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 manuals in the Indigent Defense Manual Series.

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.

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

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

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

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

Appeals from interlocutory orders or rulings, other than those authorized by G.S. 15A-1432(d), will be dismissed. *See, e.g., State v. Shoff,* 118 N.C. App. 724 (1995) (holding that defendant had no statutory right to an interlocutory appeal from the trial judge's order denying defendant's motion to dismiss based on double jeopardy grounds); *Joseph*, 92 N.C. App. 203 (same); *State v. Howard*, 70 N.C. App. 487 (1984) (dismissing appeal from trial judge's denial of one claim in defendant's motion for appropriate relief because defendant's conviction was vacated on another ground and a new trial ordered; no final judgment existed from which defendant could appeal). Although a defendant does not have a statutory right to appeal from an interlocutory order or ruling (with the one exception noted above), he or she may seek review by filing a petition for writ of certiorari pursuant to N.C. R. APP. P. 21(a)(1) or N.C. GEN. R. PRAC. SUPER. & DIST. CT. 19. Writs of certiorari are discretionary and are discussed *infra* in § 35.7D, Certiorari of Trial Court Orders and Judgments. For additional discussion of interlocutory appeals under G.S 15A-1432(d), see *infra* § 35.1K, Interlocutory Appeals to Appellate Division.

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

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

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

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

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

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

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

consent offense" in this subsection B (discussing limits enacted by General Assembly on right to appeal in certain cases).

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

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

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

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

Ordinarily, offenses for which the defendant was charged but not convicted in district court (e.g., charges that were dismissed by the State or by the trial judge or for which the defendant was found not guilty) are not within the superior court's jurisdiction on the defendant's appeal of other charges. *See, e.g., State v. Reeves*, 218 N.C. App. 570 (2012) (vacating judgment for reckless driving to endanger based on lack of jurisdiction in superior court because record failed to show that the State's voluntary dismissal of the charge in

district court was taken pursuant to a plea arrangement); *State v. Phillips*, 127 N.C. App. 391, 392 (1997) (noting that because the State's voluntary dismissal of the speeding charge in district court was not pursuant to a plea agreement, "that offense was not properly before the superior court for final disposition"). However, any charges that were dismissed, reduced, or modified pursuant to a plea arrangement in district court are reinstated if the defendant appeals. G.S. 7A-271(b); G.S. 15A-1431(b); *see also State v. Fox*, 34 N.C. App. 576 (1977) (the State is not bound by a plea agreement if the defendant elects to appeal and invoke the right to a trial de novo).

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

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

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

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

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

- payment of costs;
- payment of a fine;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

G.S. 15A-1347 does not specifically address whether a defendant on probation for a misdemeanor has the right to appeal from the imposition of short periods of confinement described in G.S. 15A-1343(a1)(3) (colloquially known as "quick dips") or from the longer periods of confinement in response to violations (CRVs, colloquially known as "dunks") imposed under G.S. 15A-1344(d2) in driving while impaired cases (and in misdemeanor cases where the defendant was placed on probation before December 1, 2015). However, the N.C. Court of Appeals has ruled that a defendant does not have a statutory right to appeal from an imposition of confinement in response to violation (CRV) of probation. *See State v. Romero*, 228 N.C. App. 348 (2013) (granting State's motion to dismiss defendant's appeal from the imposition of CRV and declining to express any opinion on whether a "terminal CRV" that acts as a de facto revocation triggers a right to appeal since the time remaining on defendant's maximum imposed sentence far exceeded the 90-day CRV he received); *see also* Jamie Markham, *No Appeal of Confinement in Response to Violation*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 16, 2013) (noting that *Romero* involved an appeal from superior court to the Court of Appeals but opining that "the same rationale would seem to preclude de novo appeals from district to superior court" as well). Because the court failed to express an opinion on the appealability of "terminal CRVs," it remains an open question as to whether the defendant has the right to appeal from those. The appealability of "quick dips" was not addressed in *Romero* "but it seems safe to say that if there's no right to appeal a CRV, then there's likewise no right to appeal a quick dip." *See* Jamie Markham, *Some FAQ about Probation Violation Appeals*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 9, 2016). Although a defendant does not have a statutory right to appeal, he or she may be able to obtain review of the imposition of a period of confinement by petitioning the superior court for a writ of certiorari. *See* N.C. GEN. R. PRAC. SUPER. & DIST. CT. 19 (superior court may grant the writ of certiorari in proper cases); *State v. McCurry*, 244 N.C. App. 544 (2015) (unpublished) (court granted defendant's petition for writ of certiorari and reviewed the denial of his motion to continue to obtain counsel and other alleged errors in trial judge's order imposing a 90-day non-terminal CRV); *see also* § 35.7D, Certiorari of Trial Court Orders and Judgments.

A defendant who has been found to be in criminal contempt for willfully violating a condition of probation may be imprisoned for up to thirty days. *See* G.S. 5A-12(a); G.S. 15A-1344(e1); *see also* G.S. 5A-11(a)(9a) (authorizing criminal contempt for a defendant's willful refusal to comply with a condition of probation). A defendant who has been found in contempt in district court for violating probation may appeal to the superior court for a

hearing de novo. *See* G.S. 5A-17(a) ("A person found in criminal contempt may appeal in the manner provided for appeals in criminal actions, except appeal from a finding of contempt by a judicial official inferior to a superior court judge is by hearing de novo before a superior court judge"). A bail hearing must be held within a reasonable time period after imposition of the confinement. G.S. 5A-17(b), (c).

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

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

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

For further discussion of appeals from probation revocations, see James M. Markham, PROBATION VIOLATIONS IN NORTH CAROLINA 47 (UNC School of Government, 2018). *See also* Jamie Markham, *Some FAQ about Probation Violation Appeals*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 9, 2016) (including a comment citing cases where defendants have obtained certiorari review of various outcomes of probation violation hearings where

there was no statutory right to appeal). Discussion of probation revocations in conditional discharge and deferred prosecution cases are discussed *infra* § 35.1Q, Appealability of Conditional Discharge Orders and of Orders Revoking Conditional Discharge and Deferred Prosecution Probations.

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

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

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

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

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

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

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

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

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

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

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

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

1. Whether the prior record level was properly calculated. G.S. 15A-1444(a2)(1).
2. Whether the sentence disposition was a type that was authorized for the defendant's class of offense and prior record level (e.g., the defendant received an active or intermediate sentence when only an intermediate or community sentence was authorized). G.S. 15A-1444(a2)(2).
3. Whether the lengths of the minimum and maximum sentences are outside those set by statute for the defendant's class of offense and prior record level. G.S. 15A-1444(a2)(3).
4. If the defendant pled guilty or no contest to a felony and was sentenced outside of the presumptive range, whether there were improper findings of aggravating circumstances or improper failures to find mitigating circumstances. *See* G.S. 15A-1444(a1); *see also State v. Davis*, 206 N.C. App. 545 (2010); *State v. Rogers*, 157 N.C. App. 127 (2003). The N.C. Court of Appeals has interpreted the governing statutory provision to mean that a defendant is entitled to an appeal when his or her sentence falls within the aggravated range *or* within the mitigated range. *See State v. Mabry*, 217 N.C. App. 465, 470 (2011) (holding that "a defendant receiving a mitigated sentence must, under the plain language of the statute, have a right to appeal the sufficiency of the evidence supporting his or her sentence").
5. Whether a motion to withdraw the plea of guilty or no contest was improperly denied. *See* G.S. 15A-1444(e); *see also State v. Handy*, 326 N.C. 532 (1990) (defendant entitled to an appeal as of right after the trial judge denied his motion to withdraw his plea of guilty; death sentence vacated because denial of the presentence motion was improper); *State v. Dickens*, 299 N.C. 76 (1980) (defendant entitled to appeal as a matter of right from the denial of his motion to withdraw his pleas of guilty when his motion was made during the term and on the day following pronouncement of judgment).
6. Whether there were evidentiary and procedural issues in a sentencing hearing before a jury on the existence of aggravating circumstances or sentence enhancements. *See, e.g., State v. Hurt*, 361 N.C. 325 (2007) (granting new sentencing hearing where trial judge's *Blakely* error in failing to submit an aggravating factor to the jury was not harmless beyond a reasonable doubt).
7. Whether a motion to suppress evidence based on constitutional grounds or on a substantial violation of Chapter 15A was improperly denied. G.S. 15A-979(b); G.S. 15A-1444(e); *see also State v. Smith*, 193 N.C. App. 739 (2008).

Practice note: To preserve the right to appeal the denial of a motion to suppress when your client pleads guilty, you must notify the State and the trial judge ***before*** entering the guilty plea of your intention to appeal the denial of the motion or the right to do so is waived by the guilty plea. Giving notice of appeal ***after*** the plea has been entered will not suffice. *See State v. Tew*, 326 N.C. 732 (1990); *State v. Brown*, 142 N.C. App. 491 (2001); *State v. McBride*, 120 N.C. App. 623 (1995), *aff'd per curiam*, 344 N.C. 623 (1996). Additionally, a

stipulation in the appellate record that the defendant intended to appeal the denial of a suppression motion is not sufficient to preserve the issue—the trial record itself must demonstrate the defendant's intention to appeal before entry of the plea. *See Brown*, 142 N.C. App. 491. The best way to proceed is to advise the State during plea negotiations of your intent to appeal and file a written "notice of intent to appeal" before entry of the plea. The written transcript of plea and the record from the in-court plea colloquy also should include a statement that the defendant intends to appeal the denial of a suppression motion under G.S. 15A-979.

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

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

Practice note: If your client is considering pleading guilty or no contest in superior court, you should advise him or her about the consequences of the plea, including that the statutory right to appeal is extremely limited. *See infra* Appendix A, N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL, Guideline 6.1(c) The Plea Negotiation Process and the Duties of Counsel (Nov. 2004). If your client wants to appeal from a ruling on a pretrial motion other than a motion to suppress as discussed above, you will have to try the case to completion to ensure preservation of that right. (Alternative avenues of relief are discussed below in this subsection D.) Even a stipulation in a plea arrangement that allows for an appeal of the denial of a pretrial motion is not valid and will not confer jurisdiction on the appellate court if no statute authorizes that appeal. *See State v. Rinehart*, 195 N.C. App. 774 (2009); *State v. Smith*, 193 N.C. App. 739 (2008). An invalid

stipulation assuring the right to appeal may give a defendant a basis for withdrawing a guilty plea because he or she cannot get the benefit of his or her bargain, but in some circumstances the defendant may have to proceed by motion for appropriate relief and not by appeal to obtain that relief. *Compare State v. White*, 213 N.C. App. 181 (2011) (where appellate court had jurisdiction over the case based on defendant's proper appeal from a denial of a motion to suppress, it could vacate the judgment and allow defendant on remand to withdraw a guilty plea that was given with the intent to preserve an appeal from the denial of defendant's pretrial motion to suppress *and* pretrial motion to dismiss), and *Smith*, 193 N.C. App. 739 (to same effect), *with Rinehart*, 195 N.C. App. 774 (distinguishing *Smith* and other decisions, in which it had vacated a guilty plea based on a plea agreement that included a reservation of the right to appeal that was ineffective, and holding that the defendant's recourse was to file a motion for appropriate relief where only issue he raised (denial of pretrial motion to dismiss) was not appealable).

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

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

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

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

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

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

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

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

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

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

Counsel should be aware of the Court of Appeals' discussion in *Killette* that even if the court was not required by binding precedent to deny the defendant's petition based on the defendant's failure to give pre-plea notice of intent to appeal, it would have done so based on the reasoning of the prior cases—i.e., it would be unfair to allow a defendant to lock the State into an advantageous plea bargain without giving the State and the trial court notice of

his or her intent to seek an appeal. The court warned that "[i]f defendants can so easily circumvent the fairness requirement that the State be informed of a defendant's intent to appeal prior to concluding the plea agreement, the State may offer fewer plea bargains." *Killette*, ___ N.C. App. at ___, 834 S.E.2d 696, 699. The concurring judge likewise acknowledged that, while the earlier cases cited by the majority were no longer binding after *Ledbetter* and *Stubbs*, the analysis in them "may be instructive to the exercise of our discretion when reviewing a petition for certiorari review of an appeal following a guilty plea . . . ." *Id*. at 700.

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

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

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

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

Government, Oct. 2001). For further discussion of grounds for motions for appropriate relief in general, see *infra* § 35.3, Motions for Appropriate Relief.

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

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

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

No right to appeal from other periods of confinement. G.S. 15A-1347 does not specifically address whether a defendant has the right to appeal from the imposition of short periods of confinement described in G.S. 15A-1343(a1)(3) (colloquially known as "quick dips") or from the longer periods of confinement in response to violations imposed under G.S. 15A-1344(d2) (CRVs, colloquially known as "dunks," which are ninety days unless the time remaining on the maximum sentence is less than that).

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

Romero, "but it seems safe to say that if there's no right to appeal a CRV, then there's likewise no right to appeal a quick dip." *See* Jamie Markham, *Some FAQ about Probation Violation Appeals*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 9, 2016).

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

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

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

F. Procedural Requirements for Appealing from Superior Court

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

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

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

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

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

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

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

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

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

G. Stay of Superior Court Sentence

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

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

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

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

underlying charge. However, when a defendant has given notice of appeal from the criminal judgment and these civil orders, a trial judge may be amenable to signing an order staying their execution pending appeal.

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

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

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

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

H. Withdrawal of Notice of Appeal from Superior Court Judgment

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

Withdrawal after record on appeal filed. If the record on appeal has already been filed in the appellate court, the defendant also must file a written notice of the withdrawal with the clerk of the appropriate appellate court. N.C. R. APP. P. 37(d). If the defendant withdraws

his or her appeal after the record on appeal has been filed, he or she may be taxed with costs of the appeal. *See* G.S. 15A-1450; *see also* N.C. R. APP. P. Appendix F ("Court costs on appeal total $9.00 . . . and are imposed when a notice of appeal is withdrawn or dismissed . . . .").

