Chapter 7

Speedy Trial and Related Issues

This chapter covers four related issues concerning trial delay:

- statutory protections against delayed prosecution of a criminal defendant;
- constitutional protections against prolonged delay between the commission of the offense and the defendant's arrest or indictment on the charge;

- constitutional protections against prolonged delay after arrest or indictment; and
- limits on prosecutors' use of their calendaring authority.

The Due Process Clause of the Fourteenth Amendment and the Sixth Amendment to the United States Constitution, as well as analogous provisions in North Carolina's Constitution (article I, sections 18 and 19), are the primary sources of law guaranteeing a defendant charged with a felony the right to a timely prosecution and a speedy trial. North Carolina has no statute of limitations for felonies, and the state's speedy trial statute, Sections 15A-701 to 15A-710 of the North Carolina General Statutes (hereinafter G.S.), was repealed effective October 1, 1989.

North Carolina has a two-year statute of limitations for misdemeanors, in addition to the above constitutional protections. There also are some statutory provisions governing the jurisdiction of the juvenile court that limit the ability of either the juvenile or superior court to try an adult for crimes committed when the adult was a juvenile.

The statutory protections against delayed prosecution are discussed in Section 7.1. Section 7.2 addresses the limitations on pre-accusation delay imposed by the Due Process Clause of the Fourteenth Amendment and the Law of the Land clause of article I, section 19 of the North Carolina Constitution. Section 7.3 discusses limitations on pretrial delay imposed by the speedy trial provisions in the Sixth Amendment and article I, section 18 of the North Carolina Constitution. Section 7.4 addresses constitutional and statutory limitations on the prosecutor's calendaring authority.

7.1 Statutory Protections against Delayed Prosecution

A. Statute of Limitations for Misdemeanors

G.S. 15-1 requires that prosecutions for misdemeanor offenses be initiated within two years of the commission of the offense. G.S. 15-1 was amended in 2017, and the differences between the former and current versions are discussed below.

Before 2017 amendments. Former G.S. 15-1 stated that prosecutions for misdemeanors must be initiated by indictment or presentment (discussed further in the next section) within that time frame. Although the former statute referred only to prosecutions initiated by grand jury action, it was interpreted as also applying to offenses prosecuted on a warrant. Thus, for prosecutions initiated by warrant or other criminal process, the process must have issued within the statute of limitations period. *See State v. Hundley*, 272 N.C. 491 (1968); *State v. Underwood*, 244 N.C. 68 (1956).

Then, in *State v. Turner*, ___ N.C. App. ___, 793 S.E.2d 287 (2016), the court of appeals interpreted former G.S. 15-1 to require an indictment, presentment, or arrest warrant—and only those types of pleadings—in order to toll the statute of limitations. Under *Turner*, other pleadings, such as a citation or magistrate's order, did not toll the statute.

The holding in *Turner* was short lived. In *State v. Curtis*, ___ N.C. ___, 817 S.E.2d 187 (2018), the North Carolina Supreme Court overruled *Turner*, finding that any valid criminal pleading was sufficient to toll the statute of limitations under former G.S. 15-1. For the reasons stated in *Curtis*, the court reversed *Turner*. ___ N.C. ___, 817 S.E.2d 173 (2018).

The previous version of the statute also stated that if a prosecutor obtained a timely but defective indictment, the State had one year to reindict the defendant from the time the original indictment was dismissed as long as the dismissal occurred within the original two-year time period from the date of offense. Thus, as long as an indictment issued within the two-year statute of limitations and the dismissal occurred within that time frame, the State had an additional twelve months to obtain a new, sufficient indictment. This ability to refile applied only to indictments; no exception existed for other types of criminal pleadings. This aspect of the former statute was not affected by *Turner* or *Curtis*; however, new G.S. 15-1, discussed next, broadens the ability of the State to refile after the dismissal of any defective pleading.

After 2017 amendments. New G.S. 15-1 continues to require that misdemeanor prosecutions be initiated within two years of the date of offense. The new statute contains two significant changes, effective for offenses committed on or after December 1, 2017. *See* S.L. 2017-212, sec. 5.3.

