simply has not provided for appeals from [a court's ruling under G.S. 15A-270] and under those circumstances, harsh as the result may seem, we must hold that [this Court is] without subject matter jurisdiction to entertain [Defendant's] appeal'") (quoting *Palmer v. Wilkins*, 73 N.C. App. 171, 173 (1985)).

Additional resources. For further discussion of post-conviction motions for DNA testing, *see* Jessica Smith, *Post-Conviction DNA Testing* (Apr. 2015), NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK.

O. Trial Counsel's Obligations regarding Defendant's Right to Appeal after Superior Court Conviction

After a conviction in superior court, trial counsel's duties are not quite over. Counsel must complete the following duties before his or her representation is over.

1. Counsel should inform the client of his or her right to appeal and advise him or her of the consequences of appealing. *See* N.C. Commission on Indigent Defense Services Rule 1.7(a) (May 29, 2015); *see also infra* Appendix A, N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL, Guideline 9.3 Right to Appeal to the Appellate Division (Nov. 2004); *cf. Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000) (noting that "the better practice is for counsel routinely to consult with the defendant regarding the possibility of an appeal") (citing ABA Standards for Criminal Justice, Defense Function § 4-8.2(a) (3d. ed. 1993)).

2. If the client wants to appeal, counsel must take the necessary steps to give proper notice of appeal. *See* N.C. Commission on Indigent Defense Services Rule 1.7(a) (May 29, 2015). By entering notice of appeal on the client's behalf, trial counsel is not obligating himself or herself to represent the client in the appellate division. *See* G.S. 15A-143 (an attorney who represents a defendant in a criminal action without limiting his or her appearance represents the defendant at all stages of the case until entry of final judgment at the trial stage); N.C. Commission on Indigent Defense Services Rule 1.7(a) (May 29, 2015) ("Unless otherwise provided by law, [appointed counsel] is required to continue with the representation through judgment at the trial level, discussion with the client about his or her right to appeal, and entry of notice of appeal or expiration of the time for giving notice of appeal.").

3. If you give notice of appeal orally in open court at trial, you should request that the judge determine the indigency of your client at that time so that, if the client is indigent, the Office of the Appellate Defender can be appointed and the transcript can be ordered at state expense. *See* N.C. Commission on Indigent Defense Services Rule 3.2(b) (September 21, 2018). You also should request that the trial judge set an appeal bond or other conditions of post-trial release under G.S. 15A-536 so that your client can be released pending the determination of the appeal. *See supra* § 35.1J, Release Pending Appeal from Superior

Court Judgment; *see also infra* Appendix A, N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL, Guideline 9.4 Bail Pending Appeal (Nov. 2004). If you file written notice of appeal, you should make sure that the case is added back on the docket in superior court in order to have the trial judge address the issues discussed above.

4. It is extremely helpful to appellate counsel for you to make sure when you enter notice of appeal in open court (or at a subsequent hearing, discussed in 3. above, if written notice of appeal was filed) that the clerk notes all the pretrial hearing dates in the order requiring transcription. This order is part of the Appellate Entries form filled out by the clerk when notice of appeal is entered, available on the Administrative Office of the Courts website. *See* AOC-CR-350, "Appellate Entries" (Mar. 2016). If all the pertinent dates are not included in the transcript order, the appeal may be delayed many months while appellate counsel tracks down dates and court reporters and gets additional transcript orders signed.

5. If the client does not have a right to appeal but counsel believes that he or she has a meritorious issue that can be raised by a petition for writ of certiorari, counsel should advise the client of this opinion and counsel should consult with the Office of the Appellate Defender about the appropriate procedure. *See infra* Appendix A, N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL, Guideline 9.3(c) Right to Appeal to the Appellate Division (Nov. 2004). Counsel also should consult with the Office of the Appellate Defender if the trial judge denies appointment of counsel on appeal or denies indigency status for purposes of appeal. *See infra* Appendix A, Guideline 9.3(d) Right to Appeal to the Appellate Division.

