Chapter 13
Motions Practice

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A motion is a "written or oral application requesting a court to make a specified ruling or order." BLACK'S LAW DICTIONARY 1106 (9th ed. 2009). While the primary function of a motion is to obtain the requested relief, motions practice also may provide discovery or facilitate plea negotiations by advancing the defendant's theory or revealing problems in the State's case. This chapter addresses procedural and timing requirements that apply to pretrial motions. The substantive law governing most of the motions mentioned in this chapter is discussed elsewhere

in this manual. The law underlying certain motions not covered elsewhere is included in this chapter.

Section 13.1 lists types of motions that counsel may consider filing; this section is organized according to the time when the motion should be filed in superior court. Section 13.2 discusses the procedures applicable to pretrial motions in superior court. Section 13.3 summarizes the procedural requirements for motions in district court.

Section 13.4 discusses the law governing certain significant motions not covered elsewhere in this manual, including motions to: (a) continue; (b) dismiss on the grounds of double jeopardy; (c) recuse the trial judge; and (d) dismiss because of vindictive or selective prosecution. It also provides some resources on postconviction motions.

13.1 Types and Timing of Pretrial Motions

The discussion in this section deals primarily with motions practice in cases within the original jurisdiction of the superior court—that is, felonies and joined misdemeanors. Although many of the motions discussed here may be filed in misdemeanor cases in district court, the discussion of time limits is written with superior court in mind. Motions practice in district court and misdemeanor appeals in superior court are discussed specifically *infra* in § 13.3, Motions Practice in District Court.

A. Timing

Almost any motion may be made before trial. *See* N.C. GEN. STAT. § G.S. 15A-952(a) (hereinafter G.S.) ("[a]ny defense, objection, or request which is capable of being determined without the trial of the general issue may be raised before trial by motion"); *State v. Tate*, 300 N.C. 180 (1980) (includes discussion of proper timing for suppression motions). It can be strategically advantageous for various reasons to file motions ahead of trial—to obtain a ruling on an issue that affects how you try the case, to discover additional information, and to prevent the jury from hearing inadmissible, prejudicial evidence that is not easily cured by an instruction that the jury disregard it. On the other hand, waiting until trial begins and jeopardy has attached to raise motions where you are statutorily permitted to do so may preclude retrial and generally will eliminate any right of appeal by the State. *See* G.S. 15A-1432(a); G.S. 15A-1445(a) (State may not appeal where further prosecution would be prohibited by double jeopardy); *see also Tate*, 300 N.C. at 183 (State has right to appeal pretrial grant of suppression motion by superior court); *State v. Shedd*, 117 N.C. App. 122 (1994) (State has right to appeal midtrial dismissal where dismissal was based on discovery violation and not on defendant's factual guilt or innocence). For a further discussion of the State's right to appeal from a superior court ruling, see 2 NORTH CAROLINA DEFENDER MANUAL § 35.2 (Appeals by the State) (UNC School of Government, 2d ed. 2012).

Many motions are subject to time limits and must be filed before trial, or they are considered waived. Time limits for specific motions and requests are discussed below.

B. Motions and Requests after Appointment of Counsel

Request for voluntary discovery. Before filing a formal motion to compel discovery, a defendant must make a written request for voluntary discovery from the prosecutor. *See* G.S. 15A-902(a). There are different triggering events for determining the timeliness of a request for voluntary discovery.

- If the defendant is represented by counsel at the time of a probable cause hearing, the request must be made no later than ten working days after the hearing is held or waived.
- If the defendant is not represented by counsel at the probable cause hearing, or is indicted (or consents to a bill of information) before a probable cause hearing occurs, the request must be made no later than ten working days after appointment of counsel or service of the indictment (or consent to a bill of information), whichever is later.

See G.S. 15A-902(d); *see also supra* § 4.2D, Requests for Discovery.

Motion to compel discovery. If the State fails to reply to a request for voluntary discovery within seven days of the request, or responds inadequately, the defendant may file a motion to compel discovery. *See* G.S. 15A-902(a). Also, if the defendant misses the deadline for requesting voluntary discovery, a safety valve exists; a motion to compel discovery may be filed at any time before trial if the parties so stipulate or for good cause shown. *See* G.S. 15A-902(f); *see also supra* § 4.2D, Requests for Discovery; § 4.2E, Motions for Discovery.

Practice note: Some attorneys routinely file a combined "Request for Voluntary Discovery and Alternative Motion for Discovery," in which they ask the court to treat their request as a motion in the event that the State fails to provide voluntary discovery within the time prescribed by law. This relieves counsel of the burden of filing a separate, follow-up motion to compel. A sample is available under "Discovery" in the non-capital trial motions bank at www.ncids.org (select "Training & Resources"). *See also* MAITRI "MIKE" KLINKOSUM, NORTH CAROLINA CRIMINAL DEFENSE MOTIONS MANUAL 140 (2d ed. 2012) (discussing this approach).

Request for arraignment. An arraignment is a formal opportunity, either in court or by audio-video transmission, for the defendant to be informed of the charges against him or her and to enter a plea of guilty or not guilty. A defendant must file a written request for arraignment no later than 21 days after return of an indictment as a true bill. Where a defendant is not represented by counsel, the request for arraignment must be made within 21 days of *service* of a bill of indictment. *See* G.S. 15A-941(d); G.S. 15A-630. A defendant who fails to request arraignment waives the right to be arraigned, and the court will enter a plea of not guilty. *See* G.S. 15A-941(d); *State v. Lane*, 163 N.C. App. 495 (2004) (defendant waived right to arraignment where record contained no written request for arraignment, and he could not argue error in being required to proceed to trial during same week as arraignment). For a discussion of whether these deadlines apply to

misdemeanors appealed for a trial de novo in superior court, see *infra* § 13.3A, Misdemeanors.

Practice note on significance of arraignment: Important motions deadlines are triggered by the date of arraignment. *See* subsection C., below. To maximize the time available for the filing of motions, counsel should request arraignment in all cases. *See also supra* § 7.4D, Other Limits (discussing restrictions on trial being held during the same week in which arraignment is held). The window closes for certain motions on the date of arraignment, but this date is generally later than the motions deadline without arraignment (21 days after return of the indictment). Further, if you have not received discovery by the scheduled date of arraignment, at which your client must enter a plea, you may have grounds for moving to continue arraignment for production of discovery.

Motion for bond reduction. While there are no statutory time limits on a motion for bond reduction, your client will likely want you to raise this motion as soon as practicable after arrest. *See* G.S. 15A-534; *see also supra* § 1.7, Investigation and Preparation for Bond Reduction Motion.

Motions for experts. To obtain funds for an expert in a noncapital case, an indigent defendant must apply to the court. There are no statutory time limits on when a motion seeking funds for a defense expert may be brought, and developing a threshold showing of need may take time and require discovery. However, a belated request could be viewed skeptically by the court. *See State v. Jones*, 342 N.C. 523 (1996) (motion for expert, filed one day before trial, was one factor court considered in finding no showing of need); *see also supra* § 5.5, Obtaining an Expert Ex Parte in Noncapital Cases. Also, if you intend to pursue an insanity or other type of mental health defense, you should consider seeking funds for a mental health expert and obtaining an evaluation as soon as practicable because these defenses depend on the defendant's mental state at the time of the offense.

C. Motions before Arraignment

Time restrictions. Under G.S. 15A-952(c), the timing of certain motions in superior court is keyed to arraignment. Such motions must be filed:

- by the time of arraignment if a written request for arraignment has been filed and arraignment is held before the session of court for which the trial is calendared, or
- if arraignment is to be held at the session of court scheduled for trial, then by 5:00 p.m. on the Wednesday before that session of court, or
- if a written request for arraignment has not been filed, then no later than 21 days from the return of the bill of indictment as a true bill.

Applicable motions. The above time restrictions apply to the following motions:

- motions to continue (*see infra* § 13.4A, Motion for Continuance),

- motions to join or sever offenses under G.S. 15A-926(c) or G.S. 15A-927 (*see supra* § 6.1, Joinder and Severance of Offenses; § 6.3, Procedures for Joinder or Severance),
- motions for change of venue under G.S. 15A-957 (*see supra* § 11.3, Change of Venue),
- motions for a special venire under G.S. 15A-958 or G.S. 9-12 (*see supra* § 11.4A, Special Venire),
- motions to dismiss for improper venue (*see supra* § 11.2, Challenging Improper Venue),
- motions challenging the composition of the grand jury under G.S. 15A-955 (*see supra* § 9.2, Challenges to Grand Jury Composition or Selection of Foreperson; § 9.4, Challenges to Grand Jury Procedures),
- motions for a bill of particulars under G.S. 15A-924(b) or 15A-925 (*see supra* § 8.4B, Types of Pleadings and Related Documents), and
- motions attacking non-jurisdictional defects in the pleadings or addressing certain other issues related to the pleadings under G.S. 15A-924 through 15A-927 (*see supra* § 8.6J, Timing of Motions to Challenge Indictment Defects).

See G.S. 15A-952(b).

Waiver. Failure to timely file any of the above motions constitutes a waiver of the right to file the motion. *See* G.S. 15A-952(e); *State v. Branch*, 306 N.C. 101 (1982) (failure to file continuance motion within time limits of G.S. 15A-952 constituted waiver, and trial court did not abuse discretion in failing to grant defendant relief); *State v. Perry*, 69 N.C. App. 477 (1984) (certain challenges to indictment are waived if not raised by arraignment). The trial court may excuse the waiver, except for failure to move to dismiss for improper venue. G.S. 15A-952(e). The circumstances in which continuance motions may be filed after arraignment are discussed further *infra* in § 13.4A, Motion for Continuance.

D. Motions before Trial

The following motions need not be filed before arraignment but should be filed before trial.

Suppression motions. Motions to suppress under G.S. 15A-974 ordinarily must be filed before trial. *See* G.S. 15A-975(a); *State v. Ford*, 194 N.C. App. 468 (2008) (trial court did not err in denying motion to suppress for defendant's failure to file it before trial); *see also State v. Reavis*, 207 N.C. App. 218 (2010) (upholding denial of suppression motion because defendant failed to make pretrial motion). There are two exceptions to this rule. The defendant may file a suppression motion during trial if: (i) the defendant did not have a "reasonable opportunity to make the motion before trial"; or (ii) the evidence consists of statements by the defendant, items obtained during a warrantless search, or items obtained during the execution of a search warrant when the defendant was not present *and* the State failed to notify the defendant at least 20 working days before trial of its intent to introduce such evidence. *See* G.S. 15A-975(a), (b); *State v. Fisher*, 321 N.C. 19 (1987) (defendant could raise suppression issue at trial when he was unaware that State

intended to introduce certain evidence against him); *State v. Gerald,* ___ N.C. App. ___, 742 S.E.2d 280 (2013) (counsel was ineffective by failing move to make a timely motion to suppress evidence obtained by a "patently unconstitutional seizure"), *temp. stay allowed*, ___ N.C. ___, 742 S.E.2d 194 (2013); *State v. Jones*, 157 N.C. App. 110 (2003) (defendant's statement that he thought State's evidence would be stronger did not excuse failure to make suppression motion before trial); *State v. Howie*, 153 N.C. App. 801 (2002) (motion to suppress was exclusive method of challenging evidence regarding contents of defendant's hotel room on ground that search was illegal, and defendant's general objections during trial did not suffice), *habeas corpus granted sub nom.*, *Howie v. Crow*, 2006 WL 3257047 (W.D.N.C. 2006) (finding that defense counsel was ineffective for failing to move to suppress before trial). Where the State notifies the defendant 20 or more working days before trial of its intent to introduce the types of evidence described in G.S. 15A-975(b), the defendant must make the motion within 10 business days of receiving the notice. G.S. 15A-976(b). For a further discussion of deadlines for making a motion to suppress, see *infra* § 14.6A, Timing of Motion.

Motions to recuse trial judge. Motions to recuse must be made at least five days before trial, absent a showing of good cause for delay. *See* G.S. 15A-1223(d); *State v. Pakulski*, 106 N.C. App. 444 (1992) (noting that defendant should file motion as early as possible and may not wait until after trial); *see also infra* § 13.4C, Motion to Recuse Trial Judge.

Notice of defenses, expert testimony, and witnesses. If the State has voluntarily provided or has been ordered to provide discovery in response to the defendant's discovery request, the defendant has a reciprocal obligation on request of the State to give notice of intent to rely on the defenses set out in G.S. 15A-905(c)—that is, alibi, duress, entrapment, insanity, mental infirmity, diminished capacity, self-defense, accident, automatism, involuntary intoxication, and voluntary intoxication. The defendant must give this notice within 20 working days after the case is set for trial or at a later time set by the court. G.S. 15A-905(c) (also requiring information as to the nature and extent of the defense for certain of the listed defenses); *State v. Pender*, ___ N.C. App. ___, 720 S.E.2d 836 (2012) (trial court did not err in denying defendant's request for a jury instruction on voluntary manslaughter based on imperfect self-defense where defendant failed, following request, to provide State with notice of intent to assert self-defense at trial; court also finds that evidence was insufficient to require the instruction). If the defendant intends to rely on the defense of insanity, the defendant must give notice of the defense as provided in G.S. 15A-905(c) or, if the case is not subject to that statute (for example, the defendant has not requested any discovery and has not triggered the State's reciprocal discovery rights), the defendant must give notice of the defense within a reasonable time before trial. G.S. 15A-959(a); *see also State v. Beach*, 333 N.C. 733 (1993) (noting requirement of filing pretrial notice of insanity defense).

If the defendant is obligated to provide discovery to the State, the defendant also must give the State notice of expert witnesses and related information within a reasonable time before trial and a list of other witnesses at the beginning of jury selection. G.S. 15A-905(c)(2), (c)(3). If the defendant intends to rely on the defense of alibi, the court may order the defendant to disclose the identity of any alibi witnesses no later than two weeks

before trial and may order the State to disclose any rebuttal witnesses no later than one week before trial. G.S. 15A-905(c)(1)a. (also allowing court to specify different time periods with parties' agreement). In cases in which the State is not entitled to discovery under the discovery statutes, the defendant still must give notice of intent to rely on expert testimony relating to a mental disease, defect, or other condition pertaining to the defendant's mental state within a reasonable time before trial. *See* G.S. 15A-959(b).

The discovery statutes do not set a specific deadline for the defendant to produce the other discovery identified in the statutes (namely, certain documents and tangible objects and reports of examinations and tests). *See* G.S. 15A-905(a), (b). Presumably, the defendant must provide the discovery within a reasonable time or at such time as ordered by the court.

For a further discussion of the defendant's obligation to provide discovery to the State, see *supra* § 4.8, Prosecution's Discovery Rights.

Notice of intent to rely on residual hearsay. The proponent of residual hearsay must give written notice of his or her intent to rely on such hearsay, including the name and address of the declarant. *See* N.C. R. EVID. 804(b)(5). The rule does not explicitly require that notice be given before trial; however, the notice must be sufficient to permit the opponent of the hearsay to prepare to meet the statement. *See State v. Ali*, 329 N.C. 394 (1991) (eleven days before trial sufficient notice under circumstances); *State v. Triplett*, 316 N.C. 1 (1986) (oral notice three weeks before trial followed by written notice on first day of trial deemed sufficient).

Notice of objection to admission of forensic lab reports and demand for testing analyst to appear and testify. The State is barred by the Confrontation Clause of the United States Constitution from introducing hearsay that is testimonial in nature except in certain circumstances. *See Crawford v. Washington*, 541 U.S. 36 (2004) (testimonial statements of a witness who is not subject to cross-examination at trial are barred unless the witness is unavailable and defendant had a prior opportunity to cross-examine the witness or an exception applies); *see also Davis v. Washington*, 547 U.S. 813 (2006) (statements made in response to police interrogation where primary purpose is to assist police in addressing an ongoing emergency are nontestimonial); *Michigan v. Bryant*, ___ U.S. ___, 131 S. Ct. 1143 (2011) (analyzing the "primary purpose of an interrogation" and existence of an "ongoing emergency" requirements of *Davis*).

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the U.S. Supreme Court held that forensic lab reports—such as those identifying a substance as a controlled substance—are testimonial under the *Crawford* Confrontation Clause rule. Thus, the prosecution may not introduce such a report to prove the truth of its contents and must prove the analysis through a live witness, unless the defendant has waived the right of confrontation.

The U.S. Supreme Court has held further that the defendant has a right to confront the analyst who performed the testing and certification; substitute analyst testimony—that is,

testimony by an analyst who did not personally perform or observe the testing—has been found to violate *Crawford. Bullcoming v. New Mexico*, ___ U.S. ___, 131 S. Ct. 2705 (2011); *see also State v. Locklear*, 363 N.C. 438 (2009) (trial court erred in admitting analyses performed by a forensic pathologist and forensic dentist, who did not testify at trial, through the testimony of a different forensic pathologist who had not performed the analyses). Some post-*Crawford* North Carolina cases have found that substitute analyst testimony did not violate the Confrontation Clause on the rationale that the reports were not admitted for their truth but were instead admitted as the basis of the testifying expert's opinion. *See State v. Mobley*, 200 N.C. App. 570 (2009) (no *Crawford* violation occurred when a substitute analyst testified to her own expert opinion, formed after reviewing data and reports prepared by nontestifying expert); *State v. Hough*, 202 N.C. App. 674 (2010) (no *Crawford* violation where reports by nontestifying analyst as to composition and weight of controlled substances were admitted as basis of testifying expert's opinion and testifying expert performed peer review of reports), *aff'd by an equally divided court*, ___ N.C. ___, 743 S.E.2d 174 (2013) (per curiam). These holdings have been called into doubt by *Williams v. Illinois*, ___ U.S. ___, 132 S. Ct. 2221 (2012), in which five United States Supreme Court justices rejected the "basis of opinion" rationale. *See* Jessica Smith, *Confrontation Clause Update: Williams v. Illinois and What It Means for Forensic Reports*, ADMINISTRATION OF JUSTICE BULLETIN No. 2012/03 (UNC School of Government, Sept. 2012), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1203.pdf.

Following *Williams*, the North Carolina Supreme Court held that substitute analyst testimony does not violate the Confrontation Clause where the testifying analyst provides an independent opinion based on otherwise inadmissible facts or data of a type reasonably relied on by experts in the field. *State v. Ortiz-Zape*, ___ N.C. ___, 743 S.E.2d 156 (2013) (reversing Court of Appeals and finding no Confrontation Clause violation where crime lab analyst testified to her opinion that substance at issue was cocaine based on tests done by another analyst in laboratory); *see also State v. Brewington*, ___ N.C. ___, 743 S.E.2d 626 (2013) (following *Ortiz-Zape* and finding no error where testifying expert gave independent opinion that substance was cocaine); *State v. Hurt*, ___ N.C. ___, 743 S.E.2d 173 (2013) (reversing Court of Appeals per curiam for reasons stated in *Ortiz-Zape* in case involving DNA analysis and finding no violation). *Cf. State v. Craven,* ___ N.C. ___, 744 S.E.2d 458 (2013) (distinguishing *Ortiz-Zape* and holding State's expert did not testify to an independent opinion but rather offered impermissible surrogate testimony repeating testimonial out-of-court statements of non-testifying analysts). The U.S. Supreme Court has not yet weighed in on these holdings.

Melendez-Diaz upheld the constitutionality of simple "notice and demand" statutes. Under these statutes, the State gives notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant has a certain amount of time to object in writing to the admission of the evidence without the testimony of the analyst. Following *Melendez-Diaz*, in 2009, the N.C. General Assembly amended several notice and demand statutes and created additional ones as a mechanism for the State to obtain a waiver of the defendant's right to confront the analyst for certain types of evidence, such as forensic lab reports and chemical analyses. If the defendant fails to file

a timely "objection and demand," the defendant waives the right to confront and the report may be admitted without the testimony of the analyst. *See State v. Jones*, ___ N.C. App. ___, 725 S.E.2d 910 (2012) (SBI report was properly admitted without analyst being present where State gave notice under G.S. 90-95(g) and defendant filed no objection); *State v. Steele*, 201 N.C. App. 689 (2010) (interpreting version of notice and demand provisions in G.S. 90-95(g) in effect before 2009 amendments and holding that defendant waived right to confront lab analyst where State gave timely notice of intent to introduce lab report identifying substance as cocaine and defendant failed to object). In *Steele*, the defendant argued that counsel was ineffective in failing to object to the admissibility of the lab report; however, the court found that the failure was not prejudicial in light of other evidence of the defendant's guilt, such as his own admission. On other facts, a failure to object and demand the analyst within the prescribed time frame could constitute ineffectiveness.

Legislative note: Effective for proceedings held on or after December 1, 2013, S.L. 2013-171 (S 630) amends various statutes allowing the admissibility of a laboratory report, affidavit, or statement to provide that they "shall" (prior law used "may") be admissible without the necessity of testimony if the defendant or attorney fails to file a written objection. These statutes are: G.S. 8-58.20(f) (forensic evidence); G.S. 8-58.20(g) (chain of custody); G.S. 20-139.1(c1) (chemical analysis of blood or urine); G.S. 20-139.1(c3) (chain of custody); G.S. 20-139.1(e1) (chemical analyst's affidavit in district court); G.S. 90-95(g) (chemical analysis for controlled substance); and G.S. 90-95(g1) (chain of custody).

Additionally, the 2013 Appropriations Act (S.L. 2013-360 (S 402)), as amended by S.L. 2013-363 (H 112), S.L. 2013-380 (H 936), and S.L. 2013-385 (S 182) imposes new court costs for expert witnesses providing testimony about chemical or forensic analyses at trial. Section 18B.19, effective for fees assessed or collected on or after August 1, 2013, adds new G.S. 7A-304(a)(11) (expert witness employed by State Crime Laboratory) and G.S. 7A-304(a)(12) (expert witness employed by crime laboratory operated by local government or governments) to require a district or superior court judge, on conviction, to require the defendant to pay $600 to be remitted to the Department of Justice or local government unit in a case in which the expert witness testified about a completed chemical analysis under G.S. 20-139.1 or a forensic analysis under G.S. 8-58.20. This fee is in addition to any costs assessed under G.S. 7A-304(a)(7) or (8). Defenders may want to challenge the fee on the ground that it chills the right to confront and may want to review any legislative history for this provision.

For a further discussion of these statutes and this developing area of law, see Jessica Smith, *Understanding the New Confrontation Clause Analysis: Crawford, Davis, and Melendez-Diaz*, ADMINISTRATION OF JUSTICE BULLETIN No. 2010/02 (UNC School of Government, Apr. 2010), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1002.pdf. Table 1 on page 23 of the bulletin sets out North Carolina's notice and demand statutes and the time requirements for the prosecution's notice and the defendant's objection/demand. For a discussion of the applicability of the Confrontation Clause to pretrial hearings, see *infra* § 13.2F, Conduct of Evidentiary Hearing.

Demand for speedy trial. Although a motion alleging that the defendant has been denied his or her constitutional right to a speedy trial may be made at any time, one of the factors the court will consider in assessing whether there has been a constitutional violation is whether the defendant has previously demanded a speedy trial. For further discussion, see *supra* § 7.3, Post-Accusation Delay.

Motion to sever co-defendant's trial. There is no statutory requirement that a motion to sever a co-defendant's trial be made before trial. However, a pretrial motion is much more likely to be granted since granting a motion to sever during trial creates a mistrial. *See* G.S. 15A-927(c); *see also supra* § 6.2 Joinder and Severance of Defendants, and § 6.3, Procedures for Joinder or Severance.

Other pretrial motions. As a practical matter, the following motions must be made and ruled on before trial, or they will be wholly or partially moot:

- motions for full recordation,
- motions to record the race of prospective jurors,
- motions for partial or full individual voir dire, and
- motions to sequester witnesses.

E. Motions not Subject to Time Limits

Certain Motions to Dismiss. Motions to dismiss the charges based on the grounds listed below may be made either before or during trial (*see* G.S. 15A-952(d); G.S. 15A-954):

- the statute alleged to have been violated is unconstitutional on its face or as applied to the defendant,
- the statute of limitations has run,
- the defendant has been denied the constitutional right to a speedy trial (*but cf.* "Demand for speedy trial" in subsection D., above),
- the defendant's constitutional rights have been flagrantly violated, resulting in irreparable prejudice that requires dismissal,
- there has been a violation of double jeopardy (*see infra* § 13.4B, Motion to Dismiss on Double Jeopardy Grounds),
- the defendant has been charged with the same offense in another North Carolina court that has jurisdiction and those charges are still pending and valid,
- an issue of law or fact essential to prosecution has been adjudicated in favor of the defendant in a prior action between the parties (res judicata),
- the court lacks jurisdiction over the charged offense,
- the defendant has been granted immunity from prosecution, and
- the pleadings fail to charge an offense as provided in G.S. 15A-924(e).

The advantage of waiting until the trial has begun to raise the above motions is that jeopardy will have attached and the State may not be able to retry the defendant. Note,

however, that with respect to most of the above grounds for dismissal, a pretrial ruling in the defendant's favor will require dismissal with prejudice so there may be no tactical reason to delay in filing the motion.

Motion questioning capacity to proceed. A motion questioning the defendant's capacity may be raised at any time, before or during trial, by the defense, court, or prosecutor. *See* G.S. 15A-1002(a). The issue of the defendant's capacity depends on the mental state of the defendant at the time of the proceedings. If you believe your client is incapable of standing trial, he or she should be evaluated close enough to the time of trial that the evaluation is considered relevant and reliable. *See State v. Silvers*, 323 N.C. 646 (1989); *see also supra* § 2.1D, Time of Determination. A court may be less receptive, however, if the request appears to be made at the last minute. *See State v. Washington*, 283 N.C. 175 (1973) (characterizing as "belated" a motion for initial examination two weeks before trial); *State v. Wolfe*, 157 N.C. App. 22 (2003) (no error in denying defendant's motion to continue to determine defendant's capacity to proceed where defense counsel raised the issue during jury selection and trial court had already ruled on the question of capacity following an evaluation).

Waiver. Some of the above motions may be made even after trial, such as motions alleging that the court lacks jurisdiction. *See State v. Wallace*, 351 N.C. 481, 503–04 (2000) (jurisdictional challenge to indictment may be raised at any time, including for first time on appeal). Most of the other motions must be made before or at trial, or they are waived. *See, e.g.*, *State v. Grooms*, 353 N.C. 50 (2000) (defendant waived appellate review of speedy trial claim where defense counsel never asserted right during or before trial); *State v. White*, 134 N.C. App. 338 (1999) (defendant's failure to raise double jeopardy claim at trial precluded relying on issue on appeal), *habeas corpus granted sub nom.*, *White v. Hall*, 2010 WL 2572654 (E.D.N.C. 2010).

F. Motions in Limine

A motion in limine is a written motion, usually made on the eve of a jury trial, requesting that "certain inadmissible evidence not be referred to or offered at trial." *See* BLACK'S LAW DICTIONARY 1109 (9th ed. 2009). The purpose of such motions is to prevent the jury from learning about potentially prejudicial evidence, obviating the need for a jury instruction to disregard improperly admitted evidence. *See State v. Fearing*, 315 N.C. 167 (1985) (noting that motions in limine typically are employed to prevent the admission at trial of evidence that is irrelevant, inadmissible, or prejudicial); *State v. Tate*, 300 N.C. 180 (1980) (explaining motions in limine). Examples might include motions:

- to exclude 404(b) or other bad character evidence;
- to exclude inflammatory photographs or exhibits;
- challenging the admissibility of hearsay under the N.C. Rules of Evidence and, where applicable, under the Confrontation Clause to the U.S. Constitution and *Crawford v. Washington*, 541 U.S. 36 (2004);
- challenging a witness's competence to testify;

- to prohibit reference to a defendant's silence;
- to exclude evidence not disclosed in accordance with discovery requirements (as provided by G.S. 15A-910(a)); and
- to exclude unreliable tests or demonstrations, or testimony pertaining to such tests or demonstrations.

While there is a tactical advantage in raising motions in limine before the trial begins to prevent the jury from learning of the existence of unfavorable evidence, if a motion is ruled on before jeopardy attaches, the State may be able to obtain alternative evidence before the trial gets underway and may have the right to appeal the adverse ruling. *See Tate*, 300 N.C. 180 (where defendant's pretrial motion to suppress results of scientific test was granted before trial, State had right to appeal).

A motion to suppress is a specific type of motion in limine. *Id.* at 182. As with other motions in limine, if a pretrial motion to suppress is denied, defense counsel must renew the objection to introduction of the evidence at trial; otherwise, the objection is waived. *See infra* § 13.2H, Renewing Pretrial Motions. Unlike other motions in limine, however, a motion to suppress ordinarily must be made before trial or it is waived. *See supra* § 13.1D, Motions before Trial.

G. Unavailability of Pretrial Motion to Dismiss for Insufficient Evidence

Under North Carolina law, motions to dismiss based on insufficient evidence cannot be made pretrial because only those defenses, objections, or requests that are capable of being determined without the trial of the general issue may be resolved by pretrial motion. *See State v. Fowler*, 197 N.C. App. 1, 28 (2009) ("court can *only* consider a motion to dismiss for insufficient evidence *after* the State has had an opportunity to present all of its evidence to the trier of fact *during* trial" (emphasis in original)); *see also State v. Seward*, 362 N.C. 210, 216 (2008) (once the grand jury has determined the sufficiency of evidence to support a charge, a trial judge "may not pass on the sufficiency of that evidence again until after the State has had an opportunity to present its case-in-chief"); *State v. Joe*, ___ N.C. App. ___, 711 S.E.2d 842 (2011) (trial court's consideration of defendant's pretrial motion to dismiss for insufficient evidence was invited error by State; State invited consideration and participated in the evidentiary hearing on the motion without any objection), *rev'd*, 365 N.C. 538 (2012) (trial court had no authority on own motion to dismiss charges); *see generally* 2 NORTH CAROLINA DEFENDER MANUAL Ch. 30 (Motions to Dismiss Based on Insufficient Evidence) (UNC School of Government, 2d ed. 2012).

Although the defendant cannot obtain a pretrial ruling on the sufficiency of the State's evidence, counsel may be able to frame a motion in terms of a ground on which the court could issue a dispositive pretrial ruling (for example, a motion to dismiss on constitutional or jurisdictional grounds). *See, e.g.*, *State v. Buddington*, 210 N.C. App. 252 (2011) (noting that defendant's pretrial motion to dismiss was based on constitutional grounds, not on a challenge to the sufficiency of the evidence). Other pretrial motions

may provide functionally equivalent relief—for example, a suppression motion that would exclude evidence essential to prosecution of the case.

13.2 Procedural Requirements in Superior Court

A. Writing Requirement

Generally, pretrial motions in superior court must be in writing. *See* G.S. 15A-951(a); *State v. Parrish*, 73 N.C. App. 662 (1985). Motions made during a hearing or trial need not be in writing. *See* G.S. 15A-951(a)(1); *State v. Marlow*, 310 N.C. 507 (1984) (joinder motion made at trial need not be in writing); *State v. Slade*, 291 N.C. 275 (1976) (joinder motion made at outset of trial may be made orally); *State v. Seay*, 59 N.C. App. 667 (1982) (permitting oral motion for modification of bond). The writing requirement applies to State's motions as well. However, if the State fails to comply with this requirement, counsel probably will have to show prejudice to obtain relief. *See State v. Fink*, 92 N.C. App. 523 (1989) (noting on facts that defendant had not shown prejudice from State's failure to file written joinder motion until after State had made motion orally at pretrial motions hearing); *see also In re R.D.L.*, 191 N.C. App. 526 (2008) (trial court did not err in allowing State's oral motion for joinder in juvenile delinquency case).

B. Filing and Service

Written pretrial motions ordinarily must be filed and served in accordance with G.S. 15A-951(b) and (c). If motions are not properly filed or served, the remedy is to file a motion to vacate any resulting order. *See State v. Sams*, 317 N.C. 230 (1986) (discussing statutory requirements and holding that an order issued without notice where actual notice is required is irregular and thus voidable; however, it is not automatically void and must be attacked by a motion to vacate); *State v. Melvin*, 99 N.C. App. 16 (1990) (where State did not serve motion to continue on attorney of record or effect proof of service, order granting continuance is voidable and may be attacked by motion to vacate).

C. Ex Parte Motions

In some instances it is appropriate and necessary to make an ex parte motion—that is, a motion without notice to the prosecution. The most common situation, approved by the North Carolina appellate courts, involves a motion for funds for an expert. The courts have allowed motions for experts to be made ex parte because, to show the basis for such a motion, counsel may have to reveal privileged attorney-client communications and trial strategy. *See supra* § 5.5A, Importance of Ex Parte Hearing. For similar reasons, some courts have allowed the defense to move ex parte for the production of records in the hands of third parties. *See supra* § 4.6A, Evidence in Possession of Third Parties. There may also be situations in which although you need to file and serve the motion on the prosecution, you should ask the court to hear the grounds for the motion in camera, without the prosecutor present—for example, if in justifying a motion for a continuance you would have to reveal confidential attorney-client communications.

D. Required Contents of Motions

Grounds for motion. G.S. 15A-951(a) requires that a motion must state the legal grounds for the motion. *See State v. Curmon*, 295 N.C. 453 (1978) (defense motion that alleged violation of unspecified "constitutional rights" did not sufficiently state grounds for motion); *State v. Van Cross*, 293 N.C. 296 (1977) (noting failure of motion for sequestration of witnesses to state grounds); *State v. VanDyke*, 28 N.C. App. 619 (1976) (denial of continuance motion upheld in part because defendant failed to state any legal grounds for motion). Legal grounds for a motion may include:

- case law,
- statutes,
- state constitutional provisions, and
- federal constitutional provisions.

Each ground should be clearly and separately stated. Though not required by statute, counsel may want to support a motion with a memorandum of legal authority.

Relief sought. A motion must also state the relief that is sought, such as a change of venue, suppression of evidence, etc. *See* G.S. 15A-951(a); *State v. Berry*, 51 N.C. App. 97 (1981) (noting requirement). The motion should state all potential relief being sought. *See generally State v. Fair*, 164 N.C. App. 770 (2004) (trial court did not err in denying defendant's oral request for discovery that was not included in written motion for discovery).

Affidavits. The following motions *must* be accompanied by an affidavit setting forth the factual basis for the motion:

- Suppression motions. *See infra* § 14.6C, Contents of Motion; *cf. State v. O'Connor*, ___ N.C. App. ___, 730 S.E.2d 248 (2012) (while trial court may summarily deny suppression motion for failure to attach an affidavit, it has the discretion to refrain from doing so).
- Motions to disqualify a judge. *See* G.S. 15A-1223(c); *State v. Pakulski*, 106 N.C. App. 444 (1992) (motion to recuse denied because, among other things, defendant failed to support motion with affidavit). For a further discussion, see *infra* § 13.4C, Motion to Recuse Trial Judge.

Any motion *may* be accompanied by a factual affidavit, and many motions *should* be accompanied by an affidavit to show the factual basis for the motion. *See State v. Buddington*, 210 N.C. App. 252 (2011) (reversing trial court's order granting motion to dismiss where defendant failed to file an affidavit or otherwise present evidence in support of motion). If you believe that an evidentiary hearing will be necessary or helpful to deciding a motion in your favor, you should attach affidavits that demonstrate any factual issues. *See generally State v. McHone*, 348 N.C. 254 (1998) (in determining whether to grant an evidentiary hearing on a motion for appropriate relief, court should consider not only the motion but also supporting or opposing information presented); *cf.*

State v. Salinas, 366 N.C. 119 (2012) (defendant's affidavit in support of motion to suppress has procedural rather than evidentiary function; affidavit assists trial court in determining whether allegations merit a full suppression hearing, but trial court may not rely on allegations in affidavit when making findings of fact).

Affidavits may and often should be attested to by counsel rather than by the defendant. *See State v. Chance*, 130 N.C. App. 107 (1998) (defendant's lawyer can attest to truthfulness of affidavit in support of suppression motion based on information and belief). Counsel should be careful not to concede contested facts in the affidavit. For example, counsel should note that "the officer claims or alleges in his report that defendant did or said [whatever is contested]," rather than positing it as fact.

E. Right to Evidentiary Hearing

Generally. The defendant has a right to an evidentiary hearing on a pretrial motion when there are disputed issues of material fact to be resolved. *See State v. McHone*, 348 N.C. 254 (1998); *State v. Dietz*, 289 N.C. 488 (1976) (no right to evidentiary hearing arises from "conjectural and conclusory" allegations in defendant's affidavit); *State v. Shropshire*, 210 N.C. App. 478 (2011) (no error to deny post-sentencing motion to withdraw plea without conducting an evidentiary hearing where defendant presented no disputed issue of fact); *State v. Hardison*, 126 N.C. App. 52 (1997) (where motion for appropriate relief raises questions of fact, court errs in dismissing motion without conducting evidentiary hearing); *State v. Chaplin*, 122 N.C. App. 659 (1996) (where motion to dismiss for lack of speedy trial raises factual dispute, trial court must hold evidentiary hearing); *State v. Roberts*, 18 N.C. App. 388 (1973) (where record shows substantial unexplained delay in bringing defendant to trial, court required to conduct evidentiary hearing on defendant's motion to dismiss for lack of speedy trial).

If you want an evidentiary hearing, make the request in the motion. In some districts, you may also need to file a separate request or motion for an evidentiary hearing.

Motions to suppress. The court must allow an evidentiary hearing on a motion to suppress if the motion:

- is timely filed,
- alleges a legal basis for the motion, and
- is accompanied by an affidavit setting out facts supporting the ground for suppression.

See G.S. 15A-977; *State v. Breeden*, 306 N.C. 533 (1982) (reversible error for trial court to summarily deny defense motion to suppress that complied with all statutory requirements; court required to conduct hearing and make findings of fact); *State v. Kirkland*, 119 N.C. App. 185 (1995) (error, harmless on these facts, for court to admit evidence without holding hearing on defendant's suppression motion), *aff'd per curiam*, 342 N.C. 891 (1996); *State v. Martin*, 38 N.C. App. 115 (1978) (reversible error to fail to hold hearing on suppression motion).

Pretrial hearing date. It is often desirable to seek a date in advance of trial for an evidentiary hearing on pretrial motions. There is no absolute right to a pretrial hearing, however. Under G.S. 15A-952(f), the court may hear a pretrial motion before or during trial. *See State v. Skeels*, 346 N.C. 147 (1997) (court did not abuse discretion by waiting until trial to rule on pretrial motion to dismiss one of charges against defendant); *State v. Artis*, 316 N.C. 507 (1986) (failure of trial court to set definite date for presentation of evidence not reversible error absent showing of prejudice); *State v. Setzer*, 42 N.C. App. 98 (1979) (court's ruling on pretrial defense motions on day before scheduled trial not reversible error where defendant failed to show prejudice).

As a practical matter, obtaining a date for a hearing on a pretrial motion may be facilitated by informing the prosecutor, trial court administrator, or judge at an administrative setting (under G.S. 7A-49.4(b)) that pretrial motions in a particular case will require an evidentiary hearing and articulating the reasons for seeking a definite date in advance.

F. Conduct of Evidentiary Hearing

Presentation of evidence. It is not always necessary to present live testimony to prevail on a motion. *See State v. Pippin*, 72 N.C. App. 387 (1985) (holding that the court may rule on pretrial motions based on affidavit or oral representations of counsel); Official Commentary to G.S. 15A-952 (noting that some pretrial motions "can be disposed of on affidavit or representations of counsel"). However, if you request a hearing based on disputed issues of material fact, the presentation of evidence will be required. *See State v. Buddington*, 210 N.C. App. 252 (2011) (reversing trial court's order granting motion to dismiss where defendant argued statute was unconstitutional as applied but failed to file an affidavit or otherwise support motion by presenting evidence or clear stipulations to necessary facts). Just as at trial, if a request to present evidence is denied, counsel should make an offer of proof.

For strategic reasons, counsel should be cautious about presenting the testimony of witnesses who also are likely to testify at trial—the State can use evidentiary hearings as a discovery device as well. The defendant's testimony at a suppression hearing, or at any hearing based on an alleged violation of the defendant's constitutional rights, may not be used against the defendant on the issue of guilt. *See Simmons v. United States*, 390 U.S. 377, 394 (1968). However, it may be used to impeach the defendant if he or she testifies at trial. *See State v. Bracey*, 303 N.C. 112 (1981) (although evidence obtained at a suppression hearing may not be used to establish the defendant's guilt, it may be used for impeachment on cross-examination).

The testimony of a State's witness at a suppression or other pretrial motion hearing could be admissible at trial as substantive evidence if the witness is unavailable to testify at trial. Although the witness's testimony would be considered testimonial under the Confrontation Clause, it could be admissible at trial if the court found that the defendant had an adequate opportunity to cross-examine the witness at the pretrial hearing. *See State v. Ross*, ___ N.C. App. ___, 720 S.E.2d 403 (2011) (holding that victim's testimony

at a probable cause hearing provided an adequate prior opportunity to cross-examine that satisfied *Crawford*). Because *Ross* involved a probable cause hearing, at which the defendant arguably had the same motive to cross-examine as at trial, it may have less application to pretrial hearings with a more limited purpose, such as a suppression hearing. *But cf. State v. Rollins*, ___ N.C. App. ___, 738 S.E.2d 440 (2013) (no violation of the defendant's confrontation rights occurred in murder case when the defendant had a chance at the defendant's plea hearing to cross-examine a State's witness who testified to the factual basis for the plea, the defendant successfully appealed the denial of his suppression motion following his guilty plea, the trial court found the witness was unavailable at trial when the witness claimed no recollection of any of the events or her prior testimony at the plea hearing, and the trial court admitted the witness's testimony from the plea hearing at trial; court rejected defendant's argument that he had no motive to cross-examine the witness at the plea hearing). If testimony at a pretrial hearing satisfies *Crawford*, it still would have to be offered for a relevant purpose at trial and would have to satisfy North Carolina's hearsay rules, such as the hearsay exception for former testimony under N.C. Rule of Evidence 804(b)(1). For a further discussion of the impact of *Ross* on the admissibility of testimony from a probable cause hearing, including possible distinctions, see *supra* "Prior opportunity for cross-examination" in § 3.4C, Impact of *Crawford*.

The Confrontation Clause also may not bar the State from introducing an unavailable witness's testimonial statements made before a pretrial hearing if the defendant had an adequate opportunity to cross-examine the witness about the statements at the pretrial hearing. If a witness's statements before a pretrial hearing do not relate to the subject matter of the hearing—for example, the witness's statements are about the alleged crime and not the investigatory actions that are the subject of a hearing on a suppression motion—the defendant likely would *not* be considered to have had an adequate opportunity for cross-examination at the pretrial hearing. Even if admissible under the Confrontation Clause, statements outside a pretrial hearing would also have to satisfy an applicable North Carolina hearsay exception.

Practice note: If the defense requires a law enforcement officer or another person who may serve as a State's witness at trial to be present at the evidentiary hearing, e.g., to explore whether a vehicle was stopped for unlawful reasons, defense counsel should subpoena the officer or witness to the hearing rather than assuming that the State will do so.

Burden of proof. On motions to suppress on constitutional grounds, the State ordinarily has the burden of proving by the preponderance of the evidence that the evidence it seeks to admit was legally obtained. *See, e.g.*, *State v. Williams*, ___ N.C. App. ___, 738 S.E.2d 211 (2013) (burden is initially on defendant to show motion to suppress is timely and in proper form; burden is then on State to demonstrate admissibility of challenged evidence); *State v. Tarlton*, 146 N.C. App. 417, 420 (2001); *State v. Nowell*, 144 N.C. App. 636 (2001) (State has burden to prove warrantless search constitutional once defendant moves to suppress), *aff'd per curiam*, 355 N.C. 273 (2002); *State v. Johnson*, 304 N.C. 680 (1982) (stating preponderance of the evidence standard); *State v. Breeden*,

306 N.C. 533 (1982) (same); *see also infra* § 14.6E, Conduct of Evidentiary Hearing (discussing State's burden of proof and exceptions in suppressions hearing).

On most other motions, the moving party has the burden of proof. *See, e.g., State v. Farmer*, 138 N.C. App. 127 (2000) (defendant has burden of proof on motion to change venue); *State v. Chaplin*, 122 N.C. App. 659 (1996) (defendant has burden of proof to show violation of speedy trial right, but where delay is exceptionally long burden shifts to the State to explain it); *State v. Johnson*, 317 N.C. 343 (1986) (burden of proof of showing illegality in grand jury selection procedure on defendant); *State v. Ray*, 274 N.C. 556 (1968) (defendant has burden of proving intentional discrimination in grand jury selection).

Rules of evidence. The North Carolina Rules of Evidence generally apply to "proceedings in the courts of this State," which would include hearings on pretrial motions. *See* N.C. R. EVID. 101, "Scope." However, there are some types of pretrial motion hearings at which formal rules of evidence do *not* apply, including hearings on the following matters:

- the competence or qualification of a person to be a witness,
- the existence of a privilege, and
- the admissibility of evidence.

See N.C. R. EVID. 104, "Preliminary Questions," and N.C. R. EVID. 1101, "Applicability of Rules."

The statutes and rules governing the specific type of hearing also may modify the rules of evidence. *See, e.g., supra* § 2.7D, Evidentiary Issues (discussing rules applicable to hearings on capacity to proceed); § 3.5B, Rules of Evidence (discussing rules applicable to probable cause hearings).

Presence of jury. Under N.C. Rule of Evidence 104(c), "Preliminary Questions," hearings on "preliminary matters" are to be conducted out of the presence of the jury if

- required in the interests of justice, or
- the defendant is a witness at the hearing and requests that the hearing be out of the jury's presence.

Ordinarily, you should ask that hearings on motions be conducted outside the presence of the jury because they involve arguments of counsel and potentially inadmissible evidence. Failure to make the request could effectively waive appellate review of the issue of the jury's presence. *See State v. Baker*, 320 N.C. 104 (1987) (upholding court's conducting voir dire on competency of victim/witness in the presence of the jury where defendant never requested that the hearing be held outside the jury's presence); *State v. Hensley*, 120 N.C. App. 313 (1995) (court declines to find plain error in judge's conducting voir dire of witness in presence of jury where defendant failed to object).

Presence of defendant. A defendant has a federal constitutional right, based primarily on the due process clause of the Fourteenth Amendment to the U.S. Constitution, to be present at any pretrial hearing that is substantially related to the fullness of his or her right to defend against the charge. *See United States v. Gagnon*, 470 U.S. 522 (1985) (per curiam). The federal constitutional right to presence is waivable. *Id.* (defendant waived right to be present at in-chambers conference where he knew it was taking place and did not invoke right). A defendant has no state constitutional right to presence until the trial commences. *See, e.g.*, *State v. Golphin*, 352 N.C. 364 (2000) (no state constitutional right to presence at pretrial hearing on change of venue). It is the better practice for the defendant to be present at all pretrial hearings because, among other things, information gained during such hearings may affect trial strategy. For a further discussion of the right to presence, including at pretrial hearings, see 2 NORTH CAROLINA DEFENDER MANUAL § 21.1 (Right to Be Present) (UNC School of Government, 2d ed. 2012).

Transcript. If the hearing on a pretrial motion is held in advance of trial, counsel should obtain the transcript of the hearing for use at trial. An indigent defendant is constitutionally entitled to a free transcript of any hearing necessary to the preparation of his or her defense. *See Britt v. North Carolina*, 404 U.S. 226 (1971); *cf. State v. Brooks*, 287 N.C. 392 (1975) (indigent defendant who appeals for trial de novo in superior court not entitled to transcript of district court proceedings). *See also supra* § 5.8B, Transcripts (discussing right of indigent defendant to assistance at state expense).

G. Disposition of Motions

Obtaining a ruling. It is the responsibility of counsel to obtain a ruling on each motion filed. The lack of a ruling may be regarded as a de facto denial of the motion or even a waiver of the issue. *See State v. Jones*, 295 N.C. 345 (1978) (defendant waived statutory right to discovery by not making any showing in support of motion, not objecting when court found motion abandoned, and not obtaining a ruling on motion); *State v. Freeman*, 280 N.C. 622 (1972) (defendant's motion for change of venue deemed denied when court proceeded to trial without ruling on motion); *State v. Partin*, 48 N.C. App. 274 (1980) (proceeding to trial without ruling on defense motion for change of venue amounted to denial of motion; court held that defendant was required to show prejudice to get relief based on court's failure to rule);.

Findings of fact. Findings of fact are specifically required in three situations:

- *Suppression motions*. *See* G.S. 15A-977(f) (so stating); *State v. Ladd*, 308 N.C. 272 (1983) (findings of fact advisable in all cases and required when there is a material conflict in the voir dire evidence); *State v. Chamberlain*, 307 N.C. 130 (1982) (duty of trial court to resolve factual conflicts by making findings of fact); *State v. Clark*, 301 N.C. 176 (1980) (after hearing evidence on admissibility of pretrial identification procedures, court must make findings of fact before allowing in-court identification of defendant); *State v. Neal*, 210 N.C. App. 645 (2011) (by orally denying motion, trial court failed to comply with the statute; remanded for findings of fact resolving material conflicts in the evidence); *State v. Baker*, 208 N.C. App. 376, 380 (2010)

(G.S. 15A-977(f) is mandatory "*unless* (1) the trial court provides its rationale from the bench, *and* (2) there are no material conflicts in the evidence at the suppression hearing" (emphasis in original) (citation omitted)); *State v. Rollins*, 200 N.C. App. 105 (2009) (court noted that even when there is no material conflict in the evidence, better practice is to make findings of fact); *State v. Toney*, 187 N.C. App. 465 (2007) (not reversible error where trial judge orally denied motion to suppress during trial and did not make findings of fact but there was no material conflict in evidence).

- *Admission of residual hearsay*. *See* N.C. R. EVID. 803(24), 804(b)(5); *State v. Smith*, 315 N.C. 76 (1985) (making of findings required before admission of statements under residual hearsay exception); *State v. Dammons*, 121 N.C. App. 61 (1995) (new trial required where court fails to make findings of fact before admission of hearsay statement under residual hearsay exception); *State v. Benfield*, 91 N.C. App. 228 (1988) (applying *Smith* and granting new trial for failure of trial court to make appropriate findings of fact).
- *Admissions of convictions more than ten years old*. *See* N.C. R. EVID. 609; *State v. Farris*, 93 N.C. App. 757 (1989) (new trial awarded where trial court permits impeachment by convictions over ten years old without making appropriate findings of fact that probative value outweighed prejudicial effect).

In addition to the above statutory requirements, findings of fact generally are required when a motion raises a factual dispute. *See State v. Porter*, 326 N.C. 489 (1990) (findings not required on *Batson* motion where evidence does not raise material question of fact).

For additional discussion on the types of cases in which a trial judge must make findings of fact and conclusions of law, see Albert Diaz, *Findings of Fact and Conclusions of Law* (Superior Ct. Judges' Benchbook, Jan. 2009), *available at* www.sog.unc.edu/node/2085.

Remedy for inadequate factual findings. If the trial court has not made findings of fact, or its findings of fact are inadequate, the reviewing court either may reverse the conviction or, more commonly, may remand for further findings of fact. *See State v. Peterson*, 344 N.C. 172 (1996) (remand for findings of fact on voluntariness of waiver of *Miranda* rights).

Legislative note: S.L. 2013-18 (S 45), effective for offenses committed on or after December 1, 2013, amends G.S. 15A-1002(b1) to require findings of fact in a court order on capacity to proceed and to provide that the State and the defendant may stipulate that the defendant is capable of proceeding but may not stipulate that the defendant lacks the capacity to proceed.

H. Renewing Pretrial Motions

Motions may be renewed if changed circumstances or new evidence justifies altering an earlier ruling. *See also infra* § 14.6B, Renewal of Motion (suppression motions).

A judge may always reconsider his or her own prior ruling. *See State v. Adcock*, 310 N.C. 1 (1984) (court permitted to reverse its earlier ruling on admissibility of evidence); *State*

v. McNeill, 170 N.C. App. 574 (2005) (trial court did not err by changing its ruling on motion to suppress, which is form of motion in limine).

Generally, a superior court judge may not modify or reverse the order of another superior court judge. The same principle applies to one district court judge modifying or reversing another district court judge's order. *See State v. Cummings*, 169 N.C. App. 249 (2005). A judge may modify or reverse the pretrial ruling of another judge, however, if a change of circumstances requires a modification or if the ruling pertains to the procedure and conduct of the trial, matters within the trial judge's purview. *See State v. Woolridge*, 357 N.C. 544 (2003) (first judge granted defendant's suppression motion and second judge reversed ruling by granting State's "motion to reexamine the evidence"; second judge should not have acted on motion, as it presented same question of law and there was no change in circumstances because the prosecution's evidence was essentially the same as at the first hearing); *State v. Stokes*, 308 N.C. 634 (1983) (preliminary ruling on defense motion for individual voir dire is interlocutory and may be reversed by judge who ultimately presides over case); *State v. Duvall*, 304 N.C. 557 (1981) (ruling on special venire is interlocutory order and may be modified by trial judge); *State v. Turner*, 34 N.C. App. 78 (1977) (trial court's order that defendant be tried at a particular session of court or else the charges would be dismissed was an interlocutory order that could be modified by another judge if circumstances changed); *see also generally* Michael Crowell, *One Trial Judge Overruling Another*, ADMINISTRATION OF JUSTICE BULLETIN No. 2011/01 (UNC School of Government, July 2011) (noting that limitations on a second judge's reconsideration of a decision of another judge do not apply when the second judge is being asked to decide a different legal issue), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1101.pdf.

If you present a motion to a second judge that a previous judge has ruled on, you should advise the second judge of the earlier motion and ruling and be prepared to present evidence of a change in circumstances or other basis that justifies reconsideration.

For a discussion of renewing motions following a mistrial, see 2 NORTH CAROLINA DEFENDER MANUAL § 31.10B (Rulings from Previous Trials) (UNC School of Government, 2d ed. 2012).

Practice note on preserving the record: If a defense motion is denied before trial, counsel should (i) renew the motion at trial; and (ii) object to the admission of any challenged evidence when it is presented at trial. Failure to object when challenged evidence is offered at trial may waive any right to appellate review. *See State v. Hill*, 347 N.C. 275 (1997) (defendant required to contemporaneously object to admission of evidence after motion in limine denied); *State v. Conaway*, 339 N.C. 487 (1995) (to same effect); *see also State v. Mitchell*, 342 N.C. 797 (1996) (right to severance lost where defendant fails to renew severance motion at close of all the evidence); G.S. 15A-927(a)(2) (motion to sever must be renewed at end of evidence).

In 2003, the North Carolina General Assembly amended North Carolina Evidence Rule 103(a) to state: "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer

of proof to preserve a claim of error for appeal." However, the North Carolina appellate courts declared the amendment unconstitutional on the ground that it conflicts with N.C. Rule of Appellate Procedure 10(b)(1) [now, 10(a)(1)] and contravenes the exclusive authority of the North Carolina Supreme Court to prescribe rules of procedure for the appellate division. *State v. Oglesby*, 361 N.C. 550 (2007). The law therefore remains that to preserve the matter for appeal, a defendant must object to the admission of evidence at trial despite a previous ruling denying a pretrial motion to suppress or exclude evidence. The State has argued in some cases that this objection requirement also applies when the court has denied a defense motion to exclude evidence based on a discovery violation. *See State v. Herrera*, 195 N.C. App. 181 (2009) (assuming, arguendo, that objection requirement applies but not ruling on argument), *abrogation on other grounds recognized by State v. Flaugher*, ___ N.C. App. ___, 713 S.E.2d 576 (2011). Accordingly, counsel should ***always*** object at trial when the State offers evidence that has been the subject of a pretrial motion to suppress or exclude, regardless of the specific grounds asserted in the motion.

An objection at a hearing outside the presence of the jury is not sufficient even when the hearing is held during trial; the objection must be made when the evidence is actually offered at trial. *See State v. Ray*, 364 N.C 272 (2010); *State v. Flaugher*, ___ N.C. App. ___, 713 S.E.2d 576 (2011).

13.3 Motions Practice in District Court

The preceding two sections have focused on the timing and procedural requirements for pretrial motions in superior court. While some of those requirements apply in district court, motions practice is not as formal.

A. Misdemeanors

Timing. Motions practice in misdemeanor cases is governed by G.S. 15A-953, "Motions practice in district court." The statute provides as follows:

- Motions in district court ordinarily should be made at arraignment (usually at the outset of trial) or during the course of trial, as appropriate. *But cf. infra* § 13.4C, Motion to Recuse Trial Judge (discussing possible time limits on motion to recuse trial judge).
- A written motion may be made before trial.
- With the consent of all parties and the court, a motion may be heard in district court before trial.

Implied-consent offenses, such as impaired driving, have different procedures and deadlines for motions. *See* "Implied-consent offenses," below, in this subsection A.

Procedure. If filed before trial, "[t]he in-writing, service, and filing requirements for motions not made in court apply to motions in the district court as well as in the superior

court." *See* Official Commentary to G.S. 15A-951. If made at trial, the motion need not be in writing. *See* G.S. 15A-951(a)(1) (motion made during hearing or trial need not be in writing). However, even when made at trial, your motion may be more persuasive if it is in writing.

Court's ruling on motion. The district court is not required to make findings of fact to support a ruling on a pretrial motion (except for certain motions in implied-consent offenses, discussed below, and in juvenile delinquency cases). *See State v. Ward*, 127 N.C. App. 115 (1997) (district court is not court of record; thus, State's failure to request findings of fact and conclusions of law does not preclude its appeal from district court dismissal of charges).

Legislative note: S.L. 2013-18 (S 45), effective for offenses committed on or after December 1, 2013, amends G.S. 15A-1002(b1) to require findings of fact in a court order on capacity to proceed. The statute appears to apply to district and superior court.

Trial de novo. G.S. 15A-953 states that, on appeal to superior court, motions are subject to G.S. 15A-952, which provides, among other things, that certain motions must be made by arraignment if you request arraignment within 21 days of indictment; and must be made within 21 days of indictment if arraignment is not requested. *See supra* § 13.1C, Motions before Arraignment. Because there is no indictment in misdemeanor appeals, it is not clear how or even whether these timing requirements apply to motions in such cases. *See State v. Vereen*, 177 N.C. App. 233 (2006) (defendant was entitled to arraignment on trial de novo in superior court and had right not to be tried in the same week as arraignment despite defendant's failure to request arraignment; 21-day time limit in which to file written request for arraignment did not apply because defendant had not been indicted). Your local criminal case docketing plan may determine the best way to proceed.

G.S. 15A-953 also provides that no motion in superior court is prejudiced by a ruling in district court or by the failure to raise an issue in district court (except as provided in G.S. 15A-135, which bars a motion to dismiss for improper venue in superior court if defense counsel stipulated to or expressly waived venue in district court). Thus, either side may ordinarily relitigate a motion if the case is appealed to superior court for a trial de novo.

Suppression motions. Motions to suppress made in district court, other than motions to suppress in implied-consent offenses (discussed below), are governed by G.S. 15A-973, "Motions to suppress evidence in district court." This statute provides that motions to suppress in misdemeanor cases generally should be made during trial. Counsel may want to reserve a district court motion to suppress in a misdemeanor case until after the first witness has been sworn and jeopardy has attached. However, with the consent of all parties and the court, a suppression motion may be heard before trial.

A defendant who wishes to have evidence suppressed on de novo appeal from a misdemeanor conviction must file a suppression motion before trial in superior court if, as in most cases, the defendant knows of the evidence based on the proceedings in district

court. *See State v. Simmons*, 59 N.C. App. 287 (1982). The exceptions set forth in G.S. 15A-975(b) do not apply to misdemeanor appeals—that is, the State is not required to give notice of its intent to introduce the evidence when a misdemeanor is appealed for trial de novo in superior court. *See* G.S. 15A-975(c); *State v. Golden*, 96 N.C. App. 249 (1989) (notice requirements do not apply to misdemeanor appeals). For a further discussion of timing and other requirements for suppression motions in superior court, *see infra* § 14.6A, Timing of Motion.

Implied-consent offenses. Offenses involving impaired driving and certain other alcohol-related offenses are considered implied-consent offenses. *See* G.S. 20-16.2(a1). The North Carolina General Assembly has enacted procedures for motions practice that are specific to implied-consent offenses committed on or after December 1, 2006.

Generally, in cases involving implied-consent offenses, the defendant must move to suppress or dismiss the charges before trial even where the matter is in district court. *See* G.S. 20-38.6(a). The court may summarily deny a motion to suppress made during trial where the defendant knows all facts material to the motion before trial and fails to make the motion before trial. *See* G.S. 20-38.6(d). However, where the defendant discovers facts during the course of the trial that were not known before trial, he or she may move to suppress or dismiss during the course of the trial. The State is barred from appealing when the district court judge grants a motion to suppress *during* trial, which may give the State a greater incentive to provide pretrial discovery, thereby triggering the requirement that the defendant file motions to suppress or dismiss pretrial. The defendant also may move to dismiss for insufficiency of the evidence at the close of the State's case and at the close of all the evidence. *See* G.S. 20-38.6(a).

While G.S. 20-38.6 does not specify that pretrial motions be in writing, the safer practice is to assume that the general requirements for pretrial motions in superior and district court apply. In other words, pretrial motions should be in writing, filed with the court, and served on the State; and suppression motions should be accompanied by a supporting affidavit. *See* "Procedure," above, in this subsection A., and *infra* § 14.6C, Contents of Motion (discussing suppression motions). In addition, making the motion in advance in writing will demonstrate to the court that the State was on notice of the motion and that the court should proceed with hearing it. Otherwise, the court may decide to continue the matter to allow the State "reasonable time to procure witnesses or evidence and to conduct research required to defend against the motion," as authorized by G.S. 20-38.6(b).

Following the hearing, the judge must make written findings of fact and conclusions of law and preliminarily indicate whether the motion should be granted or denied. *See* G.S. 20-38.6(f). Where the judge indicates that the motion should be granted, no final order may be entered until the State has either appealed to superior court or indicated that it does not intend to do so. *Id.* (The defendant may not appeal a district court's denial of a pretrial motion to suppress or dismiss; rather, following a conviction in district court, the defendant may appeal to superior court for a trial de novo. *See* G.S. 20-38.7(b).)

For further analysis of the statutory provisions governing motions to suppress and motions to dismiss in implied-consent cases, including appeals by the State following the preliminary granting of a suppression or dismissal motion in district court, see Shea Riggsbee Denning, *Motions Procedures in Implied Consent Cases after* State v. Fowler *and* State v. Palmer, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/06 (UNC School of Government, Dec. 2009), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0906.pdf; John K. Fanney, *Pretrial Motions and Hot Topics in DWI Cases* (North Carolina Public Defender Attorney and Investigator Conference, Spring 2008), *available at* www.ncids.org/Defender%20Training/2008%20Spring%20Conference/HotTopicsinDWIMS.pdf.

B. Motions in Felony Cases

The district court has jurisdiction over felony cases during the time between arrest and indictment. Certain motions, listed below, may be filed in district court during that time.

- Motion to dismiss on the ground that the pleadings fail to state a charge within the superior court's jurisdiction. *See* G.S. 15A-604; *see also State v. Cronauer*, 65 N.C. App. 449 (1983) (court notes district court's authority—and obligation—to dismiss warrant in felony extradition case on showing that it fails to sufficiently allege a crime; court relies on G.S. 15A-954(a)(10), which authorizes dismissal if pleading fails to charge offense).
- Motion to set conditions of pretrial release. *See* G.S. 15A-531 through G.S. 15A-543.
- Motion seeking an evaluation of the defendant's capacity to proceed. *See supra* § 2.5A, Moving for Examination.
- Motion seeking funds for experts. *See supra* § 5.5B, Who Hears the Motion.
- Motion seeking records in the possession of third parties. *See supra* § 4.6A, Evidence in Possession of Third Parties.
- Motion to preserve evidence. *See supra* § 4.2C, Preserving Evidence for Discovery.

Evidentiary motions for which recordation is desirable should be heard before a superior court judge. Some cases suggest that the superior court has jurisdiction to hear motions in felony cases even before indictment and transfer. *See State v. Jackson*, 77 N.C. App. 491 (1985) (relying on G.S. 7A-271).