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

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

I. Compliance with Superior Court Judgment

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

J. Release Pending Appeal from Superior Court Judgment

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

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

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

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

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

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

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

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

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

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

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

K. Interlocutory Appeals to Appellate Division

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

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

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

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

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

L. Appeals from Prayers for Judgment Continued

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

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

PJCs can be for a definite or indefinite period of time. *State v. Degree*, 110 N.C. App. 638 (1993); *see also State v. Marino*, ___ N.C. App. ___, 828 S.E.2d 689, 694 (2019) (finding that the enactment of G.S. 15A-1331.2 was to ensure that defendants convicted of the highest levels of offenses "do not escape punishment by receiving an indefinite PJC"). The trial court retains jurisdiction to impose sentence later "[a]s long as a prayer for judgment is not continued for an unreasonable period . . . and the defendant was not prejudiced." *State v. Absher*, 335 N.C. 155, 156 (1993).

A PJC can "continue 'from term to term' for some specified period on condition of the defendant's good behavior, with the understanding that the State will pray judgment and the

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

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

A "temporary" PJC is when the trial judge, after a conviction or a plea, does not immediately pronounce judgment and sentence "but, instead, continues the sentencing hearing for a short, determinate period of time, with the intent to impose a judgment and sentence in the near future." Gonder-Stanley at 39 (noting that a trial judge may want to use a temporary PJC "for judicial purposes . . . so as to afford time to consider post-trial motions, to prevent a miscarriage of justice, and for other like purposes contemplated by law and justice") (citation omitted); *see also State v. Graham*, 225 N.C. 217, 219 (1945) (holding that "[i]n the absence of a statute to the contrary, sentence does not necessarily have to be imposed at the same term of court at which the verdict or plea of guilty was had"); *State v. Watkins*, 229 N.C. App. 628, 631 (2013) (stating that sentencing may be continued to a subsequent date and a "continuance of this type vests a trial judge presiding at a subsequent session of court with the jurisdiction to sentence a defendant for crimes previously adjudicated") (citations omitted); Jamie Markham, *Limits on PJCs*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (May 31, 2018) (a PJC "can be a mere continuance of sentencing in the case, allowing the court to obtain additional information about the defendant before entering judgment"). G.S. 15A-1334(a) also authorizes a trial judge to continue the sentencing hearing on a showing of good cause by the State or the defendant. When the continuance is over, the sentence will be pronounced and judgment will be entered. Gonder-Stanley at 40.

Unlike a temporary PJC, a trial judge may impose a PJC with the intent that, barring unforeseen or changed circumstances, no further sentencing will occur. *See* Jessica Smith, *Sentencing: Prayer for Judgment Continued* (Dec. 2013), NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK; Gonder-Stanley at 40; *see also* Jamie Markham, *Limits on PJCs*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (May 31, 2018) (stating that it is often

"everyone's understanding that a PJC will be the last thing that happens in a case—an exercise of judicial mercy that will leave the defendant with a conviction but no punishment for it"). This "dispositional" type of PJC may be imposed with or without attached conditions, are "long-term or indefinite in duration, and may become the permanent disposition of the cases in which they are used." Gonder-Stanley at 40–41. "The precise legal underpinnings of the dispositional PJC are hard to pinpoint." Jamie Markham, *Limits on PJCs*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (May 31, 2018).

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

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

Appealability of PJCs. Whether a defendant has a right to appeal when a district court or superior court judge has entered a PJC depends on whether the judge's order is a "true" PJC or whether it is in the nature of a "final judgment." *See generally supra* "Finality of judgment generally required" in § 35.1A, In General; *see also* G.S. 15A- 1431 (appeal from district court); G.S. 15A-1444 (setting out the circumstances when a defendant may appeal as a matter of right from a superior court judgment); John Rubin, *Does a "Prayer for Judgment Continued" Differ Very Much from a "Prayer for Judgment Granted"?*, N.C.

CRIM. L., UNC SCH. OF GOV'T BLOG (March 3, 2020) (noting that "a true PJC . . . [is] one in which a judge finds a person guilty after a plea or trial and indefinitely continues the entry of judgment without imposing punishment (court costs are not considered punishment)"). The general rule is that when a prayer for judgment is continued and it imposes no terms or conditions amounting to punishment, i.e., a "true" PJC, there is no right to appeal because "'there is no judgment—only a motion or prayer by the prosecuting officer for judgment.'" *See State v. Popp*, 197 N.C. App. 226, 228 (2009) (quoting *State v. Griffin*, 246 N.C. 680, 683 (1957)). What constitutes the imposition of punishment is discussed later in this subsection.

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

On the other hand, when the trial judge "enters an order continuing the prayer for judgment and at the same time imposes conditions amounting to punishment . . . the order is in the nature of a final judgment, from which the defendant may appeal." *Griffin*, 246 N.C. 680, 683 (judge's statement that "the prayer be continued" was inconsistent with the judge's imposition of a condition amounting to punishment and was treated as surplusage; State's motion to remand to superior court on grounds that no final judgment had been entered was denied); *cf.* John Rubin, *Relief from a Criminal Conviction: Frequently Asked Questions (Prayer for Judgment Continued (PJC))* (2018) (noting that "[a] court sometimes will call its order a PJC when it imposes conditions amounting to punishment or briefly continues the

case for later sentencing" but these orders are not true PJCs). Once punishment has been inflicted, "the court has exhausted its power and cannot thereafter impose additional punishment." *Griffin*, 246 N.C. at 683; *see also State v. Brown*, 110 N.C. App. 658, 660 (1993) (finding error where the trial judge, after having imposed a PJC with conditions inflicting punishment, later sentenced defendant to a six-month term of imprisonment, suspended for five years, for violating a condition of the PJC; the original "entry was a final judgment, the violation of which subjected the defendant to criminal contempt of court" punishable by imprisonment and/or fine but not to additional punishment) (citations omitted). Even though a conditional PJC cannot be entered without a defendant's consent, a defendant's consent does not act as a waiver of the right to appeal when the conditional PJC is in the nature of a final judgment. *See State v. Patton*, 221 N.C. 117, 117 (1942) (holding that defendant did not waive his right to appeal when he consented to the twelve-month PJC on condition that he "be of general good behaviour and that he pay into the office of the clerk of Superior Court a fine of $25.00 and costs").

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

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

N.C. appellate courts have also found that no punitive condition was imposed when the trial judge ordered a PJC upon payment of costs and attorney fees and on the condition that the plaintiff have no contact with the victim or her immediate family. *See Walters v. Cooper*, 226 N.C. App. 166, 169 (2013) (concluding that plaintiff did not have to register as a sex

offender since the "true PJC" he received in that case was not a final conviction), *aff'd per curiam*, 367 N.C. 117 (2013). For further discussion of *Walters*, see Jamie Markham, *Walters Affirmed: No Sex Offender Registration for a PJC*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Oct. 10, 2013) (questioning whether the affirmance of *Walters* by the N.C. Supreme Court may "be viewed as setting a slightly higher floor for what constitutes a non-punitive condition").