6. Once notice of appeal is perfected and appellate counsel is appointed, trial counsel should cooperate in providing information to the client's appellate attorney concerning the trial court proceedings. *See infra* Appendix A, N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL, Guideline 9.3(e) Right to Appeal to the Appellate Division (Nov. 2004). This includes filling out a questionnaire seeking information about the case that is sent to the trial attorney by the Office of the Appellate Defender once it receives the appointment.

P. Appeals from Arrested Judgments

Generally. The common law concept of arresting judgment has existed in North Carolina since the late eighteenth century and was the vehicle for raising all sorts of issues. Jamie Markham, *Arrest of Judgment*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 17, 2019). Although the common law motion in arrest of judgment has been replaced in part by the enactment of the statutes authorizing motions for appropriate relief, it "is still the proper course of action in certain circumstances." *Id.* (noting that G.S. 15A-1411(c) states that "[t]he relief formerly available by motion in arrest of judgment . . . is available by motion for appropriate relief").

The law in North Carolina recognizes two distinct categories of arrested judgments. *See State v. Hugo*, 263 N.C. App. 594 (2019) (unpublished). The most common type of arrested judgment occurs when no judgment against the defendant can be lawfully entered because of some fatal error or defect in (1) the organization of the court, (2) the charge (the information, warrant, or indictment) against the defendant, (3) the arraignment and plea, (4) the verdict, or (5) the judgment. *See State v. Pakulski*, 326 N.C. 434 (1990) (citations omitted); *Hugo*, 263 N.C. App. 594. The motion to arrest judgment is also regularly made to alleviate double jeopardy or cumulative punishment concerns. *See, e.g., State v. Barlowe*, 337 N.C. 371, 380 (1994) (when a defendant is convicted of felony murder, "the underlying felony supporting a conviction for felony murder merges into the murder conviction" and the judgment imposed on the underlying felony must be arrested); *State v. Moses,* 205 N.C. App. 629 (2010) (arresting judgment on defendant's conviction for felony possession of stolen goods after finding that the General Assembly did not intend to subject a defendant to multiple punishments for both robbery and the possession of stolen goods that are the proceeds of the same robbery).

Although not explicitly recognized in case law, "[t]here are hints of a third type of arrest of judgment." Jamie Markham, *Arrest of Judgment*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 17, 2019). In *State v. Garris*, 191 N.C. App. 276 (2008), the defendant was convicted of attempted first degree murder and assault with a deadly weapon inflicting serious injury arising out of the same incident. Although conviction of both crimes presented no double jeopardy concerns since the crimes do not have identical elements, the trial judge arrested judgment on the assault conviction on the State's motion. On appeal, the defendant claimed the trial judge's decision to arrest judgment on the less serious conviction was arbitrary and an abuse of discretion. The Court of Appeals, after noting that the trial judge did not need to arrest either of the defendant's convictions, found that the judge acted within his discretion in deciding to arrest judgment and in deciding which judgment to arrest. "And so perhaps that is something a trial judge generally has discretion to do, albeit not in a DWI case, apparently . . . in light of *State v. Petty*, 212 N.C. App. 368 (2011)." Jamie Markham, *Arrest of Judgment*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 17, 2019).

Right to appeal. Whether a defendant has the right to appeal when a district or superior court judge has arrested judgment on an offense (i.e., stayed its enforcement) depends on whether the judge's order is in the nature of a "final judgment." *See supra* "Finality of Judgment generally required" in § 35.1A, In General. In North Carolina, the arrest of judgment can have one of two effects: the first being to vacate the underlying judgment, and the second being to withhold the entry of judgment based on a valid jury verdict. *See State v. Garner*, 252 N.C. App. 393 (2017) (citations omitted).