First, the current statute specifies that all pleadings toll the statute of limitations. This change is consistent with the *Curtis* decision, discussed above, which overruled *Turner*. Thus, under either the current or former version of G.S. 15-1, an indictment or presentment is no longer required to toll the statute as long as some pleading issues within the two-year period.

Second, under the current version of the statute, a defective pleading of any kind (not just indictments) may be reinitiated within one year from the time that the original pleading is dismissed. The dismissal and recharging need not occur within the original two-year period as long as the defective pleading was issued within that time period. Under both versions of the statute, tolling of the time period applies only to the offense charged. For example, an arrest warrant for possession of marijuana would toll the statute of limitations as to that offense. After the two-year mark, the statute of limitations would still bar trying the defendant on a related drug paraphernalia charge where no charging document had issued for that offense within the two-year period. For a further discussion of refiling charges following a dismissal of a defective pleading, see *infra* § 7.1B, Compliance with Statute of Limitations.

Misdemeanors not subject to two-year statute of limitations. G.S. 15-1 retains archaic language making an exception to the statute of limitations for "malicious misdemeanors." There are no modern cases construing this part of the statute, although an earlier case held that "malicious misdemeanors" are those in which malice is a necessary element of the offense. *See State v. Frisbee*, 142 N.C. 671 (1906) (holding that assault is not a malicious misdemeanor). A defendant charged with a "malicious misdemeanor" outside

the statute of limitations period may have a strong argument that the phrase "malicious misdemeanors" is void for vagueness. *See Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (Florida vagrancy statute held void for vagueness where it failed to give a person of ordinary intelligence fair notice that certain conduct was forbidden by the statute); *United States v. Habig*, 390 U.S. 222, 227 (1968) (courts urged to construe statutes of limitation in favor of repose).

There are also some isolated misdemeanors, specifically designated by statute, for which there is a longer statute of limitations. *See, e.g.*, G.S. 105-236(9) (establishing six-year statute of limitations for prosecutions for willful failure to file tax return or pay tax).

B. Compliance with Statute of Limitations

Issuance of indictment or presentment. In cases initiated by grand jury indictment or presentment, the indictment or presentment must be issued before the statute of limitations expires. A presentment is a grand jury request to the prosecutor to investigate an alleged crime. A presentment tolls the statute of limitations even though under our current law a presentment does not formally initiate criminal proceedings. *See State v. Whittle*, 118 N.C. App. 130 (1995) (amendment to criminal procedure act precluding prosecution initiated by presentment does not nullify provision that statute of limitations is satisfied by timely presentment).

Issuance of arrest warrant or other pleading. For cases initiated by an arrest warrant or other criminal process, the process likewise must be issued before the statute of limitations expires. A prosecution is timely if a warrant or other process issues before the two-year statute of limitations runs, even if the case does not reach superior court on appeal for more than two years. *See State v. Underwood*, 244 N.C. 68 (1956) (valid arrest warrant tolled the statute of limitations despite trial de novo not occurring for more than two years). Under both the previous and revised version of G.S. 15-1, any pleading (including an arrest warrant) tolls the statute of limitations. *See supra* § 7.1A. Statute of Limitations for Misdemeanors.

Modification of warrant. If a prosecutor files a statement of charges that substantially modifies or adds to the charges alleged in a warrant, the statement of charges must be filed within the statute of limitations period. *See State v. Caudill*, 68 N.C. App. 268 (1984) (prosecution barred by statute of limitations where statement of charges was issued after statute of limitations period had expired and statement of charges changed nature of offense charged). The same rule would presumably apply if a prosecutor sought an indictment modifying the charges alleged in a warrant.

The nature of the modification matters. Under current G.S. 15-1, if the State "abandons" a timely prosecution due to a defective pleading, it has an additional twelve months following dismissal in which to recharge the defendant with the dismissed offense. This additional time seems to be limited to situations involving a fatally defective pