Chapter 35
Appeals, Post-Conviction Litigation, and Writs

This chapter primarily discusses litigation after a defendant has been convicted. The topics include the procedures for appealing from district and superior courts, motions for appropriate relief, a trial judge's authority to modify or correct judgments, and resentencings after a successful appellate or post-conviction attack.

The topics also include the writ of habeas corpus and other types of extraordinary writs, which the

defendant may be able to seek before or after conviction, and the procedures before the N.C. Innocence Inquiry Commission.

Appeals in juvenile delinquency cases are discussed in Chapter 16 of the Juvenile Defender Manual, and appeals in involuntary commitments cases are discussed in Chapter 2 of the Civil Commitment Manual, both available on the Office of Indigent Defense Services website, www.ncids.org, under Training & Resources and then Reference Manuals.

This chapter does not discuss sentencing or probation except with respect to appeals from those matters. It also does not address post-release supervision or parole. Those topics would take up their own book and are beyond the scope of this manual.

35.1 Appeals by the Defendant

A. In General

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

1. pronounce judgment and place it into immediate effect;
2. pronounce judgment and suspend or stay its execution; or
3. enter a prayer for judgment continued.

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

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

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

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

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

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

Right to appeal to superior court. A defendant has the right to appeal a district court conviction to superior court for a trial de novo before a jury. N.C. CONST. art. I, § 24; N.C. GEN. STAT. § 15A-1431(b) (hereinafter G.S.); *see also* G.S. 7A-196(b); G.S. 7A-271(b); G.S. 7A-290. This is true even if the district court trial was free from error (*State v. Spencer*, 276 N.C. 535 (1970)) or the defendant pled guilty in district court. *State v. Fox*, 34 N.C. App. 576 (1977).

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

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

Article I, section 24 [formerly article I, section 13] of the N.C. Constitution authorizes a two-tier trial de novo system. It states: "No person shall be convicted of any crime but by the unanimous verdict of a jury in open court. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo." A defendant's constitutional right to a jury trial is not abridged by first having to submit to a trial without a jury in district court if the defendant has the "unfettered" right to appeal to superior court for a jury trial. *See Spencer*, 276 N.C. 535, 545; *accord State v.*

Pulliam, 184 N.C. 681 (1922); *State v. Sherron*, 4 N.C. App. 386 (1969). *But cf. infra* "Appeals in implied-consent cases" in this subsection B (discussing limits enacted by General Assembly on right to appeal in certain cases).

Form of notice of appeal. A defendant may give oral notice of appeal in open court or file a written notice of appeal with the clerk within ten days of the entry of the district court judgment. G.S. 7A-290; G.S. 15A-1431(c). Judgment is entered when the sentence is pronounced. G.S. 15A-101(4a).

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

Scope of jurisdiction on appeal. If notice of appeal is given and not withdrawn within the ten-day period, the clerk must transfer the case to the superior court docket. G.S. 7A-290; G.S. 15A-1431(c). Once an appeal is docketed, the superior court has the same jurisdiction over the charges for which the defendant was convicted as the district court had.

Ordinarily, offenses for which the defendant was charged but not convicted in district court (e.g., charges that were dismissed or for which the defendant was found not guilty) are not within the superior court's jurisdiction on the defendant's appeal of other charges. However, any charges that were dismissed, reduced, or modified pursuant to a plea arrangement in district court are reinstated if the defendant appeals. G.S. 7A-271(b); G.S. 15A-1431(b); *see also State v. Fox*, 34 N.C. App. 576 (1977) (the State is not bound by a plea agreement if the defendant elects to appeal and invoke the right to a trial de novo).

For further discussion of the scope of superior court jurisdiction on appeal from district court, including limitations on the bringing of new charges in superior court based on the same conduct, see 1 NORTH CAROLINA DEFENDER MANUAL § 10.7B (Misdemeanor Appeals from District Court) (Oct. 2010).

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

Release pending appeal. Unless modified, the original bail remains in effect during appeal to superior court. G.S. 7A-290; G.S. 15A-1431(e). The statutes conflict on the authority of a

district court judge, as opposed to a superior court judge, to modify a defendant's bond after he or she appeals for a trial de novo. G.S. 15A-534(e)(1) indicates that a district court judge may not modify pretrial release conditions after the "noting of an appeal," while G.S. 7A-290 and G.S. 15A-1431(c) suggest that a district court judge has ten days from the date of judgment to modify pretrial release conditions because the statutes state that at the expiration of ten days the clerk transfers the case to superior court. For a thorough discussion of the applicable statutes, the limits on a district court judge's authority to modify bond after the giving of notice of appeal, and practical considerations for defense counsel in giving notice of appeal, see 1 NORTH CAROLINA DEFENDER MANUAL § 1.10A (Appeal from District Court Conviction) (Aug. 2010).

Once the case is in superior court, a superior court judge has the authority to modify the conditions of pretrial release. G.S. 15A-534(e). Before or after appeal to superior court, a defendant may apply to the superior court to modify a bond set by or allowed to stand by the district court judge. *See* G.S. 15A-538; *see also* G.S. 15A-547 (recognizing defendant's right to habeas corpus).

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

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

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

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

G.S. 15A-1431(d) directs the district court judge to review the case and set appropriate conditions of pretrial release. *Cf.* 1 NORTH CAROLINA DEFENDER MANUAL § 1.10A (Appeal from District Court Conviction) (Aug. 2010) (discussing district court's authority to modify bond after giving of notice of appeal). Any fine or costs paid by the defendant must be remitted to him or her unless the judge orders the remission delayed pending the determination of the appeal. G.S. 15A-1431(d).

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

trial judge.

If a defendant withdraws his or her appeal after the ten-day period but before the case has been calendared in superior court, the case is automatically remanded to the district court for the execution of judgment. G.S. 15A-1431(g). If the case has already been calendared, a defendant may only withdraw his or her appeal with the superior court's consent. If consent to withdraw the appeal is granted, the defendant will be taxed with court costs unless remitted by the court. The court then may order the case remanded to the district court for the execution of the judgment with any additional court costs that have attached and have not been remitted. G.S. 15A-1431(h).

A form for the remand of a case involving a non-implied-consent offense after it has been calendared in superior court can be found on the Administrative Office of the Courts website. *See* AOC Form AOC-CR-321, "Order of Remand in Non-Implied-Consent Offense Cases" (Dec. 2008), *available at* www.nccourts.org/Forms/Documents/1106.pdf.

Appeals in implied-consent cases. Appeals from convictions in implied-consent cases (as defined in G.S. 20-16.2(a1)) are treated somewhat differently than appeals from other types of offenses. As soon as notice of appeal to superior court is given from a district court conviction for an implied-consent offense, the district court sentence is vacated. After expiration of the ten-day period in which notice of appeal can be given (and withdrawn), the case may be remanded to district court only if both the prosecutor and the superior court consent. When an appeal is noted and then withdrawn within ten days of the entry of judgment, or when a case is remanded to district court after that period, a new sentencing hearing must be held and the district court judge must consider any new convictions. *See* G.S. 20-38.7(c); G.S 20-179(c).

Practice note: Before advising a client who has been convicted of any implied-consent offense in district court regarding the advantages and disadvantages of exercising his or her right to appeal the conviction to superior court, you should carefully review G.S. 20-38.7(c) and G.S. 20-179(c). While the appeal is pending, the defendant will not have an implied-consent conviction that could be used as a grossly aggravating factor (pursuant to G.S. 20-179(c)(1)c.) if the defendant is convicted of a second implied-consent offense. Unlike in other misdemeanor cases, however, a new sentencing hearing is required to be conducted in every case returned to district court after a withdrawal of the notice of appeal or after a remand. If the client is convicted of a second driving while impaired charge (or other implied-consent offense) before the new sentencing hearing, that second implied-consent offense conviction will be a grossly aggravating factor that must be considered by the district court judge at the new sentencing hearing on the first conviction.

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

1. the sentence is based on additional facts considered by the district court that were not considered in the previously vacated sentence; and

2. the defendant would be entitled to a jury determination of those facts pursuant to G.S. 20-179.

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

Practice note: No appellate cases appear to have considered the district court judge's sentencing authority following remand and the defendant's rights should the judge impose a greater sentence. This practice note addresses one scenario that has come to the authors' attention and suggests a possible response—that is, if on remand a district court judge imposes a longer sentence even though the defendant has had no intervening impaired driving convictions. Such an increase not only may exceed the authority the General Assembly intended to give the district court, but it also may violate *North Carolina v. Pearce*, 395 U.S. 711 (1969), in which the U.S. Supreme Court held that an increased sentence on remand may only be based on *identifiable matters*, shown in the record, *that occurred after* the initial sentencing determination to ensure that vindictiveness played no part in the increased sentence. *See infra* § 35.5A, Resentencing after Successful Appellate or Post-Conviction Review: In General (discussing constitutional restrictions on resentencing under *Pearce*). In such a case, counsel should consider the following approach. First, regardless whether the statute specifically gives the defendant the right to appeal, counsel still should consider filing a notice of appeal to superior court. Counsel should be prepared to argue that denial of the right to appeal would violate the constitutional requirements for a two-tiered trial de novo system. *See supra* "Constitutionality of two-tier system" in this subsection B. Second, if the appeal is dismissed, counsel should consider filing a motion for appropriate relief with the district court under G.S. 15A-1415. Constitutional grounds may include the lack of the right of appeal as well as the imposition of a presumptively vindictive sentence. If the district court denies the motion for appropriate relief, the defendant may petition the superior court for certiorari review. *See infra* § 35.7D, Certiorari of Trial Court Orders and Judgments.

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

A form for the withdrawal of an appeal from a conviction of an implied-consent offense can be found on the Administrative Office of the Courts website. *See* AOC Form AOC-CR-321, Side Two, "Withdrawal of Appeal Order of Remand Implied-Consent Offenses" (Dec. 2008), *available at* www.nccourts.org/Forms/Documents/1106.pdf.

Appeal from a finding of violation of probation. A defendant may appeal to superior court for a de novo revocation hearing if a district court judge finds a violation of probation and activates the defendant's suspended sentence or imposes a condition of special probation (split sentence). If at the de novo hearing the superior court judge finds a violation of probation and activates a defendant's sentence or imposes special probation, the defendant may appeal to the appellate division pursuant to G.S. 7A-27. G.S. 15A-1347 (detailing authority of superior court to hear appeals). G.S. 15A-1347 does not specifically address whether a defendant has the right to appeal confinement in response to a violation under G.S. 15A-1344(b2), which can be as long as ninety days, a part of probation changes made in 2011 by the General Assembly in the Justice Reinvestment Act. *See* Jamie Markham, *Confinement in Response to Violations (CRV) and Limits on Probation Revocation Authority*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Oct. 25, 2011), http://sogweb.sog.unc.edu/blogs/ncclaw/?p=2994.

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

District court counsel's obligations regarding defendant's right to appeal and to continue representation for trial de novo. After a conviction in district court, trial counsel should advise the client of his or her right to appeal for a trial de novo with a jury in superior court. *See infra* Appendix A, N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL, Guideline 9.1(a) Appeal of Misdemeanor Conviction for Trial *de Novo* in Superior Court (Nov. 2004). "Counsel should also advise the client of the potential advantages and disadvantages of exercising that right." *Id.* If the client wishes to appeal, counsel must give notice of appeal on the client's behalf. N.C. Commission on Indigent Defense Services Rule 1.7(a) (June 2011), *available at* www.ncids.org/Rules%20&%20Procedures/IDS%20Rules/IDS%20Rules%20Part%201.pdf.

If the client wants to appeal for a trial de novo, counsel is obligated to represent him or her until entry of final judgment in superior court unless relieved by the court. *See* G.S. 15A-143 (providing that counsel who makes a general appearance in a criminal proceeding undertakes to represent the defendant until entry of final judgment at the trial stage); N.C. Commission on Indigent Defense Services Rule 1.7(a) (June 2011), *available at* www.ncids.org/Rules%20&%20Procedures/IDS%20Rules/IDS%20Rules

%20Part%201.pdf (recognizing counsel's obligation to continue representation). Local appointment plans in a few districts may provide for substitution of district court counsel if a defendant appeals for a jury trial in superior court, but counsel who represented the defendant in district court presumably would have to obtain the court's permission to withdraw. Counsel from the district court proceedings remains obligated to advise the defendant of the right to appeal and enter notice of appeal at the client's request even if counsel intends to move to withdraw thereafter.

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

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

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

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

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

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

1. lack of jurisdiction over the offense or the person;
2. failure of the criminal pleading to charge a crime;
3. insufficiency of the evidence as a matter of law;

4. prejudicial procedural errors, including the erroneous
   - denial of a pretrial, trial, or post-trial motion or other relief,
   - admission or exclusion of evidence, or
   - instructions to the jury;
5. state or federal constitutional violations resulting in an invalid conviction;
6. insufficiency of the evidence introduced at the trial and sentencing hearing to support the sentence imposed (if the defendant is sentenced outside the presumptive range as described in G.S. 15A-1444(a1));
7. violations of structured sentencing, including
   - the improper calculation of the defendant's prior record level,
   - an unauthorized sentence disposition, or
   - an unauthorized minimum or maximum term of imprisonment; and
8. any other prejudicial error of law committed by the trial judge.

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

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

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

1. Whether the prior record level was properly calculated. G.S. 15A-1444(a2)(1).
2. Whether the sentence disposition was a type that was authorized for the defendant's class of offense and prior record level (e.g., the defendant received an active or intermediate sentence when only an intermediate or community sentence was authorized). G.S. 15A-1444(a2)(2).
3. Whether the lengths of the minimum and maximum sentences are outside those set by statute for the defendant's class of offense and prior record level. G.S. 15A-1444(a2)(3).
4. If the defendant was sentenced outside of the presumptive range, whether there were improper findings of aggravating circumstances or improper failures to find mitigating circumstances. *See* G.S. 15A-1444(a1); *see also State v. Davis*, ___ N.C. App. ___, 696 S.E.2d 917 (2010); *State v. Rogers*, 157 N.C. App. 127 (2003). The N.C. Court of Appeals has interpreted the governing statutory provision to mean that a defendant is entitled to an appeal when his or her sentence falls within the aggravated range *or* within the mitigated range. *See State v. Mabry*, ___ N.C. App. ___, 720 S.E.2d 697 (2011) (holding that "a defendant receiving a mitigated sentence must, under the plain language of the statute, have a right to appeal the sufficiency of the evidence supporting his or her sentence").
5. Whether a motion to withdraw the plea of guilty or no contest was improperly denied. G.S. 15A-1444(e); *see also State v. Handy*, 326 N.C. 532 (1990) (defendant entitled to

an appeal as of right after the trial judge denied his motion to withdraw his plea of guilty; death sentence vacated because denial of the presentence motion was improper).

6. Whether there were evidentiary and procedural issues in a sentencing hearing before a jury on the existence of aggravating circumstances or sentence enhancements. *See, e.g., State v. Hurt*, 361 N.C. 325 (2007) (granting new sentencing hearing where trial judge's *Blakely* error in failing to submit an aggravating factor to the jury was not harmless beyond a reasonable doubt).
7. Whether a motion to suppress evidence based on constitutional grounds or on a substantial violation of Chapter 15A was improperly denied. G.S. 15A-979(b); G.S. 15A-1444(e); *see also State v. Smith*, 193 N.C. App. 739 (2008).

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

The last step is to enter an oral or written "notice of appeal" from the judgment itself (not from the denial of the motion to suppress) ***after*** entry of final judgment in order to confer jurisdiction on the appellate court. *See State v. Miller*, 205 N.C. App. 724 (2010); N.C. R. APP. P. 4; *see also* 1 NORTH CAROLINA DEFENDER MANUAL § 14.7 (Appeal of Suppression Motions) (July 2002).

The issues set out above are the only issues that may be appealed after the entry of a guilty or no contest plea. No other issue can be raised on appeal as a matter of right. *See, e.g., State v. Rinehart*, 195 N.C. App. 774 (2009) (because defendant pled guilty, he had no right to appeal the denial of his motions to dismiss based on double jeopardy and violation of his right to a speedy trial); *State v. Smith*, 193 N.C. App. 739 (2008) (finding that the defendant, after pleading guilty, did not have the right to appeal the denial of his motion to dismiss his habitual felon indictment and the court did not have the authority to grant certiorari review under Appellate Rule 21); *State v. Jeffery*, 167 N.C. App. 575 (2004) (because the defendant pled guilty, he had no right to appeal (1) whether the bills of information were unconstitutionally vague and therefore violated the right against double jeopardy; and (2) whether the factual basis for the plea supported the bills of indictment); *State v. Bivens*, 155 N.C. App. 645 (2002) (after pleading guilty, defendant could not appeal as of right from the denial of his motion to continue); *State v. Pimental*, 153 N.C. App. 69 (2002) (defendant had no statutory right to appellate review of multiple issues at his trial before the entry of his

guilty plea; defendant did have an appeal of right as to a sentencing issue); *see also* 1 NORTH CAROLINA DEFENDER MANUAL § 13.4B (Motion to Dismiss on Double Jeopardy Grounds) (Mar. 2009) (discussing difficulty of obtaining appellate review of double jeopardy issue after entry of guilty plea). Possible alternative remedies—writs of certiorari and motions for appropriate relief—are discussed below.

Practice note: If your client is considering pleading guilty or no contest in superior court, you should advise him or her about the consequences of the plea, including that the right to appeal is extremely limited. *See infra* Appendix A, N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL, Guideline 6.1(c) The Plea Negotiation Process and the Duties of Counsel (Nov. 2004). If your client wants to appeal from a ruling on a pretrial motion other than a motion to suppress as discussed above, you will have to try the case to completion to preserve that right. (The grounds for a writ of certiorari or motion for appropriate relief, discussed below in this subsection D., also are limited after a guilty plea.) Even a stipulation in a plea arrangement that allows for an appeal of the denial of a pretrial motion is not valid and will not confer jurisdiction on the appellate court. *See Rinehart*, 195 N.C. App. 774; *Smith*, 193 N.C. App. 739. An invalid stipulation assuring the right to appeal may give a defendant a basis for withdrawing a guilty plea because he or she cannot get the benefit of his or her bargain, but in some circumstances the defendant may have to proceed by motion for appropriate relief and not by appeal to obtain that relief. *Compare State v. White*, ___ N.C. ___, 711 S.E.2d 862 (2011) (where appellate court had jurisdiction over the case based on defendant's proper appeal from a denial of a motion to suppress, it could vacate the judgment and allow defendant on remand to withdraw a guilty plea that was given with the intent to preserve an appeal from the denial of defendant's pretrial motion to suppress *and* pretrial motion to dismiss), and *Smith*, 193 N.C. App. 739 (to same effect), *with Rinehart*, 195 N.C. App. 774 (distinguishing *Smith* and other decisions, in which it had vacated a guilty plea based on a plea agreement that included a reservation of the right to appeal that was ineffective, and holding that the defendant's recourse was to file a motion for appropriate relief where only issue he raised (denial of pretrial motion to dismiss) was not appealable).

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

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

Writ of certiorari. Although a defendant may not be entitled to an appeal of right after pleading guilty, G.S. 15A-1444 states that he or she may petition the appellate division for review by writ of certiorari. *See* G.S. 15A-1444(e), (g). However, writs of certiorari to review trial court orders and judgments are allowed by the N.C. Rules of Appellate

Procedure in three instances only:

1. where the party lost the right to appeal by failing to take timely action;
2. where the order appealed from is interlocutory and there is no right of appeal; or
3. to review a trial judge's denial of a motion for appropriate relief.

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

Faced with these conflicting provisions, the N.C. appellate courts have reached the conclusion that, other than in the three instances set out above and the one exception discussed below, they have no authority to issue a writ of certiorari. *See State v. Pimental*, 153 N.C. App. 69 (2002) (although G.S. 15A-1444(e) allows a defendant to petition for a writ of certiorari after pleading guilty, the appellate court is still limited to granting certiorari under the three circumstances set out in Appellate Rule 21; appellate rules prevail over the general statutes when there is a conflict).

Because of the limitations of Appellate Rule 21, a writ of certiorari generally will not be granted to review the denial of pretrial motions in cases in which the defendant pled guilty. *See, e.g.*, *State v. Rinehart*, 195 N.C. App. 774 (2009) (court found that it did not have the authority to issue a writ of certiorari to review double jeopardy and speedy trial issues raised by defendant before pleading guilty); *State v. Jamerson*, 161 N.C. App. 527 (2003) (where defendant pled guilty, the court held it was without authority under Rule 21 to review the denial of defendant's motion to dismiss the habitual felon indictment or his assertion that the judgment was unconstitutional); *State v. Pimental*, 153 N.C. App. 69 (2002) (court found that it did not have the authority to issue a writ of certiorari to review multiple issues raised by defendant before his guilty plea).

There is one additional exception to Appellate Rule 21 permitting a defendant who has pled guilty to obtain review by writ of certiorari. N.C. appellate courts may grant a petition for writ of certiorari after a defendant pleads guilty to review challenges to the procedures employed by the trial judge in accepting the defendant's plea. *See State v. Bolinger*, 320 N.C. 596 (1987) (reviewing the defendant's assertion that the trial judge erred in accepting his guilty plea because the judge failed to determine whether the plea was entered knowingly and did not inquire whether defendant was in fact guilty; court did not specifically address the applicability of Rule 21); *State v. Ahearn*, 307 N.C. 584 (1983) (treating defendant's appeal from a guilty plea as a petition for writ of certiorari and reviewing whether there was a factual basis for the plea); *see also State v. Demaio*, ___ N.C. App. ___, 716 S.E.2d 863 (2011) (defendant sought review of his contention that his plea was uninformed because he entered it under the erroneous impression that he was preserving the right to appeal from the denial of his pretrial motion to dismiss and motion in limine; court recognized that *Bolinger* did not specifically address Rule 21 but held that the Court of Appeals could not overrule *Bolinger* and the court had the authority to grant certiorari to review the issue); *State v. Santos*, ___ N.C. App. ___, 708 S.E.2d 208 (2011) ("given defendant's lengthy sentences," court elected to treat defendant's purported appeal from a guilty plea as a petition for writ of certiorari and found the plea to have been knowingly and voluntarily made); *State v. Flint*, 199 N.C. App. 709 (2009) (allowing

certiorari to review whether there was a sufficient factual basis for defendant's plea); *State v. Carriker*, 180 N.C. App. 470 (2006) (allowing a writ of certiorari and holding that trial judge should have informed defendant of her right to withdraw her guilty plea after the judge decided to impose a sentence other than the one set out in the plea arrangement); *State v. Poore*, 172 N.C. App. 839 (2005) (granting a writ of certiorari and addressing defendant's argument that there was an insufficient factual basis supporting the entry of his plea); *State v. Rhodes*, 163 N.C. App. 191 (2004) (writ of certiorari allowed to address defendant's challenge to the procedures employed in accepting his guilty plea); *State v. Carter*, 167 N.C. App. 582 (2004) (following *Bolinger* and granting review of defendant's assertion that the trial judge failed to determine that defendant's guilty plea was made knowingly and voluntarily). *But see State v. Nance*, 155 N.C. App. 773 (2003) (holding that court was without authority under Rule 21 to allow defendant's petition for writ of certiorari to review the issue of whether his guilty plea was made knowingly and voluntarily).

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

Motion for appropriate relief. Although a defendant may not be entitled to an appeal of right after pleading guilty, he or she may be able to pursue a motion for appropriate relief under G.S. 15A-1414 and 15A-1415. *See infra* § 35.3, Motions for Appropriate Relief. Generally, a defendant who enters a guilty plea waives all errors in the proceeding, including constitutional violations that occurred before entry of the plea. One exception to this rule is that the defendant may challenge the power of the state to bring him or her into court. *See Blackledge v. Perry*, 417 U.S. 21, 30–31 (1974); *State v. Reynolds*, 298 N.C. 380 (1979) (discussing *Blackledge*). For example, a defendant who pled guilty may use a motion for appropriate relief to challenge a conviction based on a fatally defective indictment, which constitutes a jurisdictional defect under North Carolina law. A defendant also may challenge whether his or her guilty plea was voluntary and intelligent and whether he received effective assistance of counsel in entering the plea. *See State v. Mercer*, 84 N.C. App. 623 (1987); *see also Blackledge v. Allison*, 431 U.S. 63 (1977). Additionally, a defendant may file a motion for appropriate relief seeking relief from a guilty plea if it was entered under the mistaken impression that he or she could preserve the right to appeal from the denial of pretrial motions (other than a motion to suppress from which there is a right to appeal). *See State v. Rinehart*, 195 N.C. App. 774, 777 (2009) (dismissing defendant's appeal for lack of appellate jurisdiction "without prejudice to defendant's right to file a motion for appropriate relief . . . .").

For a further discussion of possible grounds for motions for appropriate relief after a guilty plea, see Jessica Smith, *Two Issues in MAR Procedure: Hearings and Showing Required to Succeed on a MAR*, ADMINISTRATION OF JUSTICE BULLETIN No. 2001/04 (UNC School of Government, Oct. 2001), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/aoj200104.pdf.

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

A defendant may appeal under G.S. 7A-27 to the N.C. Court of Appeals from a superior

court's finding of a violation of probation if the judge either activated the defendant's suspended sentence or imposed a condition of special probation (split sentence). G.S. 15A-1347. If the judge finds a violation but continues a defendant on probation or modifies the terms of probation without imposing a condition of special probation, there is no right to appeal that ruling under G.S. 15A-1347. *See State v. Edgerson*, 164 N.C. App. 712 (2004) (although trial judge found a violation of probation and modified defendant's probation to add four more conditions of probation, defendant had no right to appeal; court also found it was without authority to grant certiorari to review the trial judge's modifications under Appellate Rule 21). G.S. 15A-1347 does not specifically address whether a defendant has the right to appeal confinement in response to a violation under G.S. 15A-1344(b2), which can be as long as ninety days, a part of probation changes made in 2011 by the General Assembly in the Justice Reinvestment Act. *See* Jamie Markham, *Confinement in Response to Violations (CRV) and Limits on Probation Revocation Authority*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Oct. 25, 2011), http://sogweb.sog.unc.edu/blogs/ncclaw/?p=2994.

F. Procedural Requirements for Appealing from Superior Court

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

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

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

N.C. R. APP. P. 4(b).

Manner of giving of appeal of satellite monitoring determination. Because the North Carolina appellate courts consider the imposition of satellite based monitoring for a sex offender to be a civil matter, they have held that oral notice of appeal is not sufficient to confer jurisdiction on the appellate court. The defendant must file written notice of appeal within thirty days pursuant to Rule 3 of the N.C. Rules of Appellate Procedure as required in civil cases. *State v. Brooks*, 204 N.C. App. 193 (2010); *see also State v. Clayton*, 206 N.C. App. 300 (2010) (treating improperly noticed appeal as petition for writ of certiorari because the defendant's satellite-based monitoring hearing at which he gave oral notice of appeal predated appellate decisions holding that satellite-based monitoring is a civil matter and that oral notice of appeal is insufficient). The content of the written notice of appeal is identical to the content of the written notice of appeal for criminal cases discussed above. *See* N.C. R. APP. P. 3(d).

Divestiture of jurisdiction. Once notice of appeal is given and the time for giving notice of appeal has expired, the superior court no longer has jurisdiction over the case. G.S. 15A-1448(a)(3). The superior court retains authority over the case to determine limited matters, such as indigency and whether and on what conditions a defendant may be granted post-trial release. *Id.*; G.S. 15A-1453; *see also infra* § 35.1J, Release Pending Appeal from Superior Court Judgment; § 35.3B, Types of Motions for Appropriate Relief by Defendant; § 35.6, Trial Judges' Authority to Correct, Modify, or Amend Judgments.

Practice note: The form used by superior court judges to note a defendant's appeal, set conditions of release if any, order the transcript, and appoint appellate counsel can be found on the Administrative Office of the Courts website. *See* AOC Form AOC-CR-350, "Appellate Entries" (June 2011), *available at* www.nccourts.org/Forms/Documents/133.pdf. The completion of this form by the clerk, even though it states that the defendant has given notice of appeal, does ***not*** fulfill the defendant's requirement to file a written notice of appeal under Rule 4 of the N.C. Rules of Appellate Procedure. *See State v. Hughes*, ___ N.C. App. ___, 707 S.E.2d 777 (2011); *State v. Blue*, 115 N.C. App. 108 (1994). For a discussion of steps trial counsel should take to perfect a client's appeal, see *infra* subsection O. of § 35.1, Trial Counsel's Obligations regarding Defendant's Right to Appeal after Superior Court Conviction.

G. Stay of Superior Court Sentence

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

- payment of costs is stayed;
- payment of any fine is stayed;
- confinement is stayed if the defendant is released pursuant to post-trial terms of release set by the judge (discussed *infra* in § 35.1J); and
- probation and special probation (i.e., split sentences under G.S. 15A-1351) are stayed.

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

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

Probationary sentences. Under G.S. 15A-1451(a)(4), probation is automatically stayed by the entry of notice of appeal. This includes any split sentence imposed as a condition of special probation. Although probation is stayed, the superior court retains the authority to impose conditions of release under G.S. 15A-536 pending the defendant's appeal. *See State v. Howell*, 166 N.C. App. 751 (2004) (after defendant gave notice of appeal from a probationary sentence, trial judge had authority to impose a new bond and set conditions,

including the condition that defendant not possess a computer or reside in or visit any home where a computer was present); *see also infra* § 35.1J, Release Pending Appeal from Superior Court Judgment.

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

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

H. Withdrawal of Notice of Appeal from Superior Court Judgment

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

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

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

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

I. Compliance with Superior Court Judgment

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

J. Release Pending Appeal from Superior Court Judgment

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

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

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

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

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

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

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

Modifications and revocations. The release order may be modified or revoked. If a defendant is arrested based on a revocation or modification of a release order, he or she is

entitled to an immediate hearing to determine whether he or she is entitled to release and, if so, on what conditions. G.S. 15A-536(e).

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

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

K. Interlocutory Appeals to Appellate Division

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

An exception to the general rule prohibiting appeals of interlocutory orders in criminal cases is found in G.S. 15A-1432(d). This statute allows a defendant to maintain an interlocutory appeal of a superior court's reversal of a district court's dismissal of criminal charges. *See State v. Joseph*, 92 N.C. App. 203 (1988); *see also infra* § 35.2A, State's Right to Appeal from District Court Judgment.

Although G.S. 1-277(a) permits appeals to be taken from interlocutory orders that affect a substantial right, this statute does not apply in criminal cases. *See Joseph*, 92 N.C. App. 203, 206 (the enactment of G.S. 15A-1444 as the exclusive authority for criminal appeals "precludes [a] defendant's resort to any 'substantial right' analysis" under G.S. 1-277); *see also State v. Shoff*, 118 N.C. App. 724 (1995), *aff'd*, 342 N.C. 638 (1996).

Writs of certiorari. Although a criminal defendant may not be entitled to an appeal of right from an interlocutory order, he or she may petition the appellate division for review by writ of certiorari. *See* G.S. 15A-1444(g). Writs of certiorari are allowed by the N.C. Rules of Appellate Procedure "when no right of appeal from an interlocutory order exists." N.C. R.

APP. P. 21(a)(1); *see also* G.S. 7A-32(b) (supreme court has jurisdiction to issue a writ of certiorari "in exercise of its general power to supervise and control the proceedings" of any of the lower courts); G.S. 7A-32(c) (court of appeals has jurisdiction to issue writ of certiorari "to supervise and control the proceedings of any of the trial courts").

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

L. Appeals from Prayers for Judgment Continued

Generally. Since a defendant may only appeal from a final judgment, whether he or she has a right to appeal when a district court or superior court judge has entered a prayer for judgment continued (PJC) depends on whether the judge's order is in the nature of a "final judgment." The general rule is that there is no right to appeal because "'there is no judgment—only a motion or prayer by the prosecuting officer for judgment.'" *See State v. Popp*, 197 N.C. App. 226, 228 (2009) (quoting *State v. Griffin*, 246 N.C. 680, 683 (1957)).

However, if the "judge imposes conditions 'amounting to punishment' on the continuation of the entry of judgment, the judgment loses its character as a PJC and becomes a final judgment." *State v. Brown*, 110 N.C. App. 658, 659 (1993) (quoting *Griffin*, 246 N.C. 680, 683). The defendant may then have the right to appeal pursuant to G.S. 15A-1444 and G.S. 7A-27 (authorizing appeals from final judgments).

What constitutes "punishment." "Prayer for judgment continued upon payment of costs, without more, does not constitute the entry of judgment." G.S. 15A-101(4a); *see also Brown*, 110 N.C. App. 658. Imposing a condition that the defendant must obey the law likewise does not constitute the entry of judgment. *See State v. Cheek*, 31 N.C. App. 379 (1976) (requirements that defendant not escape from prison and not break the law did not transform the prayer for judgment continued into a final judgment).

The appellate courts have found that the imposition of the following conditions "amounted to punishment"; therefore, the order lost its character as a prayer for judgment continued and became an appealable final judgment:

- Payment of a fine. *Griffin*, 246 N.C. 680.
- Imprisonment. *Id.*
- Continuation of mental health treatment. *Brown*, 110 N.C. App. 658 (court did not reach the question of whether the order that defendant not contact his ex-wife, the prosecuting witness, was punishment).
- Completion of a high school education. *Popp*, 197 N.C. App. 226.
- Enrollment in an institution of higher education or enlistment in the armed forces. *Id.*
- Compliance with a curfew. *Id.*
- Submission to monthly drug testing. *Id.*

- Performance of community service and payment of a community service fee. *Id.*
- Preparation of a letter of apology. *Id.*
- Continued employment. *Id.*

Additional resources. For additional discussion of this topic, see Jessica Smith, *Prayer for Judgment Continued* (May 2009), *in* THE SURVIVAL GUIDE: SUPERIOR COURT JUDGES' BENCHBOOK, www.sog.unc.edu/node/2155. *See also* Jamie Markham, *The Unwelcome Prayer for Judgment Continued*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 18. 2009) (discussing possible remedies when a defendant does not want a PJC), http://sogweb.sog.unc.edu/blogs/ncclaw/?p=717.

M. Death of Defendant While Appeal Is Pending

If a defendant dies while his or her North Carolina state criminal conviction is on appeal, the action is abated and the appeal will be dismissed. *See State v. Dixon*, 265 N.C. 561 (1965); *State v. Young*, 27 N.C. App. 308 (1975); *State v. Boyette*, 24 N.C. App. 587 (1975). North Carolina appears to have adopted the doctrine of abatement ab initio. *See Alaska v. Carlin*, 249 P.3d 752 (Ak. 2011) (asserting that North Carolina is among the nineteen states that strictly apply the doctrine of abatement ab initio); *People v. Robinson*, 699 N.E.2d 1086 (Ill. App. Ct. 1998) (listing North Carolina as a jurisdiction that abates a deceased defendant's appeal ab initio and citing *Dixon*, 265 N.C. 561), *vacated on other grounds*, 719 N.E.2d 662 (Ill. 1999). Under that doctrine, when a criminal defendant dies, not only is his or her appeal dismissed, but the conviction is also vacated and the indictment is dismissed because the appeal had not been, and now can never be, resolved. Abatement ab initio acts to restore the pre-indictment presumption of innocence to the defendant. *See* Rosanna Cavallaro, *Better Off Dead: Abatement, Innocence, and the Evolving Right of Appeal*, 73 U. COLO. L. REV. 943 (2002).

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

Right to appeal from denial of request to test. Pursuant to G.S. 15A-269, a defendant who has been convicted may request that DNA testing be performed. If the motion for testing is denied, the defendant may appeal the order and is entitled to the appointment of counsel for the appeal if indigent. G.S 15A-270.1. Although the statute does not specify the time period for taking the appeal, in order to avoid the potential for dismissal of the appeal, the notice of appeal should comply with Rule 4 of the N.C. Rules of Appellate Procedure and be given in open court or filed within fourteen days of the denial of the defendant's motion.

No right to appeal from denial of relief after testing. If the defendant's motion for DNA testing is granted, the trial judge must hold a hearing once the testing results are received in order to determine whether the results are favorable or unfavorable to the defendant. G.S. 15A-270. If the trial judge determines that the results are unfavorable and denies the defendant any relief, the defendant does not have the right to appeal from this ruling. *See State v. Norman*, 202 N.C. App. 329, 333 (2010) (stating that "'[t]he General Assembly simply has not provided for appeals from [a court's ruling under § 15A-270] and under those circumstances, harsh as the result may seem, we must hold that [this Court is] without

subject matter jurisdiction to entertain [Defendant's] appeal.'") (quoting *Palmer v. Wilkins*, 73 N.C. App. 171, 173 (1985)).

Additional resources. For further discussion of post-conviction motions for DNA testing, *see* Jessica Smith, *Post-Conviction: Motions for DNA Testing and Early Disposal of Biological Evidence* (Feb. 2010), *in* THE SURVIVAL GUIDE: SUPERIOR COURT JUDGES' BENCHBOOK, www.sog.unc.edu/node/2168.

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

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

1. Counsel should inform the client of his or her right to appeal and advise him or her of the consequences of appealing. *See* N.C. Commission on Indigent Defense Services Rule 1.7(a) (June 2011), *available at* www.ncids.org/Rules%20&%20Procedures/IDS%20Rules/IDS%20Rules%20Part%201.pdf; *see also infra* Appendix A, N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL, Guideline 9.3 Right to Appeal to the Appellate Division (Nov. 2004).

2. If the client wants to appeal, counsel must take the necessary steps to give proper notice of appeal. *See* N.C. Commission on Indigent Defense Services Rule 1.7(a) (June 2011), *available at* www.ncids.org/Rules%20&%20Procedures/IDS%20Rules/IDS%20Rules%20Part%201.pdf. By entering notice of appeal on the client's behalf, trial counsel is not obligating himself or herself to represent the client in the appellate division. *See* G.S. 15A-143 (an attorney who represents a defendant in a criminal action without limiting his or her appearance represents the defendant at all stages of the case until entry of final judgment at the trial stage); N.C. Commission on Indigent Defense Services Rule 1.7(a) (June 2011), *available at* www.ncids.org/Rules%20&%20Procedures/IDS%20Rules/IDS%20Rules%20Part%201.pdf ("Unless otherwise provided by law, [appointed counsel] is required to continue with the representation through judgment at the trial level, discussion with the client about his or her right to appeal, and entry of notice of appeal or expiration of the time for giving notice of appeal.").

3. If you give notice of appeal orally in open court at trial, you should request that the judge determine the indigency of your client at that time so that, if the client is indigent, the Office of the Appellate Defender can be appointed and the transcript can be ordered at state expense. *See* N.C. Commission on Indigent Defense Services Rule 3.2(b) (May 2010), *available at* www.ncids.org/Rules%20&%20Procedures/IDS%20Rules/IDS%20Rules%20Part%203.pdf. You also should request that the trial judge set an appeal bond or other conditions of post-trial release under G.S. 15A-536 so that your client can be released pending the determination of the appeal. *See supra* § 35.1J, Release Pending Appeal from Superior Court Judgment; *see also infra* Appendix A, N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-

CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL, Guideline 9.4 Bail Pending Appeal (Nov. 2004). If you file written notice of appeal, you should make sure that the case is added back on the docket in superior court in order to have the trial judge address the issues discussed above.

4. It is extremely helpful to appellate counsel for you to make sure when you enter notice of appeal in open court (or at a subsequent hearing, discussed in 3. above, if written notice of appeal was filed) that the clerk notes all the pretrial hearing dates in the order requiring transcription. This order is part of the Appellate Entries form filled out by the clerk when notice of appeal is entered, available on the Administrative Office of the Courts website. *See* AOC Form AOC-CR-350, "Appellate Entries" (June 2011), *available at* www.nccourts.org/Forms/Documents/133.pdf. If all the pertinent dates are not included in the transcript order, the appeal may be delayed many months while appellate counsel tracks down dates and court reporters and gets additional transcript orders signed.

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

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

35.2 Appeals by the State

There is no common law right providing for appeal by the State—the right is purely statutory. *State v. Harrell*, 279 N.C. 464 (1971). The State may not appeal a judgment in favor of a criminal defendant in the absence of a statute that clearly confers that right. *State v. Dobson*, 51 N.C. App. 445 (1981). Statutes granting the State a right to appeal in criminal cases are to be strictly construed. *State v. Elkerson*, 304 N.C. 658 (1982).

A. State's Right to Appeal from District Court Judgment

Statutory right to appeal. G.S. 15A-1432 addresses the State's right to appeal to superior court from dismissals or rulings entered by the district court. Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from district court to the superior court in two instances:

1. when there has been a decision or judgment dismissing criminal charges as to one or more counts; or
2. when a motion for a new trial has been granted on the grounds of newly discovered or newly available evidence but only on questions of law.

G.S. 15A-1432(a); *see also infra* § 35.2B, State's Right to Appeal from a District Court's "Preliminary Determination" in Implied-Consent Cases.

When double jeopardy attaches. The State is precluded from appealing from a judgment dismissing the charges for insufficient evidence *if reversal by the reviewing court would result in further prosecution*. *See supra* § 30.4, Effect of Dismissal; *cf. United States v. Scott*, 437 U.S. 82, 91 (1978) (in accordance with double jeopardy principles, "[a] judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal"). This is true even if the judge's ruling was clearly erroneous. *See State v. Morgan*, 189 N.C. App. 716 (2008); *see also Smith v. Massachusetts*, 543 U.S. 462, 473 (2005) (acknowledging "the well-established rule" that the double jeopardy bar will attach to a pre-verdict acquittal even if it is "patently wrong in law"). Thus, the State cannot appeal from district to superior court when the defendant's motion to dismiss for insufficient evidence is granted in a misdemeanor case. *See State v. Harrell*, 279 N.C. 464 (1971); *State v. Fowler*, 197 N.C. App. 1 (2009).

Since criminal trials in district court are non-jury trials, jeopardy attaches when the trial judge begins to hear evidence or testimony. *See State v. Brunson*, 327 N.C. 244 (1990); *see also Fowler*, 197 N.C. App. 1, 17 ("'until a defendant is "put to trial *before the trier of the facts*, whether the trier be a jury or a judge," jeopardy does not attach'" (emphasis added by *Fowler* court) (citations omitted)). The rationale behind this rule is that the potential for conviction exists only when evidence or testimony against a defendant is presented to and accepted by the court. *See State v. Ward*, 127 N.C. App. 115, 121 (1997).

If a dismissal is granted based on a pretrial motion of the defendant and evidence has not been accepted by the district court for an adjudication of the defendant's guilt, the State is free to appeal to superior court. *See, e.g., id.* (jeopardy had not attached and State properly appealed to superior court where district court dismissed charges before trial based on prosecutorial misconduct).

Procedural requirements. When appealing pursuant to G.S. 15A-1432(a), the State must file a written motion specifying the basis of the appeal. G.S. 15A-1432(b); *see also State v. Hinchman*, 192 N.C. App. 657, 661–62 (2008) (State properly asserted the legal basis of

appeal in its motion for appeal, which asserted that "no competent evidence was presented to support the [defendant's] motion and order to dismiss" and the "[d]ismissal of the charges was contrary to law"). The motion must be filed with the clerk and served on the defendant within ten days after entry of the district court judgment. G.S. 15A-1432(b).

Minor inadequacies in the State's "motion of appeal" will not be fatal to the superior court's jurisdiction unless the defendant can show prejudice. *See Hinchman*, 192 N.C. App. 657 (defendant showed no prejudice resulting from the State's mistake in captioning its motion to appeal as having been filed in the district court division instead of superior court); *Ward*, 127 N.C. App. 115 (State's appeal designated as "Notice of Appeal" and setting forth the legal bases on which it sought review was sufficient to vest the superior court with jurisdiction even though the document was not labeled a "motion" as required by G.S. 15A-1432(b)).

The State and the defendant are entitled to file briefs addressing the motion and to adequate time for their preparation, "consonant with the expeditious handling of the appeal." G.S. 15A-1432(c).

Scope of review. The superior court must conduct a de novo review of the district court's decision. Since district courts are not courts of record, there would be no way for the superior court to exercise appellate-like jurisdiction to determine whether the district court's findings of fact and conclusions of law were sufficient. In many instances, the only way for a superior court judge to determine whether the district court's order should be affirmed or reversed will be to hold a full evidentiary hearing. *See Ward*, 127 N.C. App. 115; *State v. Gurganus*, 71 N.C. App. 95 (1984).

De novo review in this context does not mean that the State has the opportunity for a new trial on the merits, as when a defendant appeals for a trial de novo in superior court. The hearing in superior court on the State's appeal is limited to a de novo review of the district court's order dismissing criminal charges against a defendant or granting a motion for a new trial based on newly discovered evidence. *Gurganus*, 71 N.C. App. 95 (State was only entitled to a hearing de novo on the issue of whether the second prosecution of the charges by the State was barred by double jeopardy).

Disposition by superior court. If the superior court finds that the district court's decision was erroneous, it must reinstate the charges and remand the case to district court for further proceedings. The defendant may appeal from this order to the appellate division "as in the case of other orders of the superior court." This is true even though the appeal is interlocutory if the defendant, or his or her attorney, certifies to the superior court judge "that the appeal is not taken for the purpose of delay" and "the judge finds the cause is appropriately justiciable in the appellate division as an interlocutory matter." G.S. 15A-1432(d).

If the superior court finds that the district court's decision was correct, it must enter an order affirming the district court judgment. The State may appeal from this order to the appellate division if the district attorney certifies to the ruling judge that the appeal is not taken for the

purpose of delay. G.S. 15A-1432(e).

Additional resources. For further information on double jeopardy and the State's right to appeal, see Robert L. Farb, *Criminal Pleadings, State's Appeal from District Court, and Double Jeopardy Issues*, UNC SCH. OF GOV'T (Feb. 1, 2010), www.sog.unc.edu/sites/www.sog.unc.edu/files/pleadjep.pdf, and Robert L. Farb, *Double Jeopardy, Ex Post Facto, and Related Issues*, UNC SCH. OF GOV'T (Jan. 2007), www.sog.unc.edu/sites/www.sog.unc.edu/files/djoverview.pdf.

B. State's Right to Appeal from a District Court's "Preliminary Determination" in Implied-Consent Cases

The Motor Vehicle Driver Protection Act of 2006 set forth specific procedures that must be followed for implied-consent offenses committed on or after December 1, 2006. When a district court judge determines that a defendant's pretrial motion to suppress or dismiss made pursuant to G.S. 20-38.6(a) should be granted, he or she must issue a written "preliminary determination" setting forth findings of fact and conclusions of law. G.S. 20-38.6(f). The State may appeal from that "preliminary determination" to superior court. If there is a dispute about the findings of fact, the superior court is not bound by the district court's findings and must determine the matter de novo. G.S. 20-38.7(a). The superior court will determine the merits of the defendant's motion and remand to district court for the entry of final judgment.

If the judge affirms the district court's "preliminary determination" granting the defendant's motion to suppress or dismiss and remands for the entry of final judgment, the State has no statutory right to appeal but may petition the N.C. Court of Appeals for a writ of certiorari. *See State v. Fowler*, 197 N.C. App. 1 (2009); *State v. Palmer*, 197 N.C. App. 201 (2009).

The defendant may not appeal from a district court judge's determination that his or her pretrial motion to suppress or dismiss made pursuant to G.S. 20-38.6(a) should be denied. He or she must wait and appeal for a trial de novo if convicted of the offense. *See* G.S. 20-38.7(b).

Additional resources. For a detailed discussion of the procedures applicable to and issues surrounding appeals from a district court's "preliminary determination," 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, and 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.

C. State's Right to Appeal from Superior Court Judgment

Statutory right to appeal. Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from superior court to the appellate courts in the

following instances:

1. when there has been a decision or judgment dismissing criminal charges as to one or more counts;
2. after a motion for a new trial on the ground of newly discovered or newly available evidence is granted but only on questions of law;
3. when the State alleges that the sentence imposed
   - results from an incorrect determination of the defendant's prior record level or the defendant's prior conviction level,
   - contains a type of sentence disposition that is not authorized by statute for the defendant's class of offense and prior record or conviction level,
   - contains a term of imprisonment that is for a duration not authorized by statute for the defendant's class of offense and prior record or conviction level, or
   - imposes an intermediate punishment pursuant to G.S. 15A-1340.13(g) based on findings of extraordinary mitigating circumstances that are not supported by evidence or are insufficient as a matter of law to support the dispositional deviation.

G.S. 15A-1445(a).

Appeals from the granting of a defendant's motion to suppress. The State also may appeal from an order by the superior court granting a defendant's motion to suppress before trial pursuant to G.S. 15A-979. *See* G.S. 15A-1445(b). The prosecutor must certify to the trial judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case. G.S. 15A-979(c). The appeal is directed to the appellate court that would have jurisdiction if the defendant were found guilty of the charge and received the maximum punishment. If the order suppressing the evidence affects multiple charges, the State's appeal is to the court with jurisdiction over the offense carrying the highest punishment. *Id.*

When double jeopardy attaches. The State is precluded from appealing from a judgment dismissing the charges for insufficient evidence *if reversal by the reviewing court would result in further prosecution*. *See supra* § 30.4, Effect of Dismissal; *cf. United States v. Scott*, 437 U.S. 82, 91 (1978) (in accordance with double jeopardy principles, "[a] judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal"). This is true even if the judge's ruling was clearly erroneous. *See State v. Morgan*, 189 N.C. App. 716 (2008); *see also Smith v. Massachusetts*, 543 U.S. 462, 473 (2005) (acknowledging "the well-established rule" that the double jeopardy bar will attach to a pre-verdict acquittal even if it is "patently wrong in law"). Thus, the State cannot appeal from the superior court to the appellate division when the defendant's motion to dismiss for insufficient evidence is granted. *See State v. Ausley*, 78 N.C. App. 791 (1986); *State v. Murrell*, 54 N.C. App. 342 (1981).

Jeopardy attaches in superior court "when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and

sworn." *See State v. Cutshall*, 278 N.C. 334, 344 (1971). Thus, the critical time for jeopardy purposes in a jury trial is the empanelment and swearing of the jury, not the taking of testimony of the first witness.

Double jeopardy will prohibit further prosecution in cases where the trial judge grants a defendant's motion to dismiss based on insufficient evidence *before the verdict* because "a reversal at the appellate level would result in a new trial—requiring defendant to once again defend himself, with all the emotional and monetary burdens associated therewith." *See State v. Scott*, 146 N.C. App. 283, 286 (2001), *rev'd on other grounds*, 356 N.C. 591 (2002); *see also United States v. Scott*, 437 U.S. 82, 91 (1978) ("A judgment of acquittal . . . based . . . on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal."). As long as the motion to dismiss is granted after the jury has been empaneled but has not yet rendered a verdict, the State is barred from appealing the decision.

If the trial judge grants a dismissal *after the verdict* is returned, the State is free to appeal and the conviction may be reinstated if the appellate court finds that the trial judge erroneously granted the motion. Double jeopardy does not prohibit an appeal in that instance because the jury already has rendered its verdict and, if the State is successful on appeal, the verdict can be reinstated without subjecting a defendant to retrial. *See State v. Hernandez*, 188 N.C. App. 193 (2008).

Additional resources. For further information on double jeopardy and the State's right to appeal, see Robert L. Farb, *Double Jeopardy, Ex Post Facto, and Related Issues*, UNC SCH. OF GOV'T (Jan. 2007), www.sog.unc.edu/sites/www.sog.unc.edu/files/djoverview.pdf.

35.3 Motions for Appropriate Relief

A. In General

A motion for appropriate relief (MAR) is a motion made after verdict (or after sentencing if the defendant pled guilty and there was no verdict) to correct any error occurring before, during, or after a criminal trial or proceeding. *State v. Handy*, 326 N.C. 532 (1990). Article 89 of Chapter 15A addresses motions for appropriate relief and was enacted to provide "a single, unified procedure for raising at the trial level errors which are asserted to have been made during" a defendant's criminal trial. Ch. 15A, art. 89 Official Commentary. The MAR provided for in Article 89 was intended by the General Assembly "to replace motions in arrest of judgment, motions to set aside the verdict, motions for new trial, post-conviction proceedings, *coram nobis* and all other post-trial motions, but was not intended as a bar to relief by writ of habeas corpus." *State v. Bush*, 307 N.C. 152, 165–66 (1982) (citing G.S. 15A-1411(c)).

The procedures required by Article 89 are quite detailed and somewhat complicated. A failure to comply with the statutory requirements may result in the dismissal of the motion or the denial of relief. *See, e.g.*, *State v. Jones*, 317 N.C. 487 (1986) (MAR after ten-day

time limit for that type of MAR was properly denied by superior court judge on the ground that the superior court no longer had jurisdiction); *State v. Moore*, 185 N.C. App. 257 (2007) (defendant failed to properly present a Sixth Amendment argument to the trial judge in accordance with the rules governing MARs where he filed neither a new MAR nor a written amendment adding this argument either before or after the hearing on his original MAR); *see also State v. Riley*, 137 N.C. App. 403 (2000) (denying defendant's MAR because, among other things, he was in a position to have raised the issue on a previous appeal and failed to do so).

B. Types of Motions for Appropriate Relief by Defendant

MAR within ten days of judgment. Article 89 provides for two types of MARs. The first is governed by G.S. 15A-1414. Under this statute, a defendant may seek relief for any error that occurred before or during trial. The MAR must be filed within ten days after entry of judgment and may be acted on by the trial court even if notice of appeal has already been given. G.S. 15A-1414(a), (c). The errors that may be asserted under this statute include but are not limited to the following:

- the trial judge erroneously failed to dismiss the charge before trial pursuant to G.S. 15A-954;
- the trial judge ruled contrary to law with regard to motions made before and during trial or with regard to the admission or exclusion of evidence;
- at the close of all the evidence, the trial judge erroneously failed to dismiss the charges based on insufficiency of the evidence (whether or not a motion to dismiss was made before the verdict was rendered);
- the trial judge gave erroneous jury instructions;
- the verdict was contrary to the weight of the evidence (this ground is discussed in more detail *supra* in § 30.3D);
- the sentence imposed was not supported by the evidence introduced at trial and at the sentencing hearing; and
- for any other cause the defendant did not receive a fair and impartial trial.

G.S. 15A-1414(b).

MAR at any time after judgment. The second type of MAR is governed by G.S. 15A-1415 and may be filed by a defendant at any time after verdict in non-capital cases. Capital cases have an outer time limit, and MARs in those cases must be filed in accordance with the requirements of G.S. 15A-1415(a). The defendant may raise the following grounds for relief under G.S. 15A-1415(b):

- at the time the defendant committed the acts charged, they did not amount to a violation of criminal law;
- the trial court did not have personal jurisdiction over the defendant or subject matter jurisdiction;
- the conviction was obtained in violation of the state or federal constitution;
- the statute under which the defendant was convicted or sentenced violated the state or

federal constitution;
- the conduct for which the defendant was prosecuted was protected by the state or federal constitution;
- there has been a significant change in law, either substantive or procedural, applied in the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required;
- the sentence imposed was unauthorized at the time imposed, contained a type of sentence disposition or a term of imprisonment not authorized for the particular class of offense and prior record or conviction level, was illegally imposed, or is otherwise invalid as a matter of law; and
- the defendant is entitled to be released from confinement because his or her sentence has been fully served.

A defendant also may file a MAR alleging newly discovered evidence under this statute; however, this type of motion must be filed "within a reasonable time of its discovery." G.S. 15A-1415(c).

Note: The State has a limited right to make a motion for appropriate relief as described in G.S. 15A-1416.

C. Additional Resources

For a resource on the requirements and procedures for making motions for appropriate relief in North Carolina, see Jessica Smith, *Motions for Appropriate Relief*, ADMINISTRATION OF JUSTICE BULLETIN No. 2010/03 (June 2010), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1003.pdf. For a condensed version, see Jessica Smith, *Motions for Appropriate Relief* (July 2010), *in* THE SURVIVAL GUIDE: SUPERIOR COURT JUDGES' BENCHBOOK, www.sog.unc.edu/node/2167.

35.4 State Habeas Corpus

A. In General

A defendant who is imprisoned in North Carolina for any criminal or supposed criminal matter may challenge the lawfulness of his or her custody by applying for a writ of habeas corpus (ad subjiciendum). *See* G.S. 17-3. This writ was known as the "great Writ of Right." *See State v. Herndon*, 107 N.C. 934, 936 (1890); *see also In re Holley*, 154 N.C. 163, 168 (1910) (the writ of habeas corpus is "the most important, perhaps, in our system of government, having its origin long prior to Magna Charta"). The purpose of this ancient writ "'is to give a person restrained of his liberty an immediate hearing so that the legality of his detention may be inquired into and determined.'" *State v. Lewis*, 274 N.C. 438, 441 (1968) (citation omitted). It is not the purpose of the writ of habeas corpus to determine the guilt or innocence of a prisoner. 39 AM. JUR. 2D *Habeas Corpus and Postconviction Remedies* § 1 (2008).

Habeas corpus is a collateral attack on a judgment of imprisonment and is not a substitute for appeal. *In re Palmer*, 265 N.C. 485 (1965); *In re Burton*, 257 N.C. 534 (1962). A court in a habeas corpus proceeding is not allowed to act as an appeals court and review a conviction for errors—its function is solely to determine whether the applicant is being held unlawfully. *See State v. Cannon*, 244 N.C. 399 (1956). If the defendant is seeking review of errors occurring at trial or sentencing, he or she should appeal the judgment directly, file a petition for a writ of certiorari, or file a motion for appropriate relief. *See, e.g., State v. Hamrick*, 2 N.C. App. 227 (1968) (although defendant entitled his petition "Application for Writ of Habeas Corpus," it was in substance a motion for appropriate relief since it alleged trial error, and the trial judge should have handled it in that manner).

B. Authority and Procedures for Writ

The writ of habeas corpus is guaranteed by article I, section 21 of the N.C. Constitution [previously article I, sections 18 and 21]. Chapter 17 of the N.C. General Statutes implements the right to habeas corpus, setting out the procedural requirements for the application and enforcement of the writ.

The application for the writ must be made in writing and signed by the applicant. It may be demanded of any one of the justices or judges of the appellate division or of any superior court judge whether or not court is in session. G.S. 17-6; *see also* 1 NORTH CAROLINA DEFENDER MANUAL § 10.8H (Writ of Habeas Corpus) (Oct. 2010) (discussing authority of individual judges to hear writ). Additional materials on applying for a habeas corpus writ, including form applications and orders, can be found on the website of the N.C. Office of Indigent Defense Services, www.ncids.org. Highlight Training & Resources, click on Training Materials and then Training Materials—Indexed by Subject, and scroll down to Habeas Corpus.

For special procedures pertaining to habeas corpus applications in capital cases, see Rule 25 of the General Rules of Practice for the Superior and District Courts.

C. Scope of Writ

Traditionally, at common law an applicant in a habeas corpus proceeding could be released from imprisonment only if the record disclosed that the court that imprisoned him or her did not have jurisdiction of the offense or of the person of the defendant, or that the judgment was void because it was not authorized by law. *See, e.g., In re Burton*, 257 N.C. 534, 540 (1962) ("The only questions open to inquiry [in a habeas corpus proceeding] are whether on the record the court which imposed the sentence had jurisdiction of the matter or had exceeded its powers."). However, the scope of the court's habeas corpus jurisdiction has been expanded and is now much broader. *See Hoffman v. Edwards*, 48 N.C. App. 559 (1980) (noting that G.S. 17-33(2) broadened the scope of habeas corpus to allow a party to be discharged from custody even though the original imprisonment was lawful where some act, omission, or event that took place afterwards causes the party to be entitled to release); *see also In re Imprisonment of Stevens*, 28 N.C. App. 471 (1976) (same).

Pursuant to G.S. 17-33, an applicant must be released from custody if no legal cause is found for the imprisonment or restraint. Additionally, if it appears that the applicant is in custody by process issued by a legally constituted court or by an officer in the course of judicial proceedings authorized by law, he or she may be discharged if:

- the jurisdiction of such court or officer was exceeded, either as to matter, place, sum, or person;
- the original imprisonment was lawful but some subsequent act, omission, or event has caused the applicant to become entitled to be discharged;
- the process was defective causing it to be void;
- the process, although in proper form, was issued in a case not allowed by law;
- the person having custody of the applicant under such process is not the person empowered by law to detain him or her; or
- the process was not authorized by any judgment, order, or decree of any court, nor by any provision of law.

G.S. 17-33(1)–(6).

D. Selected Examples

Reported cases indicate that defendants have applied for writs of habeas corpus in the following circumstances. The list does not exhaust the possible uses of the writ, however. Defendants have applied for habeas corpus writs to:

- Challenge the defendant's continued imprisonment because the life sentence imposed on him for first-degree murder committed in 1975 was defined by statute as a term of eighty years and the defendant alleged that he had earned sufficient credits to have completed the sentence. *Jones v. Keller*, 364 N.C. 249 (2010).
- Inquire into the legality of the defendant's continued imprisonment beyond the maximum term set for committed youthful offenders. *State v. Niccum*, 293 N.C. 276 (1977).
- Seek immediate release from custody on the basis that the defendant was not the individual who was indicted for the crime. *State v. Lewis*, 274 N.C. 438 (1968).
- Test the legality of an attorney's imprisonment where a judge found the attorney to be in contempt of court and imprisoned him for ten days. *In re Burton*, 257 N.C. 534 (1962).
- Procure immediate release where the defendant's sentence of imprisonment was for a term in excess of that allowed by law and the defendant had already served the maximum sentence authorized by law. *State v. Austin*, 241 N.C. 548 (1955).
- Contest the defendant's restraint where he was imprisoned for allegedly violating the conditions of a suspended judgment without the opportunity for a hearing on the alleged violation. *State v. Phillips*, 185 N.C. 614 (1923).

See also 1 NORTH CAROLINA DEFENDER MANUAL § 1.8A (Who Hears the Motion) (Aug. 2010) (noting possibility of habeas corpus review of district court pretrial release determination); 1 NORTH CAROLINA DEFENDER MANUAL § 3.2C (Scheduling Requirements) (Nov. 2008) (discussing use of writ to challenge defendant's continued detention in cases in

which a probable cause hearing has not been held within statutory time limits).

E. Appeal from Adverse Ruling

The applicant does not have an appeal of right from an order denying a writ of habeas corpus but may petition the appropriate appellate court for a writ of certiorari. *See State v. Niccum*, 293 N.C. 276 (1977); *State v. Wambach*, 136 N.C. App. 842 (2000). *But cf.* N.C. R. APP. P. 21(a) (authorizing appellate courts to grant a writ of certiorari only in the following three situations: (1) where the party lost the right to appeal by failing to take timely action; (2) where the order appealed from is interlocutory and there is no right of appeal; or (3) to review a trial judge's denial of a motion for appropriate relief).

F. Additional Resources

For a further discussion of the law related to state habeas corpus writs, see Jessica Smith *Habeas Corpus* (Jan. 2010), *in* THE SURVIVAL GUIDE: SUPERIOR COURT JUDGES' BENCHBOOK, www.sog.unc.edu/node/2166.

35.5 Resentencing after Successful Appellate or Post-Conviction Review

A. In General

Federal constitutional requirements. At a resentencing hearing, due process of law "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969). "[D]ue process also requires that a defendant be freed of apprehension of . . . a retaliatory motivation on the part of the sentencing judge" at resentencing; otherwise, "the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his [or her] first conviction." *Id.*

In *Pearce*, the U.S. Supreme Court held that whenever a harsher sentence is imposed at resentencing, the record must affirmatively show the existence of factors that would justify a more severe sentence. The reasons for the increased sentence "must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Id.* at 726. If the reasons do not appear in the record, the harsher sentence will be presumed to be retaliatory and in violation of the Due Process Clause. Additionally, the defendant must be given credit for the time he or she spent in custody before resentencing.

Although a more severe punishment may violate the Due Process Clause, "neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction." *Id.* at 723. A judge at resentencing "is not constitutionally precluded . . . from imposing a new sentence, whether greater or less than the original sentence, in light of events subsequent to the first trial that may have thrown

new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.'" *Id.* (citation omitted); *see also Alabama v. Smith*, 490 U.S. 794 (1989) (holding that presumption of vindictiveness does not apply if defendant successfully appeals a guilty plea and then goes to trial and receives harsher sentence because of the additional information the trial judge obtains from a trial; placing burden on defendant in these circumstances to show actual vindictiveness in violation of due process).

Broader protection of state statute. In 1977, the General Assembly codified and expanded the rule established in *Pearce.* G.S. 15A-1335 provides a broad rule that whenever a superior court judgment has been set aside on direct review or collateral attack, the resentencing judge 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 original sentence less the portion of the original sentence that the defendant has previously served. *See also* G.S. 15A-1335 Official Commentary (stating that "[t]his section embodies generally the rule of *North Carolina v. Pearce* . . . but does not allow a more severe sentence even if intervening factors would argue for a more severe sentence, as the *Pearce* decision permits"). While this statute provides defendants with greater protection against retaliation or vindictiveness for exercising the right to appeal or collaterally attack a judgment, the statute may have some surprising exceptions, discussed in B., below, of which counsel must be aware in advising clients.

B. Applicability of G.S. 15A-1335

Unlike the rule applicable in federal courts, G.S. 15A-1335 applies to resentencings held after a successful attack on a superior court judgment regardless of whether the original conviction was the result of a jury trial or a guilty plea. *Compare State v. Wagner*, 356 N.C. 599, 602 (2002) (finding that for the purposes of G.S. 15A-1335, "the fact that defendant's original conviction resulted from a negotiated plea bargain rather than a finding of guilty by a jury is of no consequence"), *with Alabama v. Smith*, 490 U.S. 794 (1989) (holding that no presumption of vindictiveness under the U.S. Constitution arises when a defendant's original sentence was based on a guilty plea and the subsequent sentence follows a trial). Per *Wagner*, the statute appears to preclude a court from imposing a more severe sentence for a conviction that has been set aside regardless of whether the original sentence resulted from a negotiated plea or an open plea and regardless of whether the defendant, after vacation of the original sentence, reenters a guilty plea or is found guilty after a jury trial. *See also State v. Dunston*, 193 N.C. App. 247 (2008) (unpublished) (applying rule in case involving jury trial after negotiated guilty plea was set aside); *State v. Burton*, 187 N.C. App. 510 (2007) (unpublished) (applying rule in case involving negotiated guilty plea after earlier negotiated guilty plea was set aside).

Exceptions to G.S. 15A-1335 exist, however. The statute does not:

- Apply to de novo appeals from district court to superior court. *State v. Burbank*, 59 N.C. App. 543, 547 (1982) ("the possibility of a more severe sentence being imposed is a risk inherent to this type of review"). *But cf.* 1 NORTH CAROLINA DEFENDER MANUAL § 10.7B (Misdemeanor Appeals from District Court) (Oct. 2010) (discussing limits on

filing of more serious charges on appeal for a trial de novo).

- Bar a more severe sentence when that sentence is statutorily mandated by the General Assembly. *See State v. Kirkpatrick*, 89 N.C. App. 353 (1988) (judge was required to increase defendant's sentence from three to fifteen years on resentencing because the habitual felon statute required it); *State v. Williams*, 74 N.C. App. 728 (1985) (imposition of fourteen-year sentence for armed robbery was proper even though it was two years more than defendant had originally received because the judge imposed the statutory mandatory sentence and had no discretion to impose a lesser sentence).
- Prohibit a resentencing judge from consolidating the convictions in a manner different from the original judge so long as the total sentence is not greater than the original sentence. *State v. Moffitt*, 185 N.C. App. 308 (2007).
- Apply to sentences imposed after the State properly prays judgment on previously arrested convictions. *State v. Pakulski*, 106 N.C. App. 444, 452 (1992) (where first-degree felony murder conviction was overturned on appeal, trial judge could impose life sentence for armed robbery conviction that was predicate felony for murder and originally had been arrested; sentence did "not constitute a resentencing within the meaning of G.S. 15A-1335").
- Prohibit a resentencing judge from changing concurrent sentences to consecutive sentences "provided neither the individual sentences, nor the aggregate sentence, exceeds that imposed at the original sentencing hearing." *State v. Oliver*, 155 N.C. App. 209, 211 (2002); *see also State v. Ransom*, 80 N.C. App. 711 (1986).
- Prevent a resentencing judge from finding new or different aggravating or mitigating factors so long as the sentence is not more severe than the original sentence. *State v. Hemby*, 333 N.C. 331 (1993).

The following two circumstances may constitute significant additional exceptions to the bar in G.S. 15A-1335, but the law is unsettled.

Reinstatement of charges previously dismissed pursuant to a plea agreement. If the defendant is successful in having his or her guilty plea vacated on appeal or by collateral attack, any charges that had been dismissed by the State as part of a negotiated plea agreement could be reinstated. The Court of Appeals has held (albeit in an opinion without precedential value) that G.S. 15A-1335 does not bar the imposition of a sentence on those reinstated charges since that statute only applies to "conviction[s] or sentence[s] imposed in superior court [that] ha[ve] been set aside on direct review or collateral attack." *See State v. Williams*, 180 N.C. App. 477 (2006) (unpublished) (defendant improperly given a more severe sentence on a charge he had originally pled to but properly given a consecutive sentence on a charge that had been dismissed under the original plea agreement for which he was subsequently convicted). *But cf.* G.S. 15A-1335 (bar on greater sentence applies to the same offense or "a different offense based on the same conduct").

Reinstatement of and sentencing on greater offense following vacation of negotiated plea to lesser offense. It is unsettled what the result would be under G.S. 15A-1335 if a defendant successfully obtains vacation of his or her guilty plea to a lesser included offense and then is convicted of the original greater offense. The language of the statute would appear to prohibit the imposition of a harsher sentence since it applies to a resentencing for

"a different offense based on the same conduct." The issue, however, has not been squarely decided by the North Carolina appellate courts.

The N.C. Court of Appeals directly ruled on the issue in *State v. Rico*, No. COA10-1536 (Dec. 6, 2011), but the case was withdrawn one week later. In *Rico*, the defendant and the State had entered into a plea agreement whereby the defendant would plead guilty to voluntary manslaughter and admit the existence of the aggravating factor that he used a deadly weapon at the time of the alleged crime in exchange for the State's dismissal of the first degree murder charge. Under the plea agreement, the defendant was to receive a specified active sentence in the aggravated range. Almost a year after the defendant pled guilty, he filed a motion for appropriate relief seeking relief from the judgment. The judge hearing the MAR amended the original judgment in an attempt to correct procedural errors and ultimately denied the remainder of the allegations. [The specific allegations and rulings on procedural errors are not detailed here since they are not relevant to this discussion.] The Court of Appeals found, among other things, that the defendant's plea agreement had to be set aside, holding that it was improper under the facts of the case to use the aggravating factor that "defendant used a deadly weapon at the time of the crime" to elevate the defendant's sentence because it also was an element of the offense of voluntary manslaughter. Concerned that a post-conviction motion could be made and ruled on years after a conviction, thereby possibly depriving the State of evidence or witnesses, the court held that the State, on remand, could choose to (1) re-indict the defendant on the greater offense that had been dismissed in exchange for his plea to a lesser offense and to an aggravated sentence; or (2) have the defendant resentenced on his guilty plea to the lesser offense. The court noted that regardless of which choice the State elected to make, G.S. 15A-1335 would apply to prohibit a more severe sentence on remand.

The Court of Appeals filed its new opinion in the case the following month. *State v. Rico*, ___ N.C. App. ___, 720 S.E.2d 801 (2012), *writ of supersedeas and motion for temporary stay allowed*, ___ N.C. ___, 721 S.E.2d 229 (2012). In that opinion, the court removed the language from its earlier decision finding that the plea agreement must be set aside as well as the language dealing with the consequences that would have ensued in that event. The court instead found that there was a mistake in a material portion of the plea agreement because the agreement erroneously required the defendant to admit to the existence of the aggravating factor that was an element of the offense. The court held the plea agreement should not be set aside because the defendant had fully performed his part under the plea agreement and it would be inequitable to release the State from its obligations under the agreement. According to the court, the State bears a higher degree of responsibility for the contents of a plea agreement since it should be well cognizant of the law. The court then vacated the judgment and the order denying the defendant's motion for appropriate relief and remanded the case for resentencing on the defendant's guilty plea to voluntary manslaughter.

The N.C. Supreme Court has granted the State's petition for writ of supersedeas pending its review of the N.C. Court of Appeals' decision. Thus, it remains an open question for the time being as to how G.S. 15A-1335 will be interpreted with regard to the imposition of a more severe sentence based on a greater offense after a defendant has successfully attacked

a guilty plea to a lesser included offense.

Practice note: Great care must be taken when advising a client who is considering an attack on a guilty plea to a lesser included offense, as the law remains unsettled. If the N.C. appellate courts ultimately conclude that G.S. 15A-1335 is inapplicable, a defendant who pleads guilty to a lesser included offense and then seeks to have it vacated may be subjecting himself or herself to re-prosecution on the greater offense and imposition of a more severe sentence. As a matter of federal constitutional law, if a defendant undoes the plea, no presumption of vindictiveness applies to protect against a harsher sentence. *See Alabama v. Smith*, 490 U.S. 794 (1989). Counsel therefore should very explicitly explain the risks to a client who is seeking to undo a plea to a lesser charge.

For an annotation collecting and analyzing state and federal cases discussing whether a defendant may properly be tried on a greater charge after a successful attack on his or her guilty plea to a lesser charge, see Michael A. DiSabatino, Annotation, *Retrial on Greater Offense Following Reversal of Plea-based Conviction of Lesser Offense*, 14 A.L.R.4th 970 (2008).

C. Additional Resources

For further discussion of the topic covered in this section, see Jessica Smith, *Limitations on a Judge's Authority to Impose a More Severe Sentence after a Defendant's Successful Appeal or Collateral Attack*, ADMINISTRATION OF JUSTICE BULLETIN No. 2003/03 (UNC School of Government, July 2003), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/aoj200303.pdf.

35.6 Trial Judges' Authority to Correct, Modify, or Amend Judgments

When errors in a judgment are discovered after the sentence has been pronounced, a party or the judge, sua sponte, may seek to correct them. Whether or not the trial judge may correct the error or modify, amend, or vacate the judgment depends on several variables, discussed below.

A. Changes to Judgment Made During Same Session of Court

Generally. A trial judge has the discretion to modify, amend, or set aside his or her judgment during the same session of court. *State v. Mead*, 184 N.C. App. 306 (2007), *aff'd*, 362 N.C. 218 (2008); *see also State v. Sammartino*, 120 N.C. App. 597, 600 (1995) (trial judge had authority to modify judgments to increase defendants' sentences because the original judgments and modified judgments were entered during the week of court assigned to the trial judge and "there had been no adjournment *sine die*"). This is true even if notice of appeal has been given. *State v. Davis*, 58 N.C. App. 330 (1982); *In re Tuttle*, 36 N.C. App. 222 (1978). During this time period the judgment is said to be in fieri, i.e., incomplete, not final. *See State v. Garris*, 191 N.C. App. 276 (2008).

Definition of "session." A "session of court" in superior court has been defined "as the time during which a court sits for business and refers to a typical one-week assignment of court." *Sammartino*, 120 N.C. App. 597, 599.

A district court session typically lasts one day. *See* Michael Crowell, *Out-of-Term, Out-of-Session, Out-of-County*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/05 (UNC School of Government, Nov. 2008), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0805.pdf; *see also* Alyson Grine, *District Court is in Session . . . But for How Long?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Nov. 20, 2009) (discussing multiday sessions in district court), http://sogweb.sog.unc.edu/blogs/ncclaw/?p=876.

A session of court may be extended by the trial judge if a trial is not completed by the close of that session of court. For further discussion of the extension of a session of court to complete a trial and to enter orders after session, see 1 NORTH CAROLINA DEFENDER MANUAL § 10.8D (Extending Session to Complete Trial) (Oct. 2010).

B. Changes to Judgment Made After Expiration of Court Session

Clerical errors. A trial judge may correct a clerical mistake regardless of whether the session of court has expired in order to make the record "speak the truth." *See, e.g.*, *State v. Dixon*, 139 N.C. App. 332 (2000); *State v. Davis*, 123 N.C. App. 240 (1996). "Clerical error" has been defined as "'[a]n error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination.'" *State v. Jarman*, 140 N.C. App. 198, 202 (2000) (quoting BLACK'S LAW DICTIONARY 563 (7th ed. 1999), but not adopting the dictionary's definition). Although a judge is authorized to make the record correspond to the actual facts, he or she "cannot, under the guise of an amendment of its records, correct a judicial error [discussed below] or incorporate anything in the minutes except a recital of what actually occurred." *State v. Cannon*¸ 244 N.C. 399, 404 (1956).

If notice of appeal has been given, the trial judge may continue to correct clerical errors until the time that the record on appeal is filed in the appellate court. Once the record on appeal has been filed, the trial judge may only amend or correct its judgment if so directed by the appellate court. *Dixon*, 139 N.C. App. 332.

Non-clerical errors. A judge's authority to modify a judgment to correct a non-clerical, or "judicial error," is limited. After the session has concluded, a trial judge may make changes to his or her judgment and sentence within ten days if a proper motion for appropriate relief is made by the defendant pursuant to G.S. 15A-1414 or by the State pursuant to G.S. 15A-1416. After ten days, a judgment may be modified if a proper motion for appropriate relief is made by the defendant pursuant to G.S. 15A-1415. A trial judge, on his or her own motion, also may grant relief *to the defendant* if at any time the defendant would be entitled to relief by way of a MAR. *See* G.S. 15A-1420(d). A judge also may vacate a judgment on a defendant's application for habeas corpus. *See supra* § 35.4, State Habeas Corpus.

Illegal sentences. Although the general rule is that after a session of court has concluded a

trial judge may not make modifications or changes to a judgment other than to correct clerical errors (absent authority conferred by the post-conviction MAR statutes or by way of a petition for habeas corpus), it appears that a judge has the authority to correct a judicial error when the error resulted in an illegal sentence. *See State v. Branch*, 134 N.C. App. 637 (1999) (trial judge, after notification by the Department of Correction that defendant's sentence was illegal as a matter of law, had the authority to correct an illegal judgment even though the session of court had ended and no motion for appropriate relief had been filed to correct the sentence); *State v. Bonds*, 45 N.C. App. 62, 64 (1980) (stating that after a session expires, North Carolina courts "have always had the authority" after a session expires to vacate judgments that are invalid as a matter of law "pursuant to petition for writ of habeas corpus and, more recently, by way of post conviction proceedings").

Additional resources. For further discussion of a trial judge's authority to modify a judgment to correct clerical and non-clerical errors, see Jessica Smith, *Trial Judge's Authority to* Sua Sponte *Correct Errors After Entry of Judgment in a Criminal Case*, ADMINISTRATION OF JUSTICE BULLETIN No. 2003/02 (UNC School of Government, May 2003), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/aoj200302.pdf.

35.7 Extraordinary Writs

A. Mandamus

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

Mandamus is a civil action and is the proper remedy when a trial judge fails or refuses to perform a particular duty that is required by law. *See* 52 AM. JUR. 2D *Mandamus* §1 (2000). Mandamus may be issued only to enforce established rights, not to create new ones. If there is another legally adequate remedy, such as an appeal, mandamus will not lie. *In re T.H.T.*, 362 N.C. 446.

The writ will be granted "only in case of necessity" and "will not issue to compel the performance of an act which a defendant shows a willingness to perform without coercion." *Sutton v. Figgatt*, 280 N.C. 89, 93 (1971) (writ of mandamus would not issue ordering a magistrate to examine plaintiffs under oath about their complaints that deputies had assaulted them because the magistrate announced in open court his readiness to perform this duty and waited several hours but plaintiffs never availed themselves of the opportunity).

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

1. The petitioner must demonstrate a clear legal right to the act requested.

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

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

Who can issue. The N.C. Supreme Court and the N.C. Court of Appeals have jurisdiction, exercisable by one or more judges or justices, to issue a writ of mandamus "to supervise and control the proceedings" of inferior courts. G.S. 7A-32(b), (c). A superior court judge has no authority or jurisdiction to issue a writ of mandamus to a district court judge. *In re Redwine*, 312 N.C. 482 (1984). That power is reserved to the appellate courts. *Id.*; *see* N.C. CONST. art. IV, § 12(1), (2); G.S. 7A-32.

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

Procedural requirements. The procedures for filing a petition for writ of mandamus are set out in Rule 22 of the N.C. Rules of Appellate Procedure.

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

- Where a trial judge refused to hold voluntary admissions hearings for juveniles residing in a state mental treatment facility. *State ex rel. Goff v. Wilkinson*, 302 N.C. 393 (1981).
- Where a trial judge failed to enter a timely order. *See In re T.H.T.*, 362 N.C. 446 (2008) (trial judge failed to adhere to the statutory time limit set in the Juvenile Code for entering a written order in an abuse and neglect case brought by the department of social services); *Stevens v. Guzman*, 140 N.C. App. 780 (2000) (trial judge failed to enter a written order denying the plaintiff's motions for a judgment notwithstanding the verdict and a new trial).

B. Prohibition

Generally. A writ of prohibition is a discretionary writ that issues to a lower court from a higher court having supervision and control to prevent the lower court from proceeding further in a pending matter. It is the opposite of a writ of mandamus. As its name indicates, it prohibits action instead of compelling action. *State v. Whitaker*, 114 N.C. 818 (1894).

The writ has been commonly defined as one that prevents a tribunal possessing judicial or quasi-judicial powers from exercising jurisdiction over matters that are not within its jurisdiction or from exceeding its legitimate powers. *See* 63C AM. JUR. 2D *Prohibition* §§ 1, 3 (2009). It is the proper remedy to seek when the jurisdiction of the trial court depends on a legal question rather than a factual question. 63C AM. JUR. 2D *Prohibition* § 3 (2009).

Like mandamus, prohibition will be denied if there is another remedy, such as appeal or certiorari. *See Whitaker*, 114 N.C. 818 (writ would not issue to prohibit mayor's court from hearing matter without a jury because the defendants had a right to appeal to superior court in the event they were convicted); *see also State v. Inman*, 224 N.C. 531 (1944); *Perry v. Shepherd*, 78 N.C. 83 (1878).

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

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

63C AM. JUR. 2D *Prohibition* § 8 (2009).

Who can issue. The N.C. Supreme Court and the N.C. Court of Appeals have jurisdiction, exercisable by one or more judges or justices, to issue a writ of prohibition "to supervise and control the proceedings" of inferior courts. G.S. 7A-32(b), (c). A superior court judge has no authority or jurisdiction to issue a writ of prohibition to a district court judge. *See Perry*, 78 N.C. 83. That power is reserved to the appellate courts. *See* N.C. CONST. art. IV, § 12(1), (2); G.S. 7A-32.

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

Procedural requirements. The procedures for filing a petition for writ of prohibition are set out in Rule 22 of the N.C. Rules of Appellate Procedure.

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

- where a court, without any legal authority for doing so, granted a new trial at a subsequent term after the defendant was convicted of a felony;
- to prevent a lower court from exceeding its jurisdiction by attempting to execute a judgment when an appeal from that judgment had been noted to the superior court; and
- to preclude a probate court from exercising jurisdiction over a deceased person's estate when it could not do so lawfully.