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

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

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

Additional resources. For further discussion of PJCs, see Jessica Smith, *Sentencing: Prayer for Judgment Continued* (Dec. 2013), NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK; and John Rubin, *Relief from a Criminal Conviction: Frequently Asked Questions (Prayer for Judgment Continued (PJC))* (2018). *See also* John Rubin, *Does a "Prayer for Judgment Continued" Differ Very Much from a "Prayer for Judgment Granted"?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (March 3, 2020); Jamie Markham, *PJCs for Serious Felonies*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (May 30, 2019); Jamie Markham, *Limits on PJCs*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (May 31, 2018); Jamie Markham, *The Unwelcome Prayer for Judgment Continued*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 18, 2009).

M. Death of Defendant While Appeal Is Pending

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

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

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

No right to appeal from denial of relief after testing. If the defendant's motion for DNA testing is granted, the trial judge must hold a hearing once the testing results are received in order to determine whether the results are favorable or unfavorable to the defendant. G.S. 15A-270(a). If the trial judge determines that the results are unfavorable and denies the defendant any relief, the defendant does not have the right to appeal from this ruling. *See State v. Norman*, 202 N.C. App. 329, 333 (2010) (stating that "'[t]he General Assembly

simply has not provided for appeals from [a court's ruling under G.S. 15A-270] and under those circumstances, harsh as the result may seem, we must hold that [this Court is] without subject matter jurisdiction to entertain [Defendant's] appeal'") (quoting *Palmer v. Wilkins*, 73 N.C. App. 171, 173 (1985)).

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

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

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

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

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

3. If you give notice of appeal orally in open court at trial, you should request that the judge determine the indigency of your client at that time so that, if the client is indigent, the Office of the Appellate Defender can be appointed and the transcript can be ordered at state expense. *See* N.C. Commission on Indigent Defense Services Rule 3.2(b) (September 21, 2018). You also should request that the trial judge set an appeal bond or other conditions of post-trial release under G.S. 15A-536 so that your client can be released pending the determination of the appeal. *See supra* § 35.1J, Release Pending Appeal from Superior Court Judgment; *see also infra* Appendix A, N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL, Guideline 9.4 Bail Pending Appeal (Nov. 2004). If

you file written notice of appeal, you should make sure that the case is added back on the docket in superior court in order to have the trial judge address the issues discussed above.

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

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

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

P. Appeals from Arrested Judgments

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

The law in North Carolina recognizes two distinct categories of arrested judgments. *See State v. Hugo*, 263 N.C. App. 594 (2019) (unpublished). The most common type of arrested judgment occurs when no judgment against the defendant can be lawfully entered because

of some fatal error or defect in (1) the organization of the court, (2) the charge (the information, warrant, or indictment) against the defendant, (3) the arraignment and plea, (4) the verdict, or (5) the judgment. *See State v. Pakulski*, 326 N.C. 434 (1990) (citations omitted); *Hugo*, 263 N.C. App. 594. The motion to arrest judgment is also regularly made to alleviate double jeopardy or cumulative punishment concerns. *See, e.g., State v. Barlowe*, 337 N.C. 371, 380 (1994) (when a defendant is convicted of felony murder, "the underlying felony supporting a conviction for felony murder merges into the murder conviction" and the judgment imposed on the underlying felony must be arrested); *State v. Moses,* 205 N.C. App. 629 (2010) (arresting judgment on defendant's conviction for felony possession of stolen goods after finding that the General Assembly did not intend to subject a defendant to multiple punishments for both robbery and the possession of stolen goods that are the proceeds of the same robbery).

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

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

If the judgment is arrested because of a fatal error in the organization of the court, the charging document, the arraignment and plea, the verdict, or the judgment, the conviction is effectively vacated. *State v. Pakulski*, 326 N.C. 434 (1990). Once the judgment is arrested for this type of error, the defendant is returned to the position he or she was in before the prosecution began and the State "must seek a new indictment if it elects to proceed again against the defendant." *Id. at* 439 (citations omitted). Since the effect of the arrest of the defendant's conviction is vacatur, this type of arrested judgment creates no final judgment from which a defendant can appeal. *See State v. Reeves*, 218 N.C. App. 570 (2012).

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

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

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

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

Conditional discharges generally. Several statutes authorize trial judges, "without entering a judgment" and with the defendant's consent, to enter orders of conditional discharge that defer further proceedings and impose probation for offenders who plead guilty or are found guilty of those offenses. *See* G.S. 14-50.29 (gang-related offenses committed under the age of 18); G.S. 14-204(b) (prostitution); G.S. 14-277.8 (several offenses against the peace involving mass violence committed under the age of 20); G.S. 14-313(f) (underage access to

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

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

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

If the appellate courts ultimately hold that there is no right to an immediate appeal from the entry of a conditional discharge because no "final judgment" has been entered (or that conditional discharge orders are not like appealable PJCs imposing punitive conditions,

discussed *supra* in § 35.1L, Appeals from Prayers for Judgment Continued), a defendant can seek review in the proper court by filing a petition for writ of certiorari. *See Kelly*, 235 N.C. App. 656; *see also* N.C. R. APP. P. 21(a)(1) (providing that the writ of certiorari may be issued in appropriate circumstances to permit review when no right to appeal from an interlocutory order exists); N.C. GEN. R. PRAC. SUPER. & DIST. CT. 19 (authorizing the superior court to issue a writ of certiorari to review district court proceedings). For further discussion of this extraordinary writ, see *infra* § 35.7D, Certiorari of Trial Court Orders and Judgments.

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

Appeal from a finding of violation of a condition of probation and imposition of sentence in conditional discharge cases. If a trial judge enters an adjudication of guilt and sentences the defendant after finding that the defendant violated a term of probation as set out in a conditional discharge order, the defendant may obtain review of the revocation of his or her probation in an appeal from the final judgment. In *State v. Burns*, 171 N.C. App. 759, 761 (2005), the defendant pled guilty to felony possession of cocaine and was placed on conditional discharge probation under G.S. 90-96. The defendant's probation was subsequently revoked at a hearing where the trial judge determined that the defendant had willfully violated a condition of probation, entered an adjudication of guilt on the original charge, and sentenced the defendant. The defendant appealed and argued that the trial judge erred in revoking his probation after the probationary period had expired without making the findings required by G.S. 15-1344(f)(2) (as then written) that the State had made reasonable efforts to notify the defendant and to conduct the hearing earlier. The N.C. Court of Appeals found that "[i]n the absence of a provision to the contrary, and except where specifically excluded, the general probation provisions found in Article 82 of Chapter 15A apply to probation imposed under N.C. Gen. Stat. § 90-96." *Id.* at 761. The court then held that due to the trial judge's error and to the lack of evidence of reasonable efforts by the State, the trial judge did not have the jurisdiction or the authority to revoke the defendant's probation. *Id. See also State v. Cordon*, 21 N.C. App. 394 (1974) (reviewing the revocation of defendant's conditional discharge probation and finding that the evidence clearly supported the superior court judge's decision to revoke defendant's probation under G.S. 90-96 and to sentence him to six months in prison). *But cf.* Jamie Markham, *No Appeal of Revocation of Deferred Prosecution Probation*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Dec. 4, 2019) (noting that the author previously would have said that revocations of conditional discharge

probation were appealable under *Burns* but now wondering whether the rule in *State v. Summers*, ___ N.C. App. ___, 836 S.E.2d 316 (2019), prohibiting appeals in deferred prosecution probation revocations (discussed below) may apply to conditional discharges).

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

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

No right to appeal from revocation of deferred prosecution probation. Deferred prosecution under G.S. 15A-1341(a1) allows a defendant charged with a Class H or I felony or a misdemeanor to be placed on probation under a written Deferred Prosecution Agreement (DPA) between the prosecutor and the defendant, with approval by the judge. *See* AOC-CR-610, Motion/Agreement and Order to Defer Prosecution (Structured Sentencing) (April 2018) (effective for deferrals entered on or after December 1, 2011); Jamie Markham, *Deferred Prosecution Probation*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Feb. 3, 2010). If the defendant complies with the conditions of probation, his or her charges will be dismissed. *See* G.S. 15A-1342(i). However, if the defendant breaches the DPA by violating the conditions of probation, the judge "may order charges as to which prosecution was deferred be brought to trial . . . ." G.S. 15A-1344(d); *see also* AOC-CR-634, Disposition/Modification of Deferred Prosecution (Dec. 2017) (effective for all

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

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

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

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

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

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

North Carolina appellate courts consider the imposition of satellite-based monitoring (SBM) for a sex offender to be a civil matter and as such have held that the oral notice of appeal allowed in criminal cases is not sufficient to confer jurisdiction on the appellate court. The

defendant must file written notice of appeal within thirty days pursuant to Rule 3 of the N.C. Rules of Appellate Procedure as required in civil cases. *State v. Brooks*, 204 N.C. App. 193 (2010). The content of the written notice of appeal is identical to the content of the written notice of appeal for criminal cases, discussed *supra* in subsection F., Procedural Requirements for Appealing from Superior Court. *See also* N.C. R. APP. P. 3(d).

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

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

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

Now that the law is settled in this area, it appears that this practice of frequently granting certiorari review may be ending so it is imperative that counsel give proper written notice of appeal and raise any relevant statutory and constitutional issues at sentencing in order to preserve the right to appellate review. *See, e.g., State v. Bishop*, 255 N.C. App. 767, 769–70 (2017) (dismissing defendant's untimely appeal and declining to allow certiorari review of the imposition of SBM; court further refused to invoke N.C. R. App. P. 2 to review the

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

S. Appeals from Expunction Decisions

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

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

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

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

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

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 nonjury 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. Loftis*, 250 N.C. App. 449, 452-53 (2016) (finding that State's notice of appeal from the district court's order dismissing "the Driving While Impaired charge against the above named defendant after denying the State's motion to continue the case during a criminal session of District Court" failed to specify the basis for the appeal as required by G.S. 15A-1432(b); "[a]n appeal under this statute requires more specificity than merely identifying the order which is being appealed"); *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); *State v. Ward*, 127 N.C. App. 115 (1997) (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 State v. Ward*, 127 N.C. App. 115 (1997); *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); *see also State v. Bryan*, 230 N.C. App. 324 (2013) (dismissing State's appeal from the superior court order that affirmed the order of the district court granting defendant's motion to dismiss for a speedy trial violation; State's failure to file a certificate as required by G.S. 15A-1432(e) deprived appellate court of jurisdiction).

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), and Robert L. Farb, *Double Jeopardy, Ex Post Facto, and Related Issues*, UNC SCH. OF GOV'T (Jan. 2007).

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). Under the applicable statutes, the State does not have "to set forth the specific findings of fact to which it objects in its notice of appeal to superior court" in order to be entitled to de novo review. *See State v. Miller*, 247 N.C. App. 628, 637 (2016) (noting, however, that senior resident superior court judges have the authority to enter local rules and administrative orders governing practices and procedures within their judicial districts). 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); *see also State v. Parisi*, 259 N.C. App. 879 (2018) (granting State's petition for writ of certiorari to review superior court judge's order that affirmed district court judge's preliminary order granting defendant's motion to suppress, and the final order of the district court granting defendant's motion to suppress), *aff'd*, 372 N.C. 639 (2019).

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).

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).

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)). Motions for appropriate relief may be made by the defendant, the State, or by the trial judge on his or her own motion. *See* G.S. 15A-1414 (motion by defendant within ten days of verdict); G.S. 15A-1415 (motion by noncapital defendant at any time after verdict); G.S. 15A-1416 (motion by the State); G.S. 15A-1416.1 (motion by defendant who was a victim of human trafficking to vacate his or her nonviolent felony conviction); G.S.

15A-1420(d) (action on judge's own motion at any time that a defendant would be entitled to relief).

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). G.S. 15A-1420 is the procedural section that provides for the formalities of making oral and written MARs, notice, and hearing.

B. Types of Motions for Appropriate Relief by Defendant

MAR within ten days of judgment. Article 89 provides for two types of MARs for the defendant. 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). The defendant can make this type of motion and the trial judge can act on it even when the defendant has given notice of appeal. G.S. 15A-1414(c).

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 noncapital 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.
- the defendant was convicted of a first offense of prostitution and the trial judge did not discharge the defendant and dismiss the charge pursuant to G.S. 14-204(b) or, for offenses committed on or after December 1, 2019, a nonviolent offense as defined in G.S. 15A-145.9; the defendant's participation in the offense was a result of having been a victim of human trafficking, sexual servitude, or the federal Trafficking Victims Protection Act; and the defendant seeks to have the conviction vacated. *See* G.S. 15A-1416.1 (describing procedures applicable to this type of MAR).

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).

If defendant has given notice of appeal, this type of MAR must be made in the appellate court where the appeal is pending. *See* G.S. 15A-1418(a); *State v. Brock*, 46 N.C. App. 120 (1980) (where defendant had appealed his case from superior court to the N.C. Court of Appeals, the trial judge had no authority to consider defendant's motion under G.S. 15A-1415; defendant's MAR should have been made in the appellate division); *see also* G.S. 15A-1448(a)(3) (with narrow exceptions, jurisdiction of the trial court is divested when notice of appeal is given).

C. Motion for Appropriate Relief by the State

MAR within ten days of judgment. Article 89 provides for two types of MARs by the State. The first is governed by G.S. 15A-1416(a). Under this statute, the State may seek relief for any error which it may assert on appeal. The State's MAR must be filed within ten days

after entry of judgment. For a discussion of the errors that the State may assert on appeal, see Jessica Smith, *Motions for Appropriate Relief* (Aug. 2017), NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK.

MAR at any time after verdict. The second type of MAR may be filed by the State at any time after verdict for:

- the imposition of sentence when prayer for judgment has been continued and grounds for the imposition of sentence are asserted; or
- the initiation of any proceeding under Article 82, Probation; Article 83, Imprisonment; and Article 84, Fines, to modify a sentence.

G.S. 15A-1416(b). The State has no right under this statute to move to set aside a judgment based on newly discovered evidence. *See State v. Oakley*, 75 N.C. App. 99 (1985).