13.4 Miscellaneous Motions

A. Motion for Continuance

Constitutional grounds. A defendant's right to a continuance is sometimes mandated by the right to effective assistance of counsel and the right to confront one's accusers under the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 19, 23, and 24 of the North Carolina Constitution. "'It is implicit in the constitutional guarantees of assistance of counsel and confrontation of one's accusers . . . that an accused and his counsel shall have a reasonable time to investigate, prepare and

present his defense.'" *State v. Rogers*, 352 N.C. 119, 124 (2000) (quoting *State v. McFadden*, 292 N.C. 609, 616 (1977)). Due process is an additional ground for seeking a continuance*. See McFadden*; *State v. Taylor*, 354 N.C. 28 (2001) (totality of circumstances considered when determining whether denial of motion to continue was violation of due process).

To show a constitutional violation, a defendant must show that he or she did not have adequate time to confer with counsel and to investigate, prepare, and present a defense. *See Rogers*, 352 N.C. at 125; *State v. Tunstall*, 334 N.C. 320 (1993).

Practice note: In any motion for a continuance, always include the claim that the continuance is constitutionally mandated. If a motion for a continuance is *not* constitutionally based, the motion is addressed to the sound discretion of the trial court. However, if a motion for a continuance raises a constitutional issue, the trial court's decision is fully reviewable on appeal. *See State v. Call*, 353 N.C. 400 (2001).

Statutory grounds. G.S. 15A-952(g) lists four factors trial judges in superior court and district court should consider in ruling on defense motions for a continuance. These factors are: (1) whether failure to grant a continuance would result in a miscarriage of justice; (2) the complexity of the case; (3) whether there is a child witness involved who would be negatively affected by delay; and (4) whether a party, witness, or lawyer has an obligation of service to the State of North Carolina. In drafting a motion for a continuance, consider the applicability of these four factors.

Other relevant factors. In ruling on motions to continue, courts also have considered: (i) the seriousness of the offense and possible punishment; (ii) the conduct of the State and the defendant (whether either party has engaged in culpable or negligent conduct); and (iii) the effect of a continuance on the availability of witnesses. *See State v. Roper*, 328 N.C. 337 (1991) (discussing relevant factors); *see also State v. Barlowe*, 157 N.C. App. 249, 254 (2003) (finding that trial court erred in denying defendant's motion for continuance to obtain blood spatter expert and stating that appellate courts should consider the following factors: "(1) the diligence of the defendant in preparing for trial and requesting the continuance, (2) the detail and effort with which the defendant communicates to the court the expected evidence or testimony, (3) the materiality of the expected evidence to the defendant's case, and (4) the gravity of the harm defendant might suffer as a result of a denial of the continuance").

Procedure. Pretrial motions for continuance must be in writing (*see* G.S. 15A-951(a)) and should be accompanied by an affidavit stating the factual basis for the motion. *See State v. White*, 129 N.C. App. 52 (1998) (motion to continue properly denied where defendant failed to make record that missing witnesses' testimony would have been helpful), *aff'd per curiam*, 350 N.C. 302 (1999). Motions to continue in superior court are subject to the time limits of G.S. 15A-952, which generally require that a continuance motion be made by arraignment. *See State v. Wright*, 210 N.C. App. 52 (2011) (defendant's failure to file motion to continue in accordance with G.S. 15A-952(c)

constituted waiver of the motion); *see also supra* § 13.1, Types and Timing of Pretrial Motions. However, G.S. 15A-952(e) permits the court to grant relief from waiver and hear post-arraignment motions. Further, as shown by the case summaries below, if events subsequent to arraignment provide grounds for a continuance, courts have granted (and may be constitutionally or statutorily required to grant) continuance motions.

Error to deny continuance. In the following cases, the appellate court held that the denial of the defendant's motion for a continuance was erroneous:

State v. Rogers, 352 N.C. 119 (2000) (new lawyers, who were inexperienced in death penalty litigation and who were appointed in capital case to replace retained attorney who had withdrawn about six weeks before trial, were not given adequate time to prepare for trial; failure to grant continuance was constitutional error)

State v. Maher, 305 N.C. 544 (1982) (new attorney, appointed to replace retained counsel who withdrew four days before trial, entitled to continuance)

State v. McFadden, 292 N.C. 609 (1977) (where associate moved to continue trial on trial date because lead counsel was involved in a trial in federal court, denial of motion to continue was error)

State v. Barlowe, 157 N.C. App. 249 (2003) (defendant entitled to continuance to obtain blood spatter expert to respond to State's evidence, which was critical because it was only physical evidence placing defendant at scene and contradicted defendant's testimony; defendant did not unreasonably delay in obtaining discovery and seeking assistance of expert)

Hodges v. Hodges, 156 N.C. App. 404 (2003) (defendant appealed for trial de novo following finding of criminal contempt in district court for violation of domestic violence protective order; denial of defendant's motion to continue trial in superior court was prejudicial error where defendant was incarcerated in another state and unable to appear)

Not error to deny continuance. In the following cases, the appellate courts found no error where trial courts denied defendants' motions for continuances.

State v. Taylor, 354 N.C. 28 (2001) (denial of motion to continue in capital case not erroneous where counsel appointed approximately 8 months before trial, had 6 months notice that trial would be capital, and had 28 days notice of trial date)

State v. Tunstall, 334 N.C. 320 (1993) (no error in denying defendant's motion for continuance, even though defendant had been incarcerated in safekeeping at Central Prison until day before trial; no record evidence that attorneys could not have consulted with defendant in 7 months between arrest and safekeeping order when defendant was in local county jail and on pretrial release)

State v. Roper, 328 N.C. 337 (1991) (no error in denying motion to continue where missing witness was not fault of State, and defendant did not show that witness could be found in reasonable time or that testimony would be significant)

State v. Branch, 306 N.C. 101 (1982) (no error in denying defendant's motion for continuance based on need to find witnesses, where defendant's motion did not name missing witnesses or demonstrate likelihood that witnesses could be found within reasonable time)

State v. Banks, 210 N.C. App. 30 (2011) (defendant failed to show requisite prejudice where he was unable to procure independent forensic examination of physical evidence that defendant did not realize, until eve of trial, to be bullet casings found in defendant's room)

State v. Ellis, 205 N.C. App. 650 (2010) (no abuse of discretion in denying defendant's motion to continue to seek expert witness on eyewitness identification where defendant failed to preserve constitutional issue and defendant was not prejudiced by denial of continuance)

State v. Flint, 199 N.C. App. 709 (2009) (no abuse of discretion in denying defendant's motion to continue where defendant never made a motion for discovery, there was no written discovery agreement between the parties, and record did not reflect that additional time was needed to prepare defense)

State v. Collins, 160 N.C. App. 310 (2003), *aff'd per curiam*, 358 N.C. 135 (2004) (no error in denying defendant's motion to continue to locate and subpoena informant where defendant did not show effort to do so during 9 months between arrest and trial)

B. Motion to Dismiss on Double Jeopardy Grounds

The meaning and scope of the prohibition against double jeopardy is the subject of much litigation. Below is a brief discussion of the fundamental principles governing the doctrine. For a further discussion and case summaries, see Robert L. Farb, *Double Jeopardy, Ex Post Facto, and Related Issues* (UNC School of Government, Jan. 2007), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/djoverview.pdf.

Constitutional basis. The Double Jeopardy Clause of the Fifth Amendment, applied to the states through the Fourteenth Amendment, prohibits three things: (i) successive prosecution for the same offense after acquittal; (ii) successive prosecution for the same offense after conviction; and (iii) multiple punishment for the same offense. *See North Carolina v. Pearce*, 395 U.S. 711 (1969); *Smith v. Massachusetts*, 543 U.S. 462 (2005) (trial court barred by double jeopardy from reconsidering its ruling, made at close of State's evidence, finding that defendant was not guilty of charge, which is equivalent of judge's granting of motion to dismiss for insufficient evidence in North Carolina); *see also Bullington v. Missouri*, 451 U.S. 430 (1981) (imposition of life sentence at capital sentencing hearing acts as "acquittal" on question of death sentence). The Law of the

Land clause in article I, section 19 of the North Carolina Constitution provides the same protections as the Fifth Amendment. *See State v. Oliver*, 343 N.C. 202 (1996).

Multiple punishments in single prosecution. Pretrial motions to dismiss on double jeopardy grounds typically address situations involving successive prosecutions. The possibility of multiple punishments arising out of a single trial of identical or overlapping offenses is not a ground for pretrial dismissal and instead should be addressed through a post-verdict motion to arrest judgment on one of the identical or overlapping offenses. In other words, the State is permitted to try a defendant simultaneously for identical or overlapping offenses (e.g., larceny and robbery of the same property) and to obtain jury verdicts, but is not permitted to impose separate punishments for two identical or overlapping offenses unless the legislature clearly intended to permit multiple convictions and punishments. *See Missouri v. Hunter*, 459 U.S. 359 (1983) (stating general principle); *State v. Jaynes*, 342 N.C. 249 (1995) (arresting judgment on larceny conviction where conviction merged with robbery conviction obtained in same trial).

Even if offenses are not considered to be identical or overlapping under double jeopardy analysis, multiple punishments may still be barred in light of legislative intent. *See State v. Ezell*, 159 N.C. App. 103 (2003) (the statutory language "[u]nless the conduct is covered under some other provision of law providing greater punishment" indicates legislative intent not to allow multiple punishments for assault inflicting serious bodily injury, the offense covered by the statutory language, and assault with deadly weapon with intent to kill inflicting serious injury, the offense with the greater punishment, in connection with same conduct); *see also State v. Davis*, 364 N.C. 297 (2010) (applying *Ezell*'s analysis to hold that defendant could not be sentenced for both second-degree murder and felony death by vehicle based on same conduct; similarly, defendant could not be sentenced for both assault with deadly weapon inflicting serious injury and felony serious injury by vehicle); *State v. Williams*, 201 N.C. App. 161 (2009) (defendant could not be sentenced for both assault inflicting serious bodily injury and assault by strangulation under G.S. 14-32.4 because the statutory language shows legislative intent only to punish offense carrying the higher penalty); *cf. State v. Hines*, 166 N.C. App. 202 (2004) (notwithstanding statutory language prohibiting punishment for offense if conduct was subject to greater punishment under another provision of law, separate sentences for aggravated assault on handicapped person and more serious felony of robbery with dangerous weapon were permissible because one offense involved assault and the other a robbery).

Multiple punishments are also effectively barred if the jury returns mutually inconsistent verdicts. *See* 2 NORTH CAROLINA DEFENDER MANUAL § 34.7E (Inconsistent Verdicts) (UNC School of Government, 2d ed. 2012).

Waiver. In cases involving successive prosecutions in superior court, the North Carolina appellate courts have held that a defendant must assert a double jeopardy objection at the time of the second trial or the issue will be waived. *See State v. McKenzie*, 292 N.C 170 (1977). Our courts have also held that a plea of guilty acts as a waiver of double jeopardy objections. *See State v. Hopkins*, 279 N.C. 473 (1971).

The U.S. Supreme Court has held, however, that if the record before the trial judge at the time of the guilty plea shows that the second prosecution is barred by double jeopardy, a plea of guilty does not waive double jeopardy protections. *See Menna v. New York*, 423 U.S. 61, 62–63 & n.2 (1975) (per curiam) ("Where the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty."); *United States v. Broce*, 488 U.S. 563 (1989) (interpreting *Menna*, court holds that a defendant does not relinquish a double jeopardy claim by pleading guilty if the presiding judge could have determined on the basis of the pleadings and record at the time of the plea that the second prosecution could not go forward); *United States v. Brown*, 155 F.3d 431 (4th Cir. 1998) (guilty plea does not waive double jeopardy claim if on face of record before trial judge, charge was one that State did not have power to bring); *see also* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 21.6(a), at 905–21 (3d ed. 2007) (discussing circumstances in which guilty plea does not waive right to review).

In *State v. Corbett*, 191 N.C. App. 1 (2008), *aff'd per curiam*, 362 N.C. 672 (2008), the Court of Appeals noted the right to review recognized by the U.S. Supreme Court in *Menna* but stated that it was bound by the North Carolina Supreme Court's earlier decision in *Hopkins*. The Court of Appeals concluded that the defendant's guilty plea waived his right to review on direct appeal of the trial court's denial of his double jeopardy motion; however, the defendant could file a motion for appropriate relief in superior court pursuant to G.S. 15A-1413. The North Carolina Supreme Court affirmed per curiam without specifically addressing the impact of *Menna*. *See also State v. Rinehart*, 195 N.C. App. 774 (2009) (court holds that defendant who pled guilty had no right to direct appeal of denial of double jeopardy motion notwithstanding reservation of right to appeal; court also distinguishes previous decisions in which it had vacated guilty plea where plea agreement included reservation of right to appeal that was ineffective, holding that defendant's recourse was to file motion for appropriate relief).

Practice note: *Corbett* makes obtaining review of a trial court's denial of a double jeopardy claim considerably more complicated. To put the defendant in the best position to obtain review, counsel should make a double jeopardy motion before entering a guilty plea and, if necessary to support the claim, put any supporting evidence on the record. Even if counsel makes such a motion, a defendant is assured of obtaining direct review of a ruling denying the motion *only* by proceeding to trial and, if found guilty, appealing. In advising the defendant about whether to go to trial, counsel should consider the strength of the State's case, the potential sentence exposure compared to a plea offer by the State, and the strength of the defendant's double jeopardy claim. For a further discussion of the limited right to appeal following a guilty plea, see 2 NORTH CAROLINA DEFENDER MANUAL § 35.1D (Defendant's Right to Appeal from Guilty Plea in Superior Court) (UNC School of Government, 2d ed. 2012).

If the defendant is interested in accepting the State's plea offer, *Corbett* suggests two possibilities. If the trial court denies the double jeopardy motion and the defendant pleads guilty, the best course may be for the defendant to file a motion for appropriate relief

(MAR) in the trial court within 10 days of judgment. *See Corbett* (defendant may file a MAR under G.S. 15A-1413, which refers both to MARs within 10 days of judgment and MARs after 10 days). If that MAR is denied, the defendant then may have the right to appeal both the judgment on the guilty plea and the denial of the MAR. Both should be referenced in the notice of appeal. A defendant also could file a MAR after 10 days. If the MAR is before a different judge, he or she should not be bound by the trial judge's earlier ruling, as *Corbett* routes defendants seeking review through MAR proceedings; still, one superior court judge may be reluctant to overrule another. If the post-10-day MAR is denied, the defendant would have to file a petition for certiorari to obtain review. If the state appellate courts do not grant relief, counsel may still seek federal habeas corpus relief, but counsel should pay close attention to the deadlines for habeas corpus applications—generally, one year after the date on which the judgment became final by the conclusion of direct review or the expiration of the time to seek direct review, subject to tolling while state postconviction proceedings are pending. *See* 28 U.S.C. 2244(d).

Waiver in misdemeanor cases. In misdemeanor cases in district court, neither the failure to raise a double jeopardy objection nor a plea of guilty should operate as a waiver on appeal to superior court for a trial de novo. *See supra* § 13.3A, Misdemeanors; *see generally State v. Sparrow*, 276 N.C. 499 (1970) (defendant convicted in district court is entitled to appeal to superior court for trial de novo as matter of right, even if defendant entered guilty plea in district court).

When jeopardy attaches. In superior court, jeopardy attaches when the jury is empanelled or the court accepts a guilty plea. In district court, jeopardy attaches when the court begins to hear evidence or accepts a guilty plea. *See State v. Brunson*, 327 N.C. 244 (1990); *State v. Wallace*, 345 N.C. 462 (1997) (tender of plea does not implicate double jeopardy; where defendant tendered plea to second-degree murder and court rejected it, defendant could be tried for first-degree murder); *State v. Ross*, 173 N.C. App. 569 (2005) (double jeopardy did not attach to defendant's acknowledgement of guilt in a deferred prosecution agreement), *aff'd per curiam*, 360 N.C. 355 (2006). Thus, if an indictment or other pleading is dismissed before the attachment of jeopardy, there is no double jeopardy bar to reinstating the charges. *See Serfass v. United States*, 420 U.S. 377 (1975); *Crist v. Bretz*, 437 U.S. 28 (1978). If a charge is dismissed after jeopardy attaches, double jeopardy principles typically prohibit retrying the defendant. *Compare United States v. Martin Linen Supply Co*., 430 U.S. 564 (1977) (retrial precluded by double jeopardy principles where defendant is acquitted, charge is dismissed on grounds related to guilt or innocence, or dismissal not requested by defendant) *with United States v. Scott*, 437 U.S. 82 (1978) (retrial permitted where dismissal unrelated to guilt or innocence and government is successful on appeal).

Definition of "same offense." Both for purposes of multiple punishment and successive prosecution, the constitutional test for the "same offense" is the *Blockburger* element-by-element test. If both offenses contain an element that the other offense does not, then the offenses are distinct. However, if all of the elements of one offense are subsumed within the other (one is a lesser-included offense of the other), or if the two offenses have identical elements, then the offenses are the "same" for double jeopardy purposes. *See*

Blockburger v. United States, 284 U.S. 299 (1932); *State v Gardner*, 315 N.C. 444 (1986); *see also United States v. Dixon*, 509 U.S. 688 (1993) (reaffirming *Blockburger*).

The *Blockburger* tests focuses on the elements of the offenses at issue. North Carolina has also employed a "same-evidence" test, which is not a component of the U.S. Supreme Court's double jeopardy analysis. Thus, the facts in a given case may constitute a double jeopardy violation if the offenses at issue are based on the same evidence. *See State v. Summrell*, 282 N.C. 157 (1972); *State v. Newman*, 186 N.C. App. 382 (2007) (court found no double jeopardy violation under same-evidence test because offenses at issue—assault on a government officer and resisting, delaying, and obstructing an officer—were based on different conduct of the defendant).

Effect of prior conviction and exceptions. Generally, a conviction for a lesser-included offense bars a later trial for a greater offense. *See Brown v. Ohio*, 432 U.S. 161 (1977); *see also Payne v. Virginia*, 468 U.S. 1062 (1984) (per curiam) (conviction of greater offense bars later prosecution of lesser offense).

This bar applies except in limited circumstances, such as an intervening change in the underlying facts (for example, a person seriously injured in an assault dies). *See State v. Meadows*, 272 N.C. 327 (1968) (conviction of felony assault based on shooting of victim did not bar subsequent conviction of manslaughter following victim's death). *But see State v. Griffin*, 51 N.C. App. 564 (1981) (where defendant pled guilty to failing to yield right-of-way and State subsequently charged defendant with death by vehicle based on the same act, prosecution for death by vehicle barred by double jeopardy even though victim died after plea; court distinguishes *Meadows* because in that case elements of first conviction for felony assault were not elements of second conviction for homicide).

Double jeopardy also does not apply if the defendant acts to sever the charges and then pleads guilty to or proceeds to trial on some of the charges. Thus, in *Ohio v. Johnson*, 467 U.S. 493 (1984), the court held that the defendant's guilty plea, over the prosecutor's objection, to two lesser counts of a multi-count indictment did not bar continued prosecution of the greater counts. *See also Jeffers v. United States*, 432 U.S. 137 (1977) (defendant was responsible for successive prosecutions by opposing State's motion to join offenses for trial; therefore, defendant's action deprived him of any right under Double Jeopardy Clause against consecutive trials); *State v. Hamrick*, 110 N.C. App. 60 (1993) (State simultaneously filed charges for misdemeanor death by vehicle and infraction of driving left of center, and defendant voluntarily appeared before magistrate and pled responsible to infraction; relying on *Ohio v. Johnson*, court holds that double jeopardy was not bar to prosecution of death by vehicle charge).

If, however, the State is responsible for bringing separate proceedings, the defendant's guilty plea to one offense should bar prosecution of the other offenses. Thus, if the State files a misdemeanor impaired driving charge and the defendant pleads guilty, and the State subsequently files a habitual impaired driving charge based on the same driving, double jeopardy would bar the subsequent habitual impaired driving charge. Likewise, if the State has brought charges in district and superior court—for example, misdemeanor

impaired driving in district court and habitual impaired driving in superior court based on the same driving—and the defendant pleads guilty to the misdemeanor charge pending in district court, double jeopardy should bar continued prosecution of the habitual impaired driving charge. In that instance, the State, not the defendant, would be responsible for separating the proceedings against the defendant. *See generally* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 17.4(b), at 91–92 (3d ed. 2007). *But cf. State v. Corbett*, 191 N.C. App. 1 (2008) (defendant was initially charged in citation with misdemeanor impaired driving and was subsequently indicted for misdemeanor and habitual impaired driving based on same incident, but district court case was not dismissed and defendant pled guilty to misdemeanor impaired driving in district court; district court thereafter vacated guilty plea, superior court denied defendant's double jeopardy motion, and defendant pled guilty to habitual impaired driving charge in superior court; without reaching merits, Court of Appeals holds that defendant waived double jeopardy claim on direct appeal, discussed above under "Waiver" in this subsection B., by pleading guilty to habitual impaired driving charge; dissent analyzes why double jeopardy motion should have been granted), *aff'd per curiam*, 362 N.C. 672 (2008).

Covered proceedings. Double jeopardy protections apply to all proceedings of a criminal nature. *See State v. Hamrick*, 110 N.C. App. 60 (1993) (finding of responsibility or nonresponsibility for infraction, although considered a noncriminal matter, could bar later criminal prosecution for "same" offense); *Breed v. Jones*, 421 U.S. 519 (1975) (juvenile adjudication bars successive trial on same offense in adult criminal court); *United States v. Dixon*, 509 U.S. 688 (1993) (criminal contempt was conviction and punishment for double jeopardy purposes and barred later criminal trial for same conduct); *State v. Dye*, 139 N.C. App. 148 (2000) (double jeopardy barred later prosecution for domestic criminal trespass after defendant had been adjudicated to be in criminal contempt for violating domestic violence protective order forbidding similar conduct); *State v. Gilley*, 135 N.C. App. 519 (1999) (criminal contempt proceeding for violation of domestic violence protective order for certain conduct barred later prosecution for assault on female but not for domestic criminal trespass, misdemeanor breaking and entering, and kidnapping).

In some circumstances, a prior conviction also may include a proceeding that resulted in the imposition of a civil or administrative sanction. For a discussion of when a civil sanction is sufficiently "punitive" to preclude further punishment, see *Hudson v. United States*, 522 U.S. 93 (1997) (test focuses on purpose of civil sanction—that is, does it promote traditional aims of punishment, deterrence, and retribution, or are there other purposes rationally assignable to it); *State v. Thompson*, 349 N.C. 483 (1998) (48-hour detention for domestic violence offense was "regulatory" in purpose and did not bar later prosecution on double jeopardy grounds, although detention in this case violated due process and barred further prosecution); *State v. Oliver*, 343 N.C. 202 (1996) (ten-day revocation of drivers license did not preclude later prosecution for drunk driving); *State v. Hinchman*, 192 N.C. App. 657 (2008) (30-day license revocation for driving while impaired not criminal punishment under double jeopardy clause); *State v. Reid*, 148 N.C. App. 548 (2002) (30-day revocation of commercial driver's license not criminal punishment and did not preclude prosecution for impaired driving). *But see State v.*

McKenzie, ___ N.C. App. ___, 736 S.E.2d 591 (2013) (one-year disqualification of commercial driver's license constituted punishment), *writ allowed*, ___ N.C. ___, 736 S.E.2d 184 (2013).

Collateral estoppel. A defendant who is *acquitted* at a first trial may be able to rely on the doctrine of collateral estoppel, embodied in the Fifth Amendment bar against double jeopardy, to preclude a second trial on a factually related crime. Collateral estoppel bars the State from relitigating an issue of fact that has been determined against it. For a further discussion of collateral estoppel, see *supra* § 8.6B, Collateral Estoppel.

Effect of mistrial. Double jeopardy precludes the retrial of a defendant following a mistrial unless the trial court makes specific findings that the mistrial was a "manifest necessity." *See State v. Lachat*, 317 N.C. 73 (1986) (second trial violated double jeopardy where trial court made no findings explaining prior mistrial). In a noncapital case, a defendant ordinarily must object to mistrial or the jeopardy argument is waived. *See State v. Odom*, 316 N.C. 306 (1986); *State v. Hargrove*, 206 N.C. App. 591 (2010). *Cf. Lachat*, 317 N.C. at 85–86 (objection not required in capital case to preserve double jeopardy argument). In a noncapital case, a hung jury creates a manifest necessity for a mistrial, and retrial is permitted. *See State v. Booker*, 306 N.C. 302 (1982). *Cf.* G.S. 15A-2000(b) (if jury deadlocks during deliberations in a capital sentencing hearing, judge must impose life sentence). Other reasons also may justify a mistrial. *See, e.g., State v. Cummings*, 169 N.C. App. 249 (2005) (second trial did not violate double jeopardy where initial judge declared mistrial based on his familiarity with the case and defendant made no objection). Where prosecutorial misconduct forces a mistrial, a second trial may be barred even when the defendant moves for or consents to the mistrial. *See Oregon v. Kennedy*, 456 U.S. 667 (1982); *State v. White*, 322 N.C. 506 (1988) (double jeopardy bars retrial where prosecutor intentionally provokes mistrial).

For a further discussion of the effect of a mistrial, see 2 NORTH CAROLINA DEFENDER MANUAL § 31.9 (Double Jeopardy and Mistrials) (UNC School of Government, 2d ed. 2012).

Effect of successful appeal. Double jeopardy does not preclude retrying a defendant who wins on appeal unless the reviewing court found the evidence legally insufficient to support the conviction. A finding of legal insufficiency by the appellate court is equivalent to an acquittal and will bar retrial. *See North Carolina v. Pearce*, 395 U.S. 711 (1969); *Tibbs v. Florida*, 457 U.S. 31 (1982).

