35.7 Extraordinary Writs

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)).

Mandamus 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 (2000). 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. 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 (1984). That power is reserved to the appellate courts. *Id.*; *see* N.C. CONST. art. IV, § 12(1), (2); G.S. 7A-32.

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.

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).

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. *State v. Whitaker*, 114 N.C. 818 (1894). 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 (2009). 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 (2009).

Like mandamus, prohibition 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); *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 (2009).

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*, 78 N.C. 83. That power is reserved to the appellate courts. *See* N.C. CONST. art. IV, § 12(1), (2); G.S. 7A-32.

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.

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;
- 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; and
- to preclude a probate court from exercising jurisdiction over a deceased person's estate when it could not do so lawfully.

See State v. Whitaker, 114 N.C. 818 (1894).

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). Supersedeas suspends the power of the lower court to issue an execution on the judgment or decree appealed from. 5 AM. JUR. 2D *Appellate Review* § 398 (2007).

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).

Procedural requirements. The procedures for filing a petition for writ of mandamus and motion for temporary stay are set out in Rule 23 of the N.C. Rules of Appellate Procedure.

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 of notice of appeal (*see supra* § 35.1G, Stay of Superior Court Sentence), or to stay enforcement of a judgment while a petition for writ of certiorari 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.

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).

A petition for writ of certiorari must show merit or that error was probably committed 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).

The superior court also has jurisdiction to issue a writ of certiorari to review district court proceedings pursuant to Rule 19 of the General Rules of Practice for the Superior and District Courts. 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 Rule 21 of the N.C. Rules of Appellate Procedure. *State v. Hamrick*, 110 N.C. App. 60 (1993).

When authorized. Rule 21 of the N.C. Rules of Appellate Procedure authorizes a writ of

certiorari to be issued by the appellate division in appropriate circumstances to review judgments and orders of trial tribunals in three situations only:

1. where the right to appeal has been lost by the failure to take timely action;
2. when no right to appeal from an interlocutory order exists; or
3. to review a trial judge's denial of a motion for appropriate relief under G.S. 15A-1422(c)(3).

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

G.S. 15A-1444(e) purports to allow a defendant to petition for a writ of certiorari after pleading guilty; however, the N.C. appellate courts have held that they are limited to granting certiorari in the three circumstances set out above in Appellate Rule 21 (and the additional circumstance described below). *See State v. Pimental*, 153 N.C. App. 69 (2002) (holding that the court did not have the authority to issue a writ of certiorari to review defendant's arguments because he had no right to appeal and his case did not fall into one of the categories listed in Appellate Rule 21; court stated that appellate rules prevail over the general statutes when there is a conflict); *see also State v. Smith*, 193 N.C. App. 739 (2008) (finding that the defendant, after pleading guilty, did not have the right to appeal the denial of his motion to dismiss his habitual felon indictment and the court did not have the authority to grant certiorari review under Appellate Rule 21).

The N.C. Supreme Court also has recognized a fourth instance in which a defendant may petition for a writ of certiorari—when challenging guilty plea procedures. For a discussion of that topic, *see supra* § 35.1D, Defendant's Right to Appeal from Guilty Plea in Superior Court: Writ of Certiorari.

It is not clear whether the limits applicable to writs of certiorari in the appellate division would apply to writs of certiorari by the superior court to review district court judgments and orders, which are governed by Rule 19 of the General Rules of Practice for the Superior and District Courts. Rule 19 does not specify such limits, and they may or may not apply by analogy. *See generally State v. Hamrick*, 110 N.C. App. 60 (1993) (finding that superior court properly granted State's petition for writ of certiorari to review a district court judge's order dismissing the defendant's case based on double jeopardy where State had lost its right to appeal under G.S. 15A-1432 through its failure to file notice of appeal in a proper manner).

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. 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.