D. Motion for Appropriate Relief on Court's Own Motion

At any time that a defendant would be entitled to relief by MAR, the court may grant such relief on its own motion. G.S. 15A-1420(d); *see also State v. Wilkerson*, 232 N.C. App. 482, 490 (2014) (noting that "the trial court has the authority, in appropriate cases, to grant postconviction relief on its own motion"). The trial court cannot grant relief that would only benefit the State. *State v. Oakley*, 75 N.C. App. 99 (1985) (finding error where, after learning additional information about the case, trial judge sua sponte struck defendant's guilty plea).

The trial court must give appropriate notice to the parties. G.S. 15A-1420(d); *see also State v. Williams*, 227 N.C. App. 209 (2013) (holding that trial judge gave sufficient notice of his sua sponte MAR where he had announced it in open court, he was the presiding judge, the MAR occurred during the same criminal session of court as the judgment, the judgment had been rendered only the day before, and the judge stated the grounds for the motion and the relief he was granting).

E. "Consent" Motions for Appropriate Relief

G.S. 15A-1420(e) states that "[n]othing in this section shall prevent the parties to the action from entering into an agreement for appropriate relief, including an agreement as to any aspect, procedural or otherwise, of a motion for appropriate relief." By enacting (and thereafter retaining) G.S. 15A-1420(e) in 2012, the General Assembly appears to have authorized a trial judge to grant a MAR if the State and defendant consent. *See* John Rubin, *Relief from a Criminal Conviction: Motions for Appropriate Relief* (2018); Jessica Smith, *Motions for Appropriate Relief* at 14–15 (Aug. 2017), NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK (noting potential impact of change but advising judges to exercise caution in considering "consent" MARs without other grounds); *see also State v. Chevallier*, 264 N.C. App. 204, 212 (2019) (finding that because defendant failed to argue on appeal that he was improperly convicted of two offenses arising from a single transfer of a counterfeit controlled substance, the issue was not properly before the court; "[h]owever, the

failure to raise this issue does not preclude Defendant from filing a motion for appropriate relief . . . , does not preclude the trial court from considering a motion for appropriate relief *sua sponte* . . . , and does not prevent the parties to this action from entering into an agreement for appropriate relief under N.C. Gen. Stat. § 15A-1420(e)").

F. Grant or Denial of Relief

Types of relief that are available when a trial judge grants a motion for appropriate relief include:

- new trial;
- dismissal of charges;
- relief sought by the State in an MAR under G.S. 15A-1416;
- referral to the North Carolina Innocence Commission if the defendant is claiming actual innocence; or
- any other appropriate relief.

G.S. 15A-1417(a). Grounds for the denial of relief are detailed in G.S. 15A-1419.

G. 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* (Aug. 2017), NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK. *See also* John Rubin, *Relief from a Criminal Conviction: Motions for Appropriate Relief* (2018).

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.

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. *See also* G.S. 7A-32(a) (providing that the N.C. appellate courts "have jurisdiction . . . to issue the writ of habeas corpus" in accordance with Chapter 17 and to the rule of the N.C. Supreme Court); *State v. Leach*, 227 N.C. App. 399 (2013) (discussing the statutory procedures in detail).

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 (Jan. 2020) (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, then Criminal Programs, and then Criminal 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 Parole Commission's administrative decision to terminate the defendant's MAPP contract and deny him release on parole. *State v. Leach*, 227 N.C. App. 399 (2013).
- "[R]emove the restraint" of the defendant's liberty where he was held without bond on two charges of first-degree murder of unborn twins. *State v. Chapman*, 228 N.C. App. 449, 451 (2013).
- 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).

- Challenge the continued detention of county inmates who continued to be held in jail pursuant to federal immigration-related detainers. *Chavez v. McFadden*. ___ N.C. ___, 843 S.E.2d 139 (2020) (discussing circumstances in which court has authority in such cases).
- Challenge the continued detention of inmates whose health is at risk during the COVID-19 pandemic. *See* Ian A. Mance, *Securing the Release of People in Custody in North Carolina During the COVID-19 Pandemic*, ADMINISTRATION OF JUSTICE BULLETIN No. 2020/02 (UNC School of Government, June 2020).

See also 1 NORTH CAROLINA DEFENDER MANUAL § 1.8A, Who Hears the Motion (2d ed. 2013) (noting possibility of habeas corpus review of district court pretrial release determination); 1 NORTH CAROLINA DEFENDER MANUAL § 3.2C, Scheduling Requirements (Mar. 2018) (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. Leach*, 227 N.C. App. 399 (2013); *State v. Wambach*, 136 N.C. App. 842 (2000).

F. Additional Resources

For a further discussion of the law related to state habeas corpus writs, including a sample writ and judgments, see Jessica Smith *Habeas Corpus* (Mar. 2014), NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK. *See also* Ian A. Mance, *Securing the Release of People in Custody in North Carolina During the COVID-19 Pandemic*, ADMINISTRATION OF JUSTICE BULLETIN No. 2020/02 (UNC School of Government, June 2020).

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 conviction or sentence imposed after a trial in 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

Limitations and exceptions. Unlike the rule applicable in federal courts, G.S. 15A-1335, as originally enacted, applied 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, as

originally written, precluded a court from imposing a more severe sentence for a conviction that was 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, reentered a guilty plea or was 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).

However, G.S. 15A-1335 was amended in 2013 to provide that "[t]his section shall not apply when a defendant, on direct review or collateral attack, succeeds in having a plea of guilty vacated." This amendment became effective December 1, 2013 and applies to offenses and probation violations occurring on or after that date, motions filed on or after that date, and resentencing hearings held on or after that date. 2013 N.C. Sess. Laws Ch. 385; *see also State v. Kawelo*, 263 N.C. App. 594 (2019) (unpublished) (granting defendant's 2018 motion for appropriate relief that sought to set aside his plea agreement; court vacated one of his three consolidated convictions as violative of the First Amendment, remanded the two remaining charges for disposition, and noted that "[t]he provisions of Section 15A-1335 are not applicable on remand"). The amendment took away the extra protection that had been afforded to defendants who pled guilty and brought it more in line with the holdings in *Pearce* and *Smith*. The practice note following this subsection addresses consequences that may result from the vacation of a guilty plea on appeal or by collateral attack.

Although G.S. 15A-1335 is still rather broadly written, other exceptions exist. 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"); *see also Colten v. Kentucky*, 407 U.S. 104 (1972) (Due Process Clause not violated because no presumption of vindictiveness arises when a defendant receives a harsher sentence in superior court after an appeal de novo from district court). *But cf.* 1 NORTH CAROLINA DEFENDER MANUAL § 10.7B, Misdemeanor Appeals from District Court (Jan. 2020) (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. Cook*, 225 N.C. App. 745 (2013) (defendant's sentence was properly increased at resentencing where he had not been sentenced in the correct presumptive range at the original sentencing hearing); *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); *State v. Ransom*, 80 N.C. App. 711 (1986).

- 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"); *cf. State v. Van Trusell*, 170 N.C. App. 33 (2005) (declining to recognize a presumption of vindictiveness when the State prays judgment on a previously arrested offense following a defendant's successful appeal on a separate conviction).
- 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. Gates*, 248 N.C. App. 732 (2016) (citing *Oliver*).
- 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).