If a retrial or resentencing is permissible, principles of due process generally preclude the State from imposing a more severe punishment on the defendant following remand (effectively penalizing the defendant for exercising his or her right to appeal), unless events that occur between the first and second trial justify a greater sentence. *See North Carolina v. Pearce*, 395 U.S. 711 (1969); *see also Alabama v. Smith*, 490 U.S. 794 (1989) (reaffirming *Pearce* rule, but holding that presumption of vindictiveness does not arise where a sentence imposed after remand and a trial was more severe than the initial sentence imposed after a guilty plea). North Carolina's statute is stricter on this issue,

prohibiting greater punishment following remand regardless of any intervening factors and regardless of whether the defendant pled guilty or went to trial initially. *See* G.S. 15A-1335 & Official Commentary ("When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, [that] is more severe than the prior sentence . . . ."). Exceptions to this statutory restriction exist, however, which counsel should carefully consider in advising a client whether to appeal. *See* 2 NORTH CAROLINA DEFENDER MANUAL § 35.5 (Resentencing after Successful Appellate or Post-Conviction Review) (UNC School of Government, 2d ed. 2012).

State's right to appeal. The Double Jeopardy Clause limits the State's right to appeal from adverse rulings in criminal cases. If retrial would violate the Double Jeopardy Clause, the State cannot appeal a dismissal. *See* G.S. 15A-1445(a) (limiting right to appeal from superior court); *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977); *State v. Morgan*, 189 N.C. App. 716 (2008) (State had no right to appeal to superior court where district court judge dismissed driving while impaired charge based on insufficiency of the evidence, although district court judge's dismissal hinged on an erroneous finding that affidavits offered by the State were inadmissible); *State v. Scott*, 146 N.C. App. 283 (2001) (State had right to appeal where trial court dismissed driving while impaired charge for insufficient evidence *after* jury finding of guilt, as reversal would simply reinstate jury's verdict), *rev'd on other grounds*, 356 N.C. 591 (2002); *see also State v. Starkey*, 177 N.C. App. 264 (2006) (construing statutory provisions authorizing appeals, court finds that State had no right to appeal from trial court's grant of appropriate relief dismissing habitual felon charge); *State v. Vestal*, 131 N.C. App. 756, 757 n.1 (1998) (defendant's failure to raise double jeopardy issue on appeal did not relieve appellate court of duty to determine whether a jurisdictional basis exists for State's appeal).

There are two situations in which the State may appeal a dismissal in superior court: (i) where the charge is dismissed before jeopardy attaches (*see State v. Brunson*, 327 N.C. 244 (1990)); and (ii) where a midtrial dismissal is both sought by the defendant and unrelated to the guilt or innocence of the defendant (*see United States v. Scott*, 437 U.S. 82 (1978); *Vestal*, 131 N.C. App. at 760; *State v. Priddy*, 115 N.C. App. 547 (1994)). *See also* G.S. 15A-1432 (limiting circumstances in which State may appeal from district court).

For further discussion of the limitations on the State's right to appeal, see 2 NORTH CAROLINA DEFENDER MANUAL § 35.2A (State's Right to Appeal from District Court Judgment), § 35.2C (State's Right to Appeal from Superior Court Judgment) (UNC School of Government, 2d ed. 2012).

Criminal pleadings. For a discussion of the interrelationship between criminal pleadings and double jeopardy issues, see *supra* § 8.6, Limits on Successive Prosecution. Also consult the following:

- Robert L. Farb, *Criminal Pleadings, State's Appeal from District Court, and Double Jeopardy Issues* (UNC School of Government, Feb. 2010), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/pleadjep.pdf;
- Jessica Smith, *The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/03 (UNC School of Government, July 2008), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/aojb0803_000.pdf.

C. Motion to Recuse Trial Judge

Constitutional basis. Due process requires the trial judge to be absolutely impartial. *See Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) ("It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'"(citation omitted)); *Hope v. Charlotte-Mecklenburg Bd. of Educ.*, 110 N.C. App. 599, 602 (1993) ("One of the essential elements of due process is a fair hearing by a fair tribunal. In order to provide a fair hearing, due process demands an impartial decision maker.").

North Carolina provisions. G.S. 15A-1223 and Canon 3 of the N.C. Code of Judicial Conduct both address the disqualification of a judge presiding over a criminal trial when a claim of partiality is raised.

A defendant may move that the trial judge disqualify himself or herself from a hearing or trial if the judge is: (i) prejudiced against either party; (ii) closely related by blood or marriage to the defendant; (iii) for any other reason unable to perform the duties required of him or her; or (iv) a witness for or against one of the parties in the case. *See* G.S. 15A-1223(b), (e). A motion to disqualify must be in writing, accompanied by a factual affidavit, and filed no less than five days before trial, unless the grounds for disqualification are discovered after that time or other good cause exists. *See* G.S. 15A-1223(c), (d); *State v. Moffitt*, 185 N.C. App. 308 (2007) (defendant failed to make motion in writing and failed to demonstrate grounds for disqualification). It is not clear whether this deadline applies to motions in district court, so if you know in advance who the trial judge will be and are aware of facts warranting recusal, the safest course may be to file a motion to recuse at least five days before trial. *Compare* G.S. 15A-953 (motions should ordinarily be made upon arraignment or during course of trial in district court), *with* G.S. 15A-1101 (except for certain provisions, trial procedure in district court is in accordance with Subchapter XII of Ch. 15A, which includes timing requirements for motions to recuse).

Canon 3C.(1)(a) of the N.C. Code of Judicial Conduct provides that on the motion of any party, a judge should disqualify himself or herself in a proceeding in which his or her impartiality may reasonably be questioned, including but not limited to instances where he or she has a personal bias or prejudice concerning a party. For other instances requiring disqualification, such as kinship or financial interest in the matter in controversy, see N.C. CODE OF JUD. CONDUCT Canon 3C.(1)(b)–(d).

Burden on moving party. Case law states that a party moving to disqualify a judge must "demonstrate objectively that grounds for disqualification actually exist. Such a showing

must consist of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that the judge would be unable to rule impartially." *State v. Fie*, 320 N.C. 626, 627 (1987); *accord State v. Honaker*, 111 N.C. App. 216 (1993). A mere allegation of bias or prejudice is not enough to compel recusal. *State v. Moffitt*, 185 N.C. App. 308 (2007). The standard for recusal is whether there are reasonable grounds to question the judge's objectivity. If a reasonable person, knowing all the facts, would have doubts about the judge's ability to be impartial, the judge should recuse himself or herself or refer the recusal issue to another judge. *See State v. Poole*, 305 N.C. 308 (1982). If the allegations in the motion to recuse are such that findings of fact are required, the trial judge should not rule on the motion but should refer the matter to another judge for hearing. *N.C. Nat'l Bank v. Gillespie*, 291 N.C. 303 (1976) (citing *Ponder v. Davis*, 233 N.C. 699 (1951)).

Case summaries. The following cases address recusal motions.

State v. Scott, 343 N.C. 313 (1996) (trial judge did not err in hearing and denying recusal motion in murder case where defendant alleged that judge and defendant had been friends, that judge had expressed doubts about victim's credibility in earlier case, and that judge had relatives who worked as prosecutor and probation officer; judge attested that he had never discussed the case with either relative).

State v. Vick, 341 N.C. 569 (1995) (judge's acceptance of verdict in previous case of co-defendant, without a showing that verdict was improper, is not grounds for recusal; judge's finding of mitigating factor that codefendant was acting under duress did not itself suggest partiality)

State v. Fie, 320 N.C. 626 (1987) (trial judge should have been recused where judge presided over trial of co-defendant and following trial wrote letter to DA asking DA to indict defendant)

State v. Moffitt, 185 N.C. App. 308 (2007) (trial judge did not err in refusing to recuse himself when he was the same judge who had sentenced defendant before defendant successfully appealed sentence and was aware of a plea arrangement that defendant had rejected; defendant failed to comply with procedural requirements for making recusal motion and made no showing of any bias or prejudice by judge against defendant).

State v. McRae, 163 N.C. App. 359 (2004) (defendant failed to show bias or prejudice where same judge who presided over defendant's murder trial presided over retrospective hearing on capacity to proceed)

State v. White, 129 N.C. App. 52 (1998) (judge who imposed probation condition that defendant challenged as unconstitutional not required to recuse himself from probation revocation hearing), *aff'd per curiam*, 350 N.C. 302 (1999)

State v. Monserrate, 125 N.C. App. 22 (1997) (no statutory requirement that judge who

issues search warrant must recuse himself or herself regarding hearing challenging validity of warrant, but better practice is to do so)

State v. Honaker, 111 N.C. App. 216 (1993) (defendant who alleged that judge made biased comment, necessitating recusal, has burden of producing record or other evidence proving that judge made remark and context of remark)

State v. Kennedy, 110 N.C. App. 302, 305 (1993) ("[t]he 'bias, prejudice or interest' which requires a trial judge to be recused from a trial has reference to the personal disposition or mental attitude of the trial judge, either favorable or unfavorable, toward a party to the action before him"; although a judge may have strong feelings about particular crimes—it was alleged that the judge's wife had been seriously injured by an impaired driver—such allegations, without more, did not show the requisite bias or prejudice and did not disqualify superior court judge from presiding over trial)

In re Nakell, 104 N.C. App. 638 (1991) (stating that where judge is embroiled in personal dispute with defendant, maintaining appearance of absolute impartiality and fairness may require judge to recuse himself)

Other resources. For additional information on recusal motions, see Michael Crowell, *Recusal*, ADMINISTRATION OF JUSTICE BULLETIN NO. 2009/03 (UNC School of Government, Sept. 2009), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0903.pdf.

D. Motion to Dismiss for Vindictive or Selective Prosecution

Because of the broad charging discretion allowed prosecutors, it may be difficult to prevail on a motion to dismiss a charge based on vindictive or selective prosecution. Below is a short outline of the law underlying each claim.

Vindictive prosecution. Due process prohibits the State from prosecuting a defendant, or seeking enhanced punishment against a defendant, as a sanction for that defendant's exercise of his or her rights. For example, a prosecution that is intended to punish a person for exercising his or her right to appeal, or his or her right to reject a plea offer and go to trial, may be considered unconstitutionally vindictive. A defendant is constitutionally entitled to dismissal of a charge if the defendant can show: (1) that the prosecution of the defendant's case was actually motivated by a desire to punish the defendant for doing what the law clearly permits the defendant to do; or (2) the circumstances surrounding the prosecution are such that a vindictive motive may be presumed, and the State has failed to affirmatively overcome the presumption of vindictiveness. *See United States v. Goodwin*, 457 U.S. 368 (1982); *Blackledge v. Perry*, 417 U.S. 21 (1974); *see also supra* § 8.6D, Due Process (discussing presumption of vindictiveness when State files felony charges after defendant appeals misdemeanor conviction).

Selective prosecution. As a general matter, prosecutors have broad discretion to decide which cases to prosecute and what crimes to charge. *See State v. Rorie*, 348 N.C. 266

(1998) (district attorney has broad discretion to decide in homicide case whether to try defendant for first-degree murder, second-degree murder, or manslaughter); *accord State v. Lawson*, 310 N.C. 632 (1984); *see also* G.S. 15A-2004 (giving prosecutor discretion whether to seek death penalty for first-degree murder even if evidence of an aggravating circumstance exists). However, it is unconstitutional under the Due Process and Equal Protection Clauses for a prosecutor to select cases based on race, religion, or other arbitrary classification. *See Oyler v. Boyles*, 368 U.S. 448 (1962); *State v. Garner*, 340 N.C. 573 (1995); *State v. Cherry*, 298 N.C. 86 (1979); *see also* G.S. 15A-2010 (under North Carolina Racial Justice Act, "[n]o person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race").

To prevail on a selective prosecution claim, the defendant must demonstrate that the prosecution of his or her case was motivated by discriminatory intent and had discriminatory effect. *See Wayte v. United States*, 470 U.S. 598 (1985). The leading case on selective prosecution based on race is *United States v. Armstrong*, 517 U.S. 456 (1996). In *Armstrong*, the defendant alleged that African-American people in California were being selectively prosecuted for more serious drug offenses. *Armstrong* held that to show discriminatory effect, and thus make out a selective prosecution claim, the defendant had to prove that similarly situated individuals of a different race were not being prosecuted. *Id*. at 465. As a practical matter, this is difficult to prove and typically requires discovery of police and prosecutor's investigative files. To obtain discovery, the defendant has to make a "credible showing" that similarly situated individuals of a different race could have been but were not prosecuted. *Id*. at 468.

E. Postconviction Motions

This chapter does not address motions available after conviction. Additional resources are shown below.

Motions to withdraw guilty plea. *See* 2 NORTH CAROLINA DEFENDER MANUAL § 23.4E (Defendant's Right to Withdraw Plea) (UNC School of Government, 2d ed. 2012).

Motions to set bond during appeal. *See supra* § 1.10, Release Pending Appeal.

Motions for appropriate relief and writs. *See* 2 NORTH CAROLINA DEFENDER MANUAL Ch. 35 (Appeals, Post-Conviction Litigation, and Writs) (UNC School of Government, 2d ed. 2012).

Postconviction discovery. *See supra* § 4.1F, Postconviction cases.

Expunctions and other relief from a conviction. *See* John Rubin, *Relief from a Criminal Conviction: A Digital Guide to Expunctions, Certificates of Relief, and Other Procedures in North Carolina* (UNC School of Government 2012), *available at* www.sog.unc.edu/node/2588.