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

C. Supersedeas Pending Review of Decisions of the Trial Court

Generally. A writ of supersedeas is an extraordinary writ that issues from an appellate court to a lower court "to preserve the status quo pending the exercise of the appellate court's jurisdiction." *City of New Bern v. Walker*, 255 N.C. 355, 356 (1961). Supersedeas suspends the power of the lower court to issue an execution on the judgment or decree appealed from. 5 AM. JUR. 2D *Appellate Review* § 398 (2007).

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

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

Temporary stays. If a petition for supersedeas is filed, the applicant also may apply to the appellate court for an order temporarily staying the enforcement or execution of a trial court's judgment or order pending the appellate court's decision on the petition for supersedeas. N.C. R. APP. P. 23(e).

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

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

D. Certiorari of Trial Court Orders and Judgments

Generally. A writ of certiorari is "an extraordinary remedial writ to correct errors of law." *State v. Simmington*, 235 N.C. 612, 613 (1952). It issues from a higher court to a lower court, and it lies only to review judicial or quasi-judicial action to determine the action's validity and to correct errors therein. *State v. Roux*, 263 N.C. 149, 153 (1964).

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

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

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

When authorized. Rule 21 of the N.C. Rules of Appellate Procedure authorizes a writ of certiorari to be issued by the appellate division in appropriate circumstances to review judgments and orders of trial tribunals in three situations only:

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

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

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

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

It is not clear whether the limits applicable to writs of certiorari in the appellate division

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

Procedural requirements. The procedures for filing a petition for writ of certiorari in the appellate courts are set out in Rule 21 of the N.C. Rules of Appellate Procedure. The procedures for filing a petition for writ of certiorari in the superior court are set out in Rule 19 of the General Rules of Practice for the Superior and District Courts.

35.8 Innocence Inquiry Commission

A. In General

In 2006, the General Assembly added Article 92 to Chapter 15A, creating the North Carolina Innocence Inquiry Commission and establishing "an extraordinary procedure to investigate and determine credible claims of factual innocence." G.S. 15A-1461. North Carolina is the first state in the nation to create this type of commission.

According to its website, www.innocencecommission-nc.gov/about.html, the Commission "is charged with providing an independent and balanced truth-seeking forum for credible post-conviction claims of innocence in North Carolina." In essence, Article 92 authorizes the Commission to investigate claims of innocence and refer meritorious cases to a special three-judge panel appointed by the Chief Justice of the N.C. Supreme Court. G.S. 15A-1469(a). If, after an evidentiary hearing, the panel unanimously finds that the convicted person has proved by clear and convincing evidence that he or she is innocent of the charges, it is required to dismiss the charges. G.S. 15A-1469(h). Its decision is final and is not subject to any further review. G.S. 15A-1470(a); *see also About Us*, NORTH CAROLINA INNOCENCE INQUIRY COMMISSION, www.innocencecommission-nc.gov/about.html (last visited Dec. 15, 2011) ("A person exonerated by the Commission process is declared innocent and cannot be retried for the same crime."). The Commission is to give priority to cases in which the convicted person is currently incarcerated solely for the crime for which he or she has filed a claim of innocence. G.S. 15A-1466(2).

B. Structure of the Innocence Commission

The North Carolina Innocence Inquiry Commission is an independent commission within the Judicial Department and receives administrative support from the Administrative Office of the Courts. G.S. 15A-1462. It consists of eight members—a superior court judge, who serves as chair; a prosecutor; a victim advocate; a criminal defense attorney; a public member who is neither an attorney nor an employee of the Judicial Department; a sheriff

currently holding office at the time of appointment; and two members whose vocations are within the discretion of the Chief Justice of the N.C. Supreme Court. The Chief Justice appoints five members as specified in the act, and the Chief Judge of the N.C. Court of Appeals appoints three members. G.S. 15A-1463(a). The Director of the Commission must be a North Carolina attorney, and he or she may hire staff with the approval of the Commission Chair. G.S. 15A-1465. For more details regarding the method of appointment of Commission members, their terms, and the duties of the director, see G.S. 15A-1463 through 15A-1465.

C. Meaning of "Claim of Factual Innocence"

The Commission is authorized to consider "claims of factual innocence," as defined in G.S. 15A-1460(1). To qualify, a claim must be

- on behalf of a living person
- convicted of a felony in the North Carolina trial courts
- asserting complete innocence for the felony for which the person was convicted and for any reduced level of criminal responsibility relating to the crime
- for which there is some credible, verifiable evidence of innocence
- that has not been presented at trial or considered at a hearing granted through post-conviction relief.

The last element of the definition requires that evidence supporting the claim be "new" in a limited sense. Thus, it requires that "some" evidence be submitted in support of the claim that was not previously presented, but all of the evidence need not meet this requirement. *See also* Superior Court Judge Calvin E. Murphy, *Innocence Inquiry Commission Update* 3 (N.C. Superior Court Judges' Conference, June 2010) ("The 'new evidence' standard is merely a threshold that, once crossed, allows the panel to hear all relevant evidence of the Claimant's actual innocence."), *available at* www.sog.unc.edu/sites/www.sog.unc.edu/files/Murphy_InnocenceInquiryCommissionUpdate.pdf. The definition does not require the claimant to have been unaware of the evidence or to have been unable to obtain the evidence at the time of trial; it only requires that the evidence not have been presented at a trial or at a hearing granted through post-conviction relief. Evidence is not considered to have been previously presented in post-conviction proceedings if it was presented in support of a post-conviction request for which a hearing was not granted. *See* John Rubin, *2006 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2007/03, at 10 (UNC School of Government, Jan. 2007) (so interpreting last element of definition of claim of factual innocence, which provides that evidence must not have been "considered at a hearing granted through postconviction relief"), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0703.pdf.

D. Submission of Claim and Waiver of Rights

Any person, court, or agency may submit a claim of innocence to the Commission on behalf of a convicted person. The Commission may informally screen and dismiss a case

summarily or undertake a formal inquiry. G.S. 15A-1467(a). Before the Commission begins a formal inquiry, the convicted person must execute an agreement waiving his or her procedural safeguards and privileges and agreeing to provide full disclosure to the Commission on matters related to his or her claim of innocence. The waiver does not apply to matters unrelated to the claim. G.S. 15A-1467(b). However, evidence of criminal acts, professional misconduct, or other wrongdoing disclosed during the formal inquiry or later Commission proceedings are referred to the appropriate authority. Evidence favorable to the convicted person disclosed through the formal inquiry or later Commission proceedings also must be disclosed to the convicted person and his or her counsel. G.S. 15A-1468(d). If at any point during the inquiry, the convicted person refuses to comply with the Commission's requests or is otherwise deemed to be uncooperative, the Commission may discontinue the inquiry. G.S. 15A-1467(g).

E. Right to Counsel

The convicted person has the right to advice of counsel before executing a waiver of rights and, if a formal inquiry is conducted, throughout the formal inquiry. If the convicted person does not have counsel, the Commission Chair must determine whether the person is indigent and, if appropriate, enter an order for the appointment of counsel. G.S. 15A-1467(b); *see also* G.S. 15A-1469(e) (indigent person has right to appointed counsel in proceedings before three-judge panel).

For a discussion of appointed counsel's role, see memoranda prepared by the Office of Indigent Defense Services (IDS) and the North Carolina Center on Actual Innocence (a different organization than the Innocence Commission), a part of a collection of materials compiled by IDS. *See* INNOCENCE INQUIRY PROCEEDINGS MANUAL, www.ncids.org/Other%20Manuals/Innocence%20Inquiry/Innocence%20Inquiry%20Links.htm.

F. Notice to Victim

If the Commission proceeds with a formal inquiry, the Director must use due diligence to notify the victim in the case and explain the process. The victim has the right to present his or her views and concerns throughout the Commission's investigation. G.S. 15A-1467(c). The victim also has the right to notice of any proceedings before the full Commission, discussed below, and to attend Commission proceedings subject to limitations imposed by the Commission. G.S. 15A-1468(b); *see also* G.S. 15A-1469(f) (victim receives notice of hearing before three-judge panel).

G. Access to Evidence

The Commission has the power to issue process to compel the attendance of witnesses and production of evidence, administer oaths, and petition the superior court of Wake County or of the original jurisdiction for enforcement of process or other relief. G.S. 15A-1467(d), (e). In addition, all state discovery and disclosure statutes in effect at the time of the inquiry are enforceable as if the convicted person were being tried for the charge being investigated by the Commission. G.S. 15A-1467(f).

Practice note: In 2009, the General Assembly added an immunity provision for witnesses who provide information in proceedings before the Commission. *See* G.S. 15A-1468(a1). Counsel representing a witness in Commission proceedings should be aware that the immunity afforded by this provision is limited and may not fully protect a witness from criminal prosecution for information he or she provides. Counsel should so advise the witness and, if the Commission directs the witness to provide information that could be self-incriminating, should take appropriate steps to protect the witness. *See* John Rubin, *2009 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/09, at 39–40 (UNC School of Government, Dec. 2009) (discussing alternatives that counsel for a witness may take to ensure that the witness has adequate immunity from future prosecution), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0909.pdf.

H. Commission Proceedings

G.S. 15A-1468 details the procedures before the Commission once the formal inquiry is completed. All relevant evidence from the inquiry must be presented to the full Commission, which may hold a public hearing or keep the proceedings closed. G.S. 15A-1468(a). After reviewing the evidence, the Commission votes on whether to refer the case for review by a three-judge panel. In cases in which the convicted person did not plead guilty, five or more Commission members must find sufficient evidence of innocence for the case to be referred for judicial review. In cases in which the convicted person pled guilty, all eight Commission members must find sufficient evidence of innocence. G.S. 15A-1468(c). The Commission must issue an opinion, whether it finds sufficient or insufficient evidence of innocence. If a case is referred to a three-judge panel, all of the records in support of the Commission's conclusion, including a transcript of the hearing before the Commission, become public; if the case is not referred for judicial review, the files remain confidential except as the statute otherwise provides. G.S. 15A-1468(e).

I. Review by Three-Judge Panel

G.S. 15A-1469 details the procedures before the three-judge panel. If the Commission concludes that there is sufficient evidence of innocence to merit judicial review, the Chief Justice appoints a three-judge panel to conduct an evidentiary hearing. The panel may not include any trial judge who has had substantial previous involvement in the case. Following an order setting a date for a hearing, the State has ninety days to file a response to the Commission's opinion. The district attorney of the district of conviction, or his or her designee, represents the State at the hearing. The panel may compel the testimony of any witness, including the convicted person. The convicted person has the right to be present but may not assert any privilege or prevent any witness from testifying. If the three-judge panel unanimously finds by clear and convincing evidence that the convicted person is innocent of the charges, it enters a dismissal of the charges. If the vote is not unanimous, the panel denies relief.

J. Finality of Proceedings and Availability of Other Relief

The decisions of the Commission and the three-judge panel are final and are not subject to review. G.S. 15A-1470(a). Submission of a claim to the Commission does not adversely affect the right to other post-conviction relief. G.S. 15A-1470(b); G.S. 15A-1411(d) (claim to Commission does not constitute motion for appropriate relief and does not affect right to relief under post-conviction statutes). G.S. 15A-1417(a) provides that a court may, in ruling on a motion for appropriate relief, refer a claim of factual innocence to the Commission; but, the statute does not permit the court to defer claims to the Commission based on other grounds for post-conviction relief, such as a constitutional violation.

K. Additional Resources

For additional information about Innocence Commission proceedings, see

- North Carolina Innocence Inquiry Commission website, www.innocencecommission-nc.gov, which includes the Commission's rules, a case flowchart, and other resources.
- INNOCENCE INQUIRY PROCEEDINGS MANUAL, www.ncids.org/Other%20Manuals/Innocence%20Inquiry/Innocence%20Inquiry%20Links.htm, which includes memoranda on counsel's responsibilities in Commission proceedings and other resources.
- John Rubin, *2006 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2007/03, at 10–11 (UNC School of Government, Jan. 2007) (summarizing the legislation that created the Innocence Commission), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0703.pdf.
- John Rubin, *2009 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/09, at 39–40 (UNC School of Government, Dec. 2009) (summarizing amendments to the Innocence Commission statutes that create limited immunity for witnesses), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0909.pdf.