Practice note: Great care must be taken when advising a client who is considering an attack on a guilty plea since G.S. 15A-1335 no longer prohibits a more severe sentence to be imposed on resentencing when a guilty plea is vacated on direct appeal or by collateral attack. Additionally, as a matter of federal constitutional law, if a defendant undoes the guilty plea, no presumption of vindictiveness applies to protect against a harsher sentence. *See Alabama v. Smith*, 490 U.S. 794 (1989).

Even before G.S. 15A-1335 was amended, a defendant who had charges dismissed as part of a plea agreement was subject to having those previously dismissed charges reinstated if he or she was successful in attacking a guilty plea. *See, e.g., 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; the charge that had been originally dismissed pursuant to the plea arrangement had not "been set aside on direct review or collateral attack" so G.S. 15A-1335 was not applicable). Also, 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. *See State v. Fox*, 34 N.C. App. 576, 579 (1977) ("Where a defendant elects not to stand by his portion of the plea agreement, the State is not bound by its agreement to forego the greater charge."); *see also State v. Rico*, 366 N.C. 327 (2012) (reversing per curiam for the reasons stated in the dissenting opinion of the N.C. Court of Appeals; dissenting judge would have found that when defendant repudiated his part of the plea agreement to voluntary manslaughter, the State was free to bring back the original charge of first-degree murder). 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). In light of the above, counsel should carefully analyze the consequences of seeking to undo a guilty plea and very explicitly explain the risks to the client.

C. Additional Resources

For further discussion of the topic covered in this section, see Jessica Smith, *Sentencing: Limitations on a Judge's Authority to Impose a More Severe Sentence after a Defendant's Successful Appeal or Collateral Attack* (Apr. 2014), NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK.

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). Since during this time period the judgment is said to be in fieri, i.e., incomplete, not final, the judge is free to correct clerical or legal errors. *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." *State v. Sammartino*, 120 N.C. App. 597, 599 (1995).

A district court session typically lasts one day. *See* Michael Crowell, *Out-of-Term, Out-of-Session, Out-of-County* (July 2015), NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK; *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).

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 (Jan. 2020).

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). Examples of harmless clerical errors include mistakenly stating in the judgment that the prison term was imposed pursuant to plea agreement, erroneously stating the conviction of the wrong crime, and the inadvertent checking of a box finding an aggravating factor on a judgment form. *Id.* 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. These types of legal errors involve mistakes in "judicial reasoning or determination" and are more than just harmless clerical errors. *See State v. Jarman*, 140 N.C. App. 198, 202 (2000). After the session has concluded, a trial judge may only make changes to his or her judgment and sentence if:

- a proper motion for appropriate relief (MAR) is made within ten days by the defendant pursuant to G.S. 15A-1414;
- a proper MAR is made within ten days by the State pursuant to G.S. 15A-1416;
- after ten days, a proper MAR is made by the defendant pursuant to G.S. 15A-1415;
- the trial judge, on his or her own motion, grants relief *to the defendant* pursuant to G.S. 15A-1420(d); or
- a defendant's application for habeas corpus is granted. *See supra* § 35.4, State Habeas Corpus.

Once notice of appeal has been given and the fourteen-day period for taking an appeal has expired, the trial court is divested of jurisdiction and cannot thereafter correct non-clerical errors. *See State v. Lebeau*, ___ N.C. App. ___, 843 S.E.2d 317, 319–20 (2020) (holding that under the plain language of G.S. 15A-1448(a), a trial judge is not divested of jurisdiction solely by virtue of the entry of notice of appeal; jurisdiction remains in the trial court "until notice of appeal has been given and 14 days have passed"); *State v. Davis*, 123

N.C. App. 240 (1996) (finding that trial judge had no jurisdiction to amend his original order arresting judgment or to amend the judgment to correct a judicial error while the case was on appeal); *see also* G.S. 15A-1453 (addressing the ancillary actions that a trial court may take while an appeal is pending). This is true except in cases where a MAR has been filed within ten days under G.S. 15A-1414 or G.S. 15A-1416 since the judge may act on these types of motions whether or not notice of appeal has been given. *See* G.S. 15A-1414(c); G.S. 15A-1448(a)(2).

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 unless a defendant has given notice of appeal, a judge always has the inherent authority to correct a judicial error when the error resulted in an illegal sentence. *See, e.g., 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 thereby increasing the length of defendant's imprisonment even though the session of court had ended and no MAR had been filed to correct the sentence).; *State v. Bonds*, 45 N.C. App. 62, 64 (1980) (stating that 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 clerical and judicial errors and of a trial judge's authority to modify a judgment to correct those errors, see Jessica Smith, *Correcting Errors Sua Sponte After Entry of Judgment* (Feb. 2012), NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK (includes an analytical flowchart distinguishing between the types of errors).

35.7 Extraordinary Writs

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

A. Mandamus

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

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

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

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

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

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

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

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

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

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

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

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

B. Prohibition

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

The writ has been commonly defined as one that prevents a tribunal possessing judicial or quasi-judicial powers from exercising jurisdiction over matters that are not within its jurisdiction or from exceeding its legitimate powers. *See* 63C AM. JUR. 2D *Prohibition* §§ 1, 3; *see also* N.C. Rules of Appellate Procedure, 287 N.C. 669, 732 (1975) (Rule 22 Drafting Committee Notes) ("Prohibition lies most appropriately to prohibit the impending exercise of jurisdiction not possessed by the judge to whom issuance of the writ has been sought."). It is the proper remedy to seek when the jurisdiction of the trial court depends on a legal question rather than a factual question. 63C AM. JUR. 2D *Prohibition* § 3.

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

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

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

63C AM. JUR. 2D *Prohibition* § 8.

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

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

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

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

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

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

C. Supersedeas Pending Review of Decisions of the Trial Court

Generally. A writ of supersedeas is an extraordinary writ that issues from an appellate court to a lower court "to preserve the status quo pending the exercise of the appellate court's jurisdiction." *City of New Bern v. Walker*, 255 N.C. 355, 356 (1961). The literal translation

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

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

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

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

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

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

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

D. Certiorari of Trial Court Orders and Judgments

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

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

Who can issue. The N.C. Supreme Court and the N.C. Court of Appeals have jurisdiction, exercisable by one or more judges or justices, to issue a writ of certiorari "to supervise and control the proceedings" of inferior courts. G.S. 7A-32(b), (c); *see also* N.C. CONST. art. IV, § 12(1), (2). A petition for the writ should be filed in the court to which an appeal of right might lie from a final judgment in the cause. N.C. R. APP. P. 21(b); *see also* N.C. R. APP. P. 4(d) (unless the defendant has been convicted of first-degree murder and received a sentence of death, the petition should be filed in the N.C. Court of Appeals).

