
35.7 Extraordinary Writs

This section focuses on four writs: mandamus, prohibition, supersedeas, and certiorari. The writ of habeas corpus is discussed *supra* in § 35.4, State Habeas Corpus. Article IV, section 12(1) of the N.C. Constitution confers jurisdiction on the N.C. Supreme Court to "issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts." *See also* G.S. 7A-32(b) (same). The General Assembly exercised its authority under article IV, section 12(2) to confer jurisdiction on the N.C. Court of Appeals "to issue the prerogative writs, including mandamus, prohibition, certiorari, and supersedeas, in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts . . . ." *See* G.S. 7A-32(c). For further discussion of the history and origins of these four writs, see ELIZABETH BROOKS SCHERER & MATTHEW NIS LEERBERG, NORTH CAROLINA APPELLATE PRACTICE AND PROCEDURE § 20 (Remedial, Prerogative, and Extraordinary Writs of the Appellate Courts) (2018).

A. Mandamus

Generally. "A writ of mandamus is an extraordinary court order to 'a board, corporation, inferior court, officer or person commanding the performance of a specified official duty imposed by law.'" *In re T.H.T.*, 362 N.C. 446, 453 (2008) (citation omitted). The literal translation of the word "mandamus" is "We command." *Id.* (citing BLACK'S LAW DICTIONARY 980 (8th ed. 2004)). This section discusses the writ only as it applies to command a judicial officer of the General Court of Justice to fulfill an official duty.

Mandamus is in the form of an original proceeding against the judicial officer sought to be controlled, and it "lies most appropriately to compel a judicial action erroneously refused, or to correct judicial action erroneously taken, or to compel the exercise of judicial discretionary action when the taking of any action has been refused." N.C. Rules of Appellate Procedure, 287 N.C. 671, 730 (1975) (Rule 22 Drafting Committee Notes). It is a civil action and is the proper remedy when a trial judge fails or refuses to perform a particular duty that is required by law. *See* 52 AM. JUR. 2D *Mandamus* §1. Mandamus may be issued only to enforce established rights, not to create new ones. If there is another legally adequate remedy, such as an appeal, mandamus will not lie. *In re T.H.T.*, 362 N.C. 446.

The writ will be granted "only in case of necessity" and "will not issue to compel the performance of an act which a defendant shows a willingness to perform without coercion."

Sutton v. Figgatt, 280 N.C. 89, 93 (1971) (writ of mandamus would not issue ordering a magistrate to examine plaintiffs under oath about their complaints that deputies had assaulted them because the magistrate announced in open court his readiness to perform this duty and waited several hours but plaintiffs never availed themselves of the opportunity).

Required elements. The following elements must be shown for a writ of mandamus to be issued:

1. The petitioner must demonstrate a clear legal right to the act requested.
2. The respondent must have a clear legal duty to perform the act requested and the duty must exist both at the time of application for the writ and at the time the court issues the writ.
3. The performance of the duty-bound act must be ministerial in nature and cannot involve the exercise of discretion. However, a court may issue a writ of mandamus to a public official compelling the official to make a discretionary decision as long as the court does not require a particular result.
4. The respondent must have failed or refused to perform the act requested, and the time for the performance of the act must have expired. Mandamus is not appropriate to reprimand an official, to redress a past wrong, or to prevent a future legal injury.
5. There must be no alternative, legally adequate remedy.

In re T.H.T., 362 N.C. 446, 453–54 (2008). If a petitioner shows all these elements, the court cannot refuse to issue a writ of mandamus. *Id*.

Who can issue. The N.C. Supreme Court and the N.C. Court of Appeals have jurisdiction, exercisable by one or more judges or justices, to issue a writ of mandamus "to supervise and control the proceedings" of inferior courts. G.S. 7A-32(b), (c). A superior court judge has no authority or jurisdiction to issue a writ of mandamus to a district court judge. *In re Redwine*, 312 N.C. 482, 484 (1984) (finding error where superior court judge issued a writ of mandamus ordering a district court judge to admit an affidavit into evidence; N.C. Supreme Court noted that its opinion "does not affect the authority or jurisdiction of judges of the superior court to issue writs of mandamus and prohibition to parties other than justices and judges of the General Court of Justice"); *see also State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 358 (1984) (upholding superior court's denial of State's petition for mandamus or prohibition that sought to direct district court judges to rule that the Safe Roads Act of 1983 was constitutional because no state constitutional provision, statute, or rule "affords a superior court of the trial division authority or jurisdiction to issue the remedial writs of *mandamus* or *prohibition* to a judge of the district court of the trial division") (emphasis in original) (citing *Redwine)*. The power to issue a writ of mandamus to a judicial officer is reserved to the appellate courts. *Id.*; *see* N.C. CONST. art. IV, § 12(1), (2); G.S. 7A-32(b), (c).

A petition for the writ should be directed to the appellate court to which an appeal of right might lie from a final judgment entered in the cause. N.C. R. APP. P. 22(a).

Procedural requirements. The procedures for filing a petition for writ of mandamus are set out in Rule 22 of the N.C. Rules of Appellate Procedure. For a detailed discussion of the procedural requirements, see ELIZABETH BROOKS SCHERER & MATTHEW NIS LEERBERG, NORTH CAROLINA APPELLATE PRACTICE AND PROCEDURE § 22.03 (Procedures When Filing and Responding to Petition for Writ of Mandamus or Prohibition) (2018).

Selected examples. Mandamus has been found to be the proper remedy in the following instances:

- Where a trial judge refused to hold voluntary admissions hearings for juveniles residing in a state mental treatment facility. *State ex rel. Goff v. Wilkinson*, 302 N.C. 393 (1981).
- Where a trial judge failed to enter a timely order. *See In re T.H.T.*, 362 N.C. 446 (2008) (trial judge failed to adhere to the statutory time limit set in the Juvenile Code for entering a written order in an abuse and neglect case brought by the Department of Social Services); *Stevens v. Guzman*, 140 N.C. App. 780 (2000) (trial judge failed to enter a written order denying the plaintiff's motions for a judgment notwithstanding the verdict and a new trial); *see also State v. Thomas*, 260 N.C. App. 707 (2018) (unpublished) (granting defendant's petition for writ of mandamus and directing trial judge to rule on defendant's motion to locate and preserve evidence and for post-conviction DNA testing within sixty days).
- Where the superior court failed to hold a hearing to determine whether the defendant was entitled to the appointment of appellate counsel as ordered by the N.C. Court of Appeals. *State v. Hasty*, 181 N.C. App. 144 (2007).

Additional resource. For further discussion of the writ of mandamus, including a comparison between writs of mandamus and prohibition, see ELIZABETH BROOKS SCHERER & MATTHEW NIS LEERBERG, NORTH CAROLINA APPELLATE PRACTICE AND PROCEDURE § 22 (Writs of Mandamus and Prohibition) (2018).

B. Prohibition

Generally. A writ of prohibition is a discretionary writ that issues to a lower court from a higher court having supervision and control to prevent the lower court from proceeding further in a pending matter. It is the opposite of a writ of mandamus. As its name indicates, it prohibits action instead of compelling action. *See State v. Whitaker*, 114 N.C. 818 (1894); *see also Holly Shelter R. Co. v. Newton*, 133 N.C. 136, 137 (1903) (prohibition "only issues in cases where it is necessary to restrain the action of the lower courts, proceeding outside of their powers, and even then it is not a writ of right, but its issuance is a matter of discretion, and it 'issues only in cases of extreme necessity'") (citation omitted). This section discusses the writ only as it applies to prohibiting action by a judicial officer of the General Court of Justice.

The writ has been commonly defined as one that prevents a tribunal possessing judicial or quasi-judicial powers from exercising jurisdiction over matters that are not within its jurisdiction or from exceeding its legitimate powers. *See* 63C AM. JUR. 2D *Prohibition* §§ 1, 3; *see also* N.C. Rules of Appellate Procedure, 287 N.C. 669, 732 (1975) (Rule 22 Drafting

Committee Notes) ("Prohibition lies most appropriately to prohibit the impending exercise of jurisdiction not possessed by the judge to whom issuance of the writ has been sought."). It is the proper remedy to seek when the jurisdiction of the trial court depends on a legal question rather than a factual question. 63C AM. JUR. 2D *Prohibition* § 3.

Like mandamus, prohibition is in the form of an original proceeding against the judicial officer sought to be controlled and will be denied if there is another remedy, such as appeal or certiorari. *See Whitaker*, 114 N.C. 818 (writ would not issue to prohibit mayor's court from hearing matter without a jury because the defendants had a right to appeal to superior court in the event they were convicted); N.C. Rules of Appellate Procedure, 287 N.C. 671, 732 (1975) (Rule 22 Drafting Committee Notes); *see also State v. Inman*, 224 N.C. 531 (1944); *Perry v. Shepherd*, 78 N.C. 83 (1878).

Required elements. The requirements that must be shown by a petitioner before a writ of prohibition will be issued are generally stated as follows:

1. that some judge, officer, or person is about to exercise judicial or quasi-judicial power;
2. that the power about to be exercised is unauthorized by law; and
3. if the power is exercised, it will result in an injury for which there is no other adequate remedy.

63C AM. JUR. 2D *Prohibition* § 8.

Who can issue. The N.C. Supreme Court and the N.C. Court of Appeals have jurisdiction, exercisable by one or more judges or justices, to issue a writ of prohibition "to supervise and control the proceedings" of inferior courts. G.S. 7A-32(b), (c). A superior court judge has no authority or jurisdiction to issue a writ of prohibition to a district court judge. *See Perry v. Shepherd*, 78 N.C. 83 (1878); *see also State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 358 (1984) (upholding superior court's denial of State's petition for mandamus or prohibition that sought to direct district court judges to rule that the Safe Roads Act of 1983 was constitutional because no state constitutional provision, statute, or rule "affords a superior court of the trial division authority or jurisdiction to issue the remedial writs of *mandamus* or *prohibition* to a judge of the district court of the trial division") (emphasis in original) (citation omitted). That power is reserved to the appellate courts. *See* N.C. CONST. art. IV, § 12(1), (2); G.S. 7A-32(b), (c).

The petition for the writ should be directed to the appellate court to which an appeal of right might lie from a final judgment entered in the cause. N.C. R. APP. P. 22(a).

Procedural requirements. The procedures for filing a petition for writ of prohibition are set out in Rule 22 of the N.C. Rules of Appellate Procedure. For a detailed discussion of the procedural requirements, see ELIZABETH BROOKS SCHERER & MATTHEW NIS LEERBERG, NORTH CAROLINA APPELLATE PRACTICE AND PROCEDURE § 22.03 (Procedures When Filing and Responding to Petition for Writ of Mandamus or Prohibition) (2018).

Selected examples. Prohibition has been found to be the proper remedy in the following instances:

- Where a court, without any legal authority for doing so, granted a new trial at a subsequent term after the defendant was convicted of a felony. *See State v. Whitaker*, 114 N.C. 818 (1894).
- To prevent a lower court from exceeding its jurisdiction by attempting to execute a judgment when an appeal from that judgment had been noted to the superior court. *Id.*
- To preclude a probate court from exercising jurisdiction over a deceased person's estate when it could not do so lawfully. *Id.*
- To order a district court judge to pronounce judgment and sentence a defendant in accordance with the mandatory provisions of the statute in a driving while impaired case. *In re Greene*, 297 N.C. 305 (1979).

Additional resource. For further discussion of the writ of prohibition, including a comparison between writs of mandamus and prohibition, see ELIZABETH BROOKS SCHERER & MATTHEW NIS LEERBERG, NORTH CAROLINA APPELLATE PRACTICE AND PROCEDURE § 22 (Writs of Mandamus and Prohibition) (2018).

C. Supersedeas Pending Review of Decisions of the Trial Court

Generally. A writ of supersedeas is an extraordinary writ that issues from an appellate court to a lower court "to preserve the status quo pending the exercise of the appellate court's jurisdiction." *City of New Bern v. Walker*, 255 N.C. 355, 356 (1961). The literal translation of the Latin word "supersedeas" is "you shall desist." BLACK'S LAW DICTIONARY (11th ed. 2019). Supersedeas suspends the power of the lower court to issue an execution on the judgment or decree appealed from. *See* 5 AM. JUR. 2D *Appellate Review* § 370; *see also State v. Dorton*, 182 N.C. App. 34 (2007) (trial judge properly held hearing after N.C. Court of Appeals remanded the case for resentencing; fact that defendant had filed a petition for discretionary review in the N.C. Supreme Court did not divest the trial court of jurisdiction where defendant failed to file a petition for writ of supersedeas to stay enforcement of the remand order).

The writ "is issued only to hold the matter in abeyance pending review and may be issued only by the court in which an appeal is pending." *Walker*, 255 N.C. 355, 356; *see also* N.C. R. APP. P. 23(a) (an appeal or a petition for mandamus, prohibition, or certiorari must be pending in the appellate court where the application for writ of supersedeas is filed); *Craver v. Craver*, 298 N.C. 231, 237–38 (1979) ("The writ of supersedeas may issue only in the exercise of, and as ancillary to, the revising power of an appellate court . . . .").

Who can issue. The N.C. Supreme Court and the N.C. Court of Appeals have jurisdiction, exercisable by one or more judges or justices, to issue a writ of supersedeas "to supervise and control the proceedings" of inferior courts. G.S. 7A-32(b), (c); *see also* N.C. CONST. art. IV, § 12(1), (2). A petition for the writ should be made in the N.C. Court of Appeals in all cases except those originally docketed in the N.C. Supreme Court. N.C. R. APP. P. 23(a)(2).

Temporary stays. If a petition for supersedeas is filed, the applicant also may apply to the appellate court for an order temporarily staying the enforcement or execution of a trial court's judgment or order pending the appellate court's decision on the petition for supersedeas. N.C. R. APP. P. 23(e). A motion for a temporary stay should be filed in all cases where a petition for writ of supersedeas is sought to ensure that the matter is not rendered moot before the appellate court has ruled on the supersedeas petition.

Procedural requirements. The procedures for filing a petition for writ of supersedeas and motion for temporary stay are set out in Rule 23 of the N.C. Rules of Appellate Procedure. For a detailed discussion of the procedural requirements, see ELIZABETH BROOKS SCHERER & MATTHEW NIS LEERBERG, NORTH CAROLINA APPELLATE PRACTICE AND PROCEDURE § 23.04 (Procedures When Petitioning for Writ of Supersedeas) (2018).

Practice note: An application for writ of supersedeas would be appropriate if you want to stay the enforcement of any part of a trial court's judgment that is not automatically stayed pursuant to G.S. 15A-1451(a) after a defendant enters notice of appeal (*see supra* § 35.1G, Stay of Superior Court Sentence), or to stay enforcement of a trial court's judgment or order while a petition for an extraordinary writ is pending. A motion for temporary stay must be filed in the appellate court in order to stay the effect of a judgment immediately while the appellate court makes its decision on whether to grant the writ of supersedeas. When considering whether to file a petition for writ of supersedeas and motion for temporary stay, counsel should consult with the Office of the Appellate Defender on how to proceed and whether appellate counsel should be appointed to file the petition and motion.

Additional resource. For further discussion of the writ of supersedeas and the motion for temporary stay, see ELIZABETH BROOKS SCHERER & MATTHEW NIS LEERBERG, NORTH CAROLINA APPELLATE PRACTICE AND PROCEDURE § 23 (Writs of Supersedeas) (2018).

D. Certiorari of Trial Court Orders and Judgments

Generally. A writ of certiorari is "an extraordinary remedial writ to correct errors of law." *State v. Simmington*, 235 N.C. 612, 613 (1952). It issues from a higher court to a lower court, and it lies only to review judicial or quasi-judicial action to determine the action's validity and to correct errors therein. *State v. Roux*, 263 N.C. 149, 153 (1964). Certiorari provides a "means of review outside the regular appeal route." N.C. Rules of Appellate Procedure, 287 N.C. 671, 730 (1975) (Rule 21 Drafting Committee Notes).

A petition for writ of certiorari must show merit or that error was probably committed in the court below. The writ is discretionary and will issue only if the petitioner can show good and sufficient cause. *State v. Grundler*, 251 N.C. 177, 189 (1959).

Who can issue. The N.C. Supreme Court and the N.C. Court of Appeals have jurisdiction, exercisable by one or more judges or justices, to issue a writ of certiorari "to supervise and control the proceedings" of inferior courts. G.S. 7A-32(b), (c); *see also* N.C. CONST. art. IV, § 12(1), (2). A petition for the writ should be filed in the court to which an appeal of right might lie from a final judgment in the cause. N.C. R. APP. P. 21(b); *see also* N.C. R. APP. P.

4(d) (unless the defendant has been convicted of first-degree murder and received a sentence of death, the petition should be filed in the N.C. Court of Appeals).

The superior court also has jurisdiction to issue a writ of certiorari to review district court proceedings. *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). The authority of a superior court to grant a writ of certiorari under Practice Rule 19 is analogous to the power of the appellate court to issue a writ of certiorari pursuant to G.S. 7A-32(c). *Hamrick*, 110 N.C. App. 60; *see also State v. Summers*, ___ N.C. App. ___, 836 S.E.2d 316 (2019) (finding that defendant had no right to appeal to superior court from the district court's revocation of his probation under a deferred prosecution agreement but that defendant could have petitioned the superior court for certiorari review); *State v. Milanese*, 226 N.C. App. 433 (2013) (unpublished) (finding that superior court judge had authority to treat defendant's appeal from the denial of her motion for appropriate relief as a petition for writ of certiorari).

When authorized. Certiorari review is available as provided in Chapter 15A, by other rules of law, and by rule of the appellate division. *See* G.S. 15A-1444(g). G.S. 7A-32(b) and (c) both provide that the practice and procedure for issuing the prerogative writs, including certiorari, "shall be as provided by statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of the common law." *See also State v. Ledbetter*, 371 N.C. 192, 194 (2018) (stating that G.S. 7A-32(c) creates a default rule that the Court of Appeals has jurisdiction to grant certiorari review of a lower court judgment "unless a more specific statute restricts jurisdiction in the particular class of cases at issue") (citations omitted).

Rule 21 of the N.C. Rules of Appellate Procedure purports to limit certiorari review to only three instances:

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 ruling on a motion for appropriate relief.

See N.C. R. APP. P. 21(a)(1). However, the N.C. Supreme Court recently made it clear that where a statute gives an appellate court jurisdiction to issue a writ of certiorari, Appellate Rule 21 cannot take it away. *See Ledbetter*, 371 N.C. 192, 196. The 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." *Id.* at 197 (remanding case for Court of Appeals to exercise its discretion in determining whether it should grant or deny certiorari review of the denial of defendant's motion to dismiss her driving while impaired charge where defendant pled guilty; G.S. 15A-1444(e) specifically provides for certiorari review of a defendant's guilty plea and does not contains any language that limits the Court of Appeals' jurisdiction or discretionary authority). *But see State v. Killette*, ___ N.C. App. ___, 834 S.E.2d 696, 698 (2019) (Court of Appeals held, post-*Ledbetter*, that it was without authority under Rule 21 to grant certiorari review of denial of a suppression motion

where defendant's failure to give pre-plea notice of intent to appeal the denial of his motion was not a "failure to take timely action" within the meaning of that rule), *petition for mandamus and alternative petition for disc. rev. filed*, (N.C. Dec. 4, 2019) (No. 379PA18-2), discussed *supra* in "Writ of certioriari" in § 35.1D, Defendant's Right to Appeal from Guilty Plea in Superior Court.

Examples of instances other than those addressed in Appellate Rule 21 where a defendant is specifically authorized by statute or common law to seek certiorari review in the appellate division include, but are not limited to:

- Whether a defendant's sentence is supported by evidence introduced at the trial and sentencing hearing where the minimum sentence of imprisonment falls within the presumptive range for the defendant's prior record level and class of offense. G.S. 15A-1444(a1); *see also State v. Cook*, 225 N.C. App. 745 (2013) (allowing certiorari review of defendant's claim that presumptive sentence imposed on remand violated G.S. 15A-1335).
- When a defendant has pled guilty or no contest and is not entitled to appeal as a matter of right. G.S. 15A-1444(e); *see also State v. Bolinger*, 320 N.C. 596 (1987) (court acknowledged that defendant could not appeal as a matter of right the issue of whether his plea was accepted in violation of G.S. 15A-1022 but held that defendant could have sought review by writ of certiorari); *State v. Owenby*, 261 N.C. App. 774 (2018) (unpublished) (granting certiorari review and finding trial judge did not err when she accepted defendant's guilty plea since a sufficient factual basis existed for acceptance of the plea).
- When an applicant's writ of habeas corpus is denied. *See State v. Niccum*, 293 N.C. 276, 278 (1977) (holding that there is no right to appeal from an order made in a habeas corpus proceeding instituted by a prisoner to inquire into the legality of his or her restraint but noting that "[t]he remedy, if any, is by petition for certiorari addressed to the sound discretion of the appropriate appellate court") (citation omitted); *see also State v. Leach*, 227 N.C. App. 399 (2013); *State v. Wambach*, 136 N.C. App. 842 (2000).

Filing a petition for writ of certiorari may also be required when seeking appellate review of a trial judge's order granting or denying an order of expunction. *See State v. J.C.*, 372 N.C. 203 (2019); *State v. Neira*, ___ N.C. App. ___, 840 S.E.2d 890, 892 (2020) (finding that "[d]efendants who have been denied the expunction of a conviction have no appeal as of right" but may petition for certiorari review).

Procedural requirements. The procedures for filing a petition for writ of certiorari in the appellate courts are set out in Rule 21 of the N.C. Rules of Appellate Procedure. For a detailed discussion of these procedural requirements, see ELIZABETH BROOKS SCHERER & MATTHEW NIS LEERBERG, NORTH CAROLINA APPELLATE PRACTICE AND PROCEDURE § 21.05 (Procedures When Filing and Responding to Petition for Writ of Certiorari) (2018). The procedures for filing a petition for writ of certiorari in the superior court are set out in Rule 19 of the General Rules of Practice for the Superior and District Courts.

Practice note: 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." *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).

Additional resource. For further discussion of the writ of certiorari, see ELIZABETH BROOKS SCHERER & MATTHEW NIS LEERBERG, NORTH CAROLINA APPELLATE PRACTICE AND PROCEDURE § 21 (Writs of Certiorari) (2018).