If the judgment is arrested because of a fatal error in the organization of the court, the charging document, the arraignment and plea, the verdict, or the judgment, the conviction is effectively vacated. *State v. Pakulski*, 326 N.C. 434 (1990). Once the judgment is arrested for this type of error, the defendant is returned to the position he or she was in before the prosecution began and the State "must seek a new indictment if it elects to proceed again against the defendant." *Id. at* 439 (citations omitted). Since the effect of the arrest of the

defendant's conviction is vacatur, this type of arrested judgment creates no final judgment from which a defendant can appeal. *See State v. Reeves*, 218 N.C. App. 570 (2012).

On the other hand, if the judgment is arrested to avoid a double jeopardy or cumulative punishment problem, the underlying verdict is not vacated. The judgment is left standing on the docket and a defendant can be sentenced on that judgment in the event that the double jeopardy impediment is removed. *See Pakulski*, 326 N.C. 434 (holding that once the felony murder conviction had been reversed on appeal, the trial judge on remand was free to enter judgment and sentence defendant on the previously arrested predicate felony convictions that had supported the murder conviction); *Garner*, 252 N.C. App. 393 (where trial judge arrested judgment for defendant's conviction of possession of stolen goods because of double jeopardy-related concerns, defendant could be sentenced on that judgment on remand since defendant's simultaneous felony larceny conviction had been reversed on appeal).

In *Reeves*, 218 N.C. App. 570, the defendant's conviction of reckless driving was arrested because the superior court judge used that conviction to "enhance" the defendant's simultaneous conviction of driving while impaired. The defendant appealed from both convictions. The State contended that the defendant was precluded from appealing from the arrested judgment on the reckless driving conviction since there had been no final judgment in that case. The N.C. Court of Appeals, noting that this was a case of first impression, held that under *Pakulski*, this type of arrested judgment does not vacate the underlying verdict and therefore is a final judgment that can be reviewed on appeal. *Reeves*, 218 N.C. App. at 576.

Practice note: If a judgment is arrested by the trial judge due to double jeopardy or other similar concerns and the defendant would like to appeal from that judgment, make sure that the record reveals the underlying basis for the judge's ruling. If the judge's reasons are not apparent from the record, the arrested judgment will operate to vacate the conviction and a defendant's appeal therefrom will be dismissed. *See State v. Pendergraft*, 238 N.C. App. 516 (2014) (where trial judge arrested judgment on defendant's conviction of felonious breaking and entering without explanation and there was no indication in the record that it was due to double jeopardy concerns, the decision to arrest judgment had the effect of vacating the judgment thereby depriving the appellate court of the ability to review defendant's claims as to that offense), *aff'd without precedential value*, 368 N.C. 314 (2015); *see also State v. Hardison*, 243 N.C. App. 723 (2015) (denying review of defendant's arguments regarding her conviction for obtaining property by false pretenses because judgment in that case had been arrested and there was no indication in the record that it was arrested due to double jeopardy-related concerns).

Q. Appealability of Conditional Discharge Orders and Orders Revoking Conditional Discharge and Deferred Prosecution Probations

Conditional discharges generally. Several statutes authorize trial judges, "without entering a judgment" and with the defendant's consent, to enter orders of conditional discharge that defer further proceedings and impose probation for offenders who plead guilty or are found

guilty of those offenses. *See* G.S. 14-50.29 (gang-related offenses committed under the age of 18); G.S. 14-204(b) (prostitution); G.S. 14-277.8 (several offenses against the peace involving mass violence committed under the age of 20); G.S. 14-313(f) (underage access to tobacco products); G.S. 14-458.1(c) (cyberbullying of minor committed under the age of 18); G.S. 14-458.2(d) (cyberbullying of school employee by a student); G.S. 15A-1341(a4) (authorizing conditional discharge in in certain cases where a defendant pleads guilty to or is convicted of a Class H or I felony or a misdemeanor other than driving while impaired); G.S. 15A-1341(a5) (authorizing conditional discharge for defendants participating in Drug Treatment Court); G.S. 90-96 (drug offenses); G.S. 90-113.14 (toxic vapors). In the absence of a contrary provision or a specific exception, the general probation provisions found in Article 82 of G.S. Chapter 15A apply to probation imposed under a conditional discharge order. *See State v. Burns*, 171 N.C. App. 759 (2005) (finding trial judge had no jurisdiction to revoke defendant's G.S. 90-96 probation after the probation period had expired; judge failed to make specific findings and no evidence in the record showed that the State had made reasonable efforts to notify defendant and conduct a revocation hearing before the expiration of probation as then required by G.S. 15A-1344).

If the defendant complies with the terms of probation set out in the conditional discharge order, the previously-entered guilty plea or finding of guilt is withdrawn, he or she is discharged, and the charge is dismissed. However, if the defendant is found to have violated a term of the conditional discharge probation, the trial judge may enter an adjudication of guilt and impose a sentence. *See, e.g.,* G.S. 15A-1341(a6).

Appealability of conditional discharge orders. It is unclear whether a defendant has the right to appeal from the entry of a conditional discharge order. In *State v. Kelly*, 235 N.C. App. 656 (2014) (unpublished), the N.C. Court of Appeals observed in footnote 2 that "[t]he extent to which an order of conditional discharge is an appealable final judgment or an unappealable interlocutory order . . . has not been previously resolved by this Court." The defendant in *Kelly* had been convicted of misdemeanor drug-related offenses in district court and appealed de novo to superior court. In superior court, the defendant was found guilty and an order of conditional discharge was entered. On appeal, the Court of Appeals did not resolve the issue of whether the defendant had a right to appeal from the order of conditional discharge since neither party addressed the issue in its brief. In order to avoid deciding an unaddressed jurisdictional issue and "to ensure that Defendant's challenge to the jury's determination of guilt [wa]s heard and considered in a timely manner," the court opted to exercise its discretion and treat the defendant's record and briefs as a petition for writ of certiorari and allow review pursuant to N.C. R. App. P. 21(a)(1) which authorizes appellate courts to grant certiorari when no right to appeal from an interlocutory order exists. *Kelly*, 235 N.C. App. 656 n.2. *But see State v. Cordon*, 21 N.C. App. 394 (1974) (holding that a defendant, in an appeal from a revocation of G.S. 90-96 probation, may not challenge the original adjudication of guilt, and that the superior court did not err in failing to review the defendant's original district court proceedings because when the defendant consented to the terms of probation on which entry of judgment of guilt was deferred and did not appeal when the conditional discharge was ordered, he abandoned his right to appeal on the issue of guilt or innocence).

If the appellate courts ultimately hold that there is no right to an immediate appeal from the entry of a conditional discharge because no "final judgment" has been entered (or that conditional discharge orders are not like appealable PJCs imposing punitive conditions, discussed *supra* in § 35.1L, Appeals from Prayers for Judgment Continued), a defendant can seek review in the proper court by filing a petition for writ of certiorari. *See Kelly*, 235 N.C. App. 656; *see also* N.C. R. APP. P. 21(a)(1) (providing that the writ of certiorari may be issued in appropriate circumstances to permit review when no right to appeal from an interlocutory order exists); N.C. GEN. R. PRAC. SUPER. & DIST. CT. 19 (authorizing the superior court to issue a writ of certiorari to review district court proceedings). For further discussion of this extraordinary writ, see *infra* § 35.7D, Certiorari of Trial Court Orders and Judgments.

Practice note: Counsel should fully apprise a defendant who would like to consent to an order of conditional discharge and who would also like to seek review of the underlying adjudication of guilt, that there may not be a right to appeal. In the event the defendant consents to conditional discharge but still would like review, counsel should enter notice of appeal on the defendant's behalf and also consult with the Office of the Appellate Defender. *See infra* Appendix A, N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL, Guideline 9.3(c) Right to Appeal to the Appellate Division (Nov. 2004) (when a "defendant does not have a right to appeal and trial counsel believes there is a meritorious issue in the case that might be raised in the appellate division by means of a petition for writ of certiorari, counsel should inform the defendant of his or her opinion and consult with the Office of the Appellate Defender about the appropriate procedure").

Appeal from a finding of violation of a condition of probation and imposition of sentence in conditional discharge cases. If a trial judge enters an adjudication of guilt and sentences the defendant after finding that the defendant violated a term of probation as set out in a conditional discharge order, the defendant may obtain review of the revocation of his or her probation in an appeal from the final judgment. In *State v. Burns*, 171 N.C. App. 759, 761 (2005), the defendant pled guilty to felony possession of cocaine and was placed on conditional discharge probation under G.S. 90-96. The defendant's probation was subsequently revoked at a hearing where the trial judge determined that the defendant had willfully violated a condition of probation, entered an adjudication of guilt on the original charge, and sentenced the defendant. The defendant appealed and argued that the trial judge erred in revoking his probation after the probationary period had expired without making the findings required by G.S. 15-1344(f)(2) (as then written) that the State had made reasonable efforts to notify the defendant and to conduct the hearing earlier. The N.C. Court of Appeals found that "[i]n the absence of a provision to the contrary, and except where specifically excluded, the general probation provisions found in Article 82 of Chapter 15A apply to probation imposed under N.C. Gen. Stat. § 90-96." *Id.* at 761. The court then held that due to the trial judge's error and to the lack of evidence of reasonable efforts by the State, the trial judge did not have the jurisdiction or the authority to revoke the defendant's probation. *Id. See also State v. Cordon*, 21 N.C. App. 394 (1974) (reviewing the revocation of defendant's conditional discharge probation and finding that the evidence clearly supported the superior court judge's decision to revoke defendant's probation under G.S. 90-96 and to

sentence him to six months in prison). *But cf.* Jamie Markham, *No Appeal of Revocation of Deferred Prosecution Probation*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Dec. 4, 2019) (noting that the author previously would have said that revocations of conditional discharge probation were appealable under *Burns* but now wondering whether the rule in *State v. Summers*, ___ N.C. App. ___, 836 S.E.2d 316 (2019), prohibiting appeals in deferred prosecution probation revocations (discussed below) may apply to conditional discharges).

Several conditional discharge statutes specifically state that "[d]isposition of a case to determine discharge and dismissal under this section at the district court division of the General Court of Justice shall be final for purposes of appeal." *See* G.S. 14-50.29(c); G.S. 14-277.8(c); G.S. 90-96(a); G.S. 90-113.14(a); *see also Cordon*, 21 N.C. App. 394 (defendant appealed the district court's revocation of G.S. 90-96 conditional discharge probation to superior court for a de novo hearing; N.C. Court of Appeals reviewed and affirmed the superior court revocation). If a defendant's probation is revoked in district court, the appeal is to superior court (with one exception, discussed below). *See* G.S. 15A-1347(a) (providing that when a district court judge revokes probation and activates a sentence or imposes special probation, the appeal is to the superior court for a de novo revocation hearing). This is true even in cases where a defendant pled guilty to a felony in district court pursuant to G.S. 7A-272(c) if his or her probation under a conditional discharge order is subsequently revoked by the district court in accordance with G.S. 7A-271(e). Under the latter provision, the district court has jurisdiction to conduct probation violation hearings if the defendant and State consent. *See State v. Hooper*, 358 N.C. 122 (2004) (holding that G.S. 15A-1347, not G.S. 7A-272(d), governed defendant's appeal of his felony probation revocation when district court conducts revocation proceeding; appeal of revocation was to superior court and not the appellate division). The one exception to this rule occurs when a defendant's felony drug court or therapeutic court probation is revoked by the district court. In that instance, the appeal is to the appellate division, not superior court. *See* G.S. 7A-271(f). If probation is revoked in superior court, either in the first instance or after de novo review of a district court revocation, the appeal is to the N.C. Court of Appeals. *See* G.S. 7A-27(b); G.S. 15A-1347(a).

For further discussion of appeals from the revocation of probation, see *supra* § 35.1B, Defendant's Right to Appeal from District Court Judgment, and § 35.1E, Appeal from a Finding of Violation of Probation in Superior Court.

No right to appeal from revocation of deferred prosecution probation. Deferred prosecution under G.S. 15A-1341(a1) allows a defendant charged with a Class H or I felony or a misdemeanor to be placed on probation under a written Deferred Prosecution Agreement (DPA) between the prosecutor and the defendant, with approval by the judge. *See* AOC-CR-610, Motion/Agreement and Order to Defer Prosecution (Structured Sentencing) (April 2018) (effective for deferrals entered on or after December 1, 2011); Jamie Markham, *Deferred Prosecution Probation*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Feb. 3, 2010). If the defendant complies with the conditions of probation, his or her charges will be dismissed. *See* G.S. 15A-1342(i). However, if the defendant breaches the DPA by violating the conditions of probation, the judge "may order charges as to which prosecution was deferred be brought to trial . . . ." G.S. 15A-1344(d); *see also* AOC-CR-

634, Disposition/Modification of Deferred Prosecution (Dec. 2017) (effective for all dispositions/modifications on or after December 1, 2017); Jamie Markham, *Deferred Prosecution: Who Steers the Ship?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (May 26, 2016).

Deferred prosecutions differ from conditional discharges because "[g]enerally, a deferred prosecution agreement results in a defendant's 'admission of responsibility' . . . or an acknowledgement of 'guilt in fact,' but this admission or acknowledgment does not amount to a guilty plea," and the defendant has not otherwise been adjudicated guilty. *See State v. Baker*, 247 N.C. App. 398 (2016) (unpublished) (citing *State v. Ross*, 173 N.C. App. 569, 574 (2005)). A defendant may only receive an order of conditional discharge deferring further proceedings and placing him or her on probation if the defendant has already pled guilty or has been found guilty. *See, e.g.,* G.S. 15A-1341(a4).

The N.C. Court of Appeals has recently determined that a defendant has no statutory right to appeal from the revocation of probation in the deferred prosecution context. *See State v. Summers*, ___ N.C. App. ___, 836 S.E.2d 316, 318 (2019) (finding that G.S. 15A-1347(a) did not provide defendant a right to appeal the revocation of defendant's deferred prosecution probation because "no sentence [wa]s activated nor any special probation conditions imposed," and that "the effect of a revocation in this context is merely that the State is now free to prosecute: there is not yet any final judgment"). Although there is no statutory right to appeal, a defendant may seek discretionary review by petitioning the higher court for a writ of certiorari. *See id.* (noting that had defendant petitioned the superior court for certiorari, the court may have granted it in the interest of judicial economy and reviewed the district court's order of revocation). For a discussion of this extraordinary writ, see *infra* § 35.7D, Certiorari of Trial Court Orders and Judgments.

A defendant whose probation under a DPA has been revoked and who is later "brought to trial" and convicted may appeal from the final judgment of conviction if he or she otherwise has a statutory right to do so. The defendant may be able to seek review of the revocation of deferred prosecution probation in his or her appeal from the final judgment. *See Summers*, ___ N.C. App. ___, 836 S.E.2d 316, 318 (holding that "[a] defendant has *no right to appeal* the revocation until after he is adjudged guilty") (emphasis in original).

Additional resource. Further discussion of deferred prosecutions and conditional discharges, including case law describing the differences between them, practical considerations for counsel, and applicable forms, can be found on the website of the N.C. Office of Indigent Defense Services, www.ncids.org. Highlight Training & Resources, click on Training Materials, then Criminal Programs, and then Criminal Training Materials—Indexed by Subject, and scroll down to Deferred Prosecutions.

R. Appeals from Imposition of Satellite-Based Monitoring, Sex Offender Registration, and No Contact Orders

North Carolina appellate courts consider the imposition of satellite-based monitoring (SBM) for a sex offender to be a civil matter and as such have held that the oral notice of appeal

allowed in criminal cases is not sufficient to confer jurisdiction on the appellate court. The defendant must file written notice of appeal within thirty days pursuant to Rule 3 of the N.C. Rules of Appellate Procedure as required in civil cases. *State v. Brooks*, 204 N.C. App. 193 (2010). The content of the written notice of appeal is identical to the content of the written notice of appeal for criminal cases, discussed *supra* in subsection F., Procedural Requirements for Appealing from Superior Court. *See also* N.C. R. APP. P. 3(d).

Likewise, the imposition of a no contact order under G.S. 15A-1340.50 prohibiting future contact by a convicted sex offender with the crime victim has been found to be a civil remedy, *State v. Hunt*, 221 N.C. App. 48 (2012), as has the imposition of an order requiring registration as a sex offender. *State v. Pell*, 211 N.C. App. 376 (2011) (citing *State v. White*, 162 N.C. App. 183 (2004)). In order to give proper notice of appeal from these civil orders, a defendant must comply with the requirements of Appellate Rule 3 as discussed in the preceding paragraph.

Since North Carolina appellate courts consider the imposition of no contact orders, satellite-based monitoring, and sex offender registration to be civil matters, those requirements are not automatically stayed by G.S. 15A-1451 when notice of appeal is given from the underlying criminal judgment, even where a defendant receives a probationary sentence on the underlying charge. *See supra* § 35.1G, Stay of Superior Court Sentence. However, when a defendant has given notice of appeal from the criminal judgment and these civil orders, a trial judge may be amenable to signing an order staying their execution pending appeal.

Practice note: In the past, the N.C. Court of Appeals liberally granted petitions for writ of certiorari where trial counsel did not have the benefit of the court's analysis finding that these proceedings were civil in nature and so failed to give proper notice of appeal. *See e.g., State v. Hunt*, 221 N.C. App. 48, 53 (2012) (granting certiorari review of a no contact order where improper oral notice of appeal had been given and stating that "'[d]efendant would have needed a considerable degree of foresight in order to understand' that his notice of appeal was ineffective at the time he entered it given the fact that our courts have not addressed the civil nature of the order from which he appealed") (citation omitted); *State v. Clayton*, 206 N.C. App. 300 (2010) (treating improperly noticed appeal as petition for writ of certiorari because the defendant's SBM hearing at which he gave oral notice of appeal predated appellate decisions holding that SBM hearings are civil proceedings and that oral notice of appeal is insufficient); *see also State v. Modlin,* 252 N.C. App. 93 (2017) (unpublished) (granting certiorari review where defendant had given oral notice of appeal; court further reviewed defendant's unpreserved constitutional argument that the trial judge failed to conduct a hearing on the reasonableness of SBM pursuant to *Grady v. North Carolina*, 575 U.S. 306 (2015), because neither party had the benefit of the recent decisions holding that a "reasonableness" hearing was required before the imposition of SBM).

Now that the law is settled in this area, it appears that this practice of frequently granting certiorari review may be ending so it is imperative that counsel give proper written notice of appeal and raise any relevant statutory and constitutional issues at sentencing in order to preserve the right to appellate review. *See, e.g., State v. Bishop*, 255 N.C. App. 767, 769–70 (2017) (dismissing defendant's untimely appeal and declining to allow certiorari review of

the imposition of SBM; court further refused to invoke N.C. R. App. P. 2 to review the defendant's unpreserved argument that the trial judge failed to conduct a *Grady* hearing because "the law governing preservation of this issue was settled at the time Bishop appeared before the trial court"); *see also State v. Cozart*, 260 N.C. App. 96, 100 (2018) (denying defendant's petition for writ of certiorari where trial counsel gave oral notice of appeal from the imposition of SBM; court quoted *Bishop* for the proposition that "'[i]f this Court routinely allowed a writ of certiorari in every case in which the appellant failed to properly appeal, it would render meaningless the rules governing the time and manner of noticing appeal.'"); *State v. Gentle*, 260 N.C. App. 269 (2018) (same but dissenting judge would have allowed certiorari review), *aff'd per curiam,* 372 N.C. 47 (2019). *But see State v. Lopez*, ___ N.C. App. ___, 826 S.E.2d 498 (2019) (granting certiorari review in a case where trial counsel failed to give written notice of appeal from imposition of lifetime SBM and the State failed to meet its burden of showing reasonableness; court also discussed appellate preservation of the *Grady* Fourth Amendment issue at SBM hearings and determined that the issue was preserved without objection where the State initiates a reasonableness inquiry and the trial judge makes a ruling).

S. Appeals from Expunction Decisions

Generally. Expunction is a procedure by which a person obtains a court order to expunge the record of prior proceedings against him or her. The right to obtain an expunction depends on North Carolina statutes. If no statute authorizes an expunction, a person generally has no right to one. John Rubin, *Relief from a Criminal Conviction: General Considerations for Expunctions* (2018). The expunction statutes are found in Article 5 of Chapter 15A of the General Statutes.

Although each type of expunction of an adult criminal matter has its own preconditions, most involve the same basic procedure with some variations. For most matters, the petitioner must file a petition for an expunction with the appropriate state court and show that he or she meets the criteria for an expunction. For a discussion of expunction procedures, see John Rubin, *Relief from a Criminal Conviction: Procedure to Obtain an Expunction* (2018); *see also* John Rubin, *A Second Chance in North Carolina through Expanded Record Clearance*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 7, 2020) (discussing changes to expunction procedures, including automatic expunction of non-conviction records without a petition beginning Dec. 1, 2021).

Appealability of expunction decisions. North Carolina appellate courts consider an expunction decision to be a criminal matter. *See State v. J.C.*, 372 N.C. 203, 207 (2019) (holding that the plain language of G.S. 15A-145.5 designates an expunction petition as "a part of the underlying criminal proceeding, making expunctions criminal matters"). In *J.C.*, the court concluded that the State had no right to appeal from an expunction order that was granted in favor of the petitioner under G.S. 15A-145.5. The court noted that the General Assembly did not give the State the right to appeal from an expunction order in G.S. 15A-145.5, nor did it amend G.S. 15A-1445 to include this right even though it had the chance to do so. The court also noted that while the State did not have a statutory right to appeal, it

was free to seek review of an expunction order by petitioning the appropriate court for a writ of certiorari as it had done in the past.

Likewise, a petitioner has no appeal as of right from the denial of an expunction of a conviction, but he or she may petition for a writ a certiorari. *See State v. Neira*, ___ N.C. App. ___, 840 S.E.2d 890 (2020) (citing G.S. 15A-1444, the statute governing when a criminal defendant may appeal, for the proposition that no statutory appeal is allowed). In cases where a district court denies relief, the petitioner should seek review in superior court. *See* N.C. GEN. R. PRAC. SUPER. & DIST. CT. 19 ("In proper cases and in like manner, the court may grant the writ of certiorari."); *see also State v. Hamrick*, 110 N.C. App. 60 (1993). If an expunction petition is denied by the superior court, the petitioner should seek relief in the N.C. Court of Appeals. *See* G.S. 7A-32; *see also* N.C. CONST. art. IV, § 12; N.C. R. APP. P. 21. For further discussion of the procedural requirements of petitions for writs of certiorari, see *infra* § 35.7D, Certiorari of Trial Court Orders and Judgments.

Additional resource. For an in-depth discussion of expunctions, see John Rubin, *Relief from a Criminal Conviction: Expunction* (2018).