The superior court also has jurisdiction to issue a writ of certiorari to review district court proceedings. *See* N.C. GEN. R. PRAC. SUPER. & DIST. CT. 19 ("In proper cases and in like manner, the court may grant the writ of certiorari."); *see also State v. Hamrick*, 110 N.C. App. 60 (1993). The authority of a superior court to grant a writ of certiorari under Practice Rule 19 is analogous to the power of the appellate court to issue a writ of certiorari pursuant to G.S. 7A-32(c). *Hamrick*, 110 N.C. App. 60; *see also State v. Summers*, ___ N.C. App. ___, 836 S.E.2d 316 (2019) (finding that defendant had no right to appeal to superior court from the district court's revocation of his probation under a deferred prosecution agreement but that defendant could have petitioned the superior court for certiorari review); *State v. Milanese*, 226 N.C. App. 433 (2013) (unpublished) (finding that superior court judge had authority to treat defendant's appeal from the denial of her motion for appropriate relief as a petition for writ of certiorari).

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

"unless a more specific statute restricts jurisdiction in the particular class of cases at issue") (citations omitted).

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

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

See N.C. R. APP. P. 21(a)(1). However, the N.C. Supreme Court recently made it clear that where a statute gives an appellate court jurisdiction to issue a writ of certiorari, Appellate Rule 21 cannot take it away. *See Ledbetter*, 371 N.C. 192, 196. The court further stated that Appellate Rule 21 "does not prevent the Court of Appeals from issuing writs of certiorari or have any bearing upon the decision as to whether a writ of certiorari should be issued." *Id.* at 197 (remanding case for Court of Appeals to exercise its discretion in determining whether it should grant or deny certiorari review of the denial of defendant's motion to dismiss her driving while impaired charge where defendant pled guilty; G.S. 15A-1444(e) specifically provides for certiorari review of a defendant's guilty plea and does not contains any language that limits the Court of Appeals' jurisdiction or discretionary authority). *But see State v. Killette*, ___ N.C. App. ___, 834 S.E.2d 696, 698 (2019) (Court of Appeals held, post-*Ledbetter,* that it was without authority under Rule 21 to grant certiorari review of denial of a suppression motion where defendant's failure to give pre-plea notice of intent to appeal the denial of his motion was not a "failure to take timely action" within the meaning of that rule), *petition for mandamus and alternative petition for disc. rev. filed*, (N.C. Dec. 4, 2019) (No. 379PA18-2), discussed *supra* in "Writ of certioriari" in § 35.1D, Defendant's Right to Appeal from Guilty Plea in Superior Court.

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

- Whether a defendant's sentence is supported by evidence introduced at the trial and sentencing hearing where the minimum sentence of imprisonment falls within the presumptive range for the defendant's prior record level and class of offense. G.S. 15A-1444(a1); *see also State v. Cook*, 225 N.C. App. 745 (2013) (allowing certiorari review of defendant's claim that presumptive sentence imposed on remand violated G.S. 15A-1335).
- When a defendant has pled guilty or no contest and is not entitled to appeal as a matter of right. G.S. 15A-1444(e); *see also State v. Bolinger*, 320 N.C. 596 (1987) (court acknowledged that defendant could not appeal as a matter of right the issue of whether his plea was accepted in violation of G.S. 15A-1022 but held that defendant could have sought review by writ of certiorari); *State v. Owenby*, 261 N.C. App. 774 (2018) (unpublished) (granting certiorari review and finding trial judge did not err when she accepted defendant's guilty plea since a sufficient factual basis existed for acceptance of

the plea).

- When an applicant's writ of habeas corpus is denied. *See State v. Niccum*, 293 N.C. 276, 278 (1977) (holding that there is no right to appeal from an order made in a habeas corpus proceeding instituted by a prisoner to inquire into the legality of his or her restraint but noting that "[t]he remedy, if any, is by petition for certiorari addressed to the sound discretion of the appropriate appellate court") (citation omitted); *see also State v. Leach*, 227 N.C. App. 399 (2013); *State v. Wambach*, 136 N.C. App. 842 (2000).

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

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

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

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

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, 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 factual 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*, NORTH CAROLINA INNOCENCE INQUIRY COMMISSION, (last visited April 23, 2020) ("A person exonerated through 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 under the Administrative Office of the Courts. G.S. 15A-1462. It consists of eight voting 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. G.S. 15A-1463. 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. *Id.* 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 previously 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* John Rubin, *2006 Legislation Affecting Criminal Law and Procedure*,

ADMINISTRATION OF JUSTICE BULLETIN No. 2007/03, at 10 (UNC School of Government, Jan. 2007); *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"). 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* at 10 (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").

D. Submission of Claim and Waiver of Rights

Any court, State or local agency, or claimant's counsel may refer a claim of innocence for any conviction to the Commission on behalf of a convicted person. A person convicted of homicide, robbery, any offense requiring registration, or any Class A through E felony may also directly make a claim of factual innocence. 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 shall 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 and may request specific attorney with knowledge of the case).

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*, located on the IDS website.

F. Notice to Victims and Co-Defendants

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).

If a formal inquiry is granted, the Commission must also use due diligence to notify any co-defendant of the claim and inform him or her that if he or she also wishes to file a claim, the claim must be filed within sixty days of the notice or it may be barred. G.S. 15A-1467(c1). However, notice need not be given to a co-defendant if the executive director shows good cause and the Commission Chair approves. *Id.*

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).

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 in a public hearing. G.S. 15A-1468(a). After reviewing the evidence, the

Commission votes on whether to refer the case to superior court 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).

At any point during the formal inquiry, the District Attorney and the convicted person or his or her counsel may bypass the eight-member panel by agreeing that there is sufficient evidence of factual innocence to merit review by a three-judge panel. G.S. 15A-1468(f).

I. Review by Three-Judge Panel

If the Commission concludes, or the District Attorney and convicted person's counsel agree, 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. G.S. 15A-1469(a).

Following an order setting a date for a hearing, the State has ninety days to file a response to the Commission's opinion finding sufficient evidence of factual innocence to merit judicial review. G.S. 15A-1469(b). The district attorney of the district of conviction, or his or her designee, represents the State at the hearing unless credible evidence of prosecutorial misconduct has been shown. In that case, a special prosecutor may be appointed. G.S. 15A-1469(a1), (c).

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. G.S. 15A-1469(d). 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. G.S. 15A-1469(h).

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); *see also* 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)(3a) 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

- Website of the North Carolina Innocence Inquiry Commission, which includes the Commission's governing statutes, rules, a case flowchart, and other resources.
- *Innocence Inquiry Proceedings Manual*, 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 original legislation that created the Innocence Commission).
- 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).
- Robert P. Mostellar, *N.C. Innocence Inquiry Commission's First Decade: Impressive Successes and Lessons Learned*, 94 N.C. L. REV. 1725 (2016) (discussing the origins and key elements of the Innocence Commission, analyzing the first ten years of the Commission's existence, and examining seven cases handled by the Commission where innocence has been found).
- Warren D. Hynson, *North Carolina Innocence Inquiry Commission: An Institutional Remedy for Actual Innocence and Wrongful Convictions*, 38 N.C. Cent. L. Rev. 142 (2016) (discussing the creation and operation of the Commission, offering recommendations for improvement, and examining two cases handled by the Commission where the defendants were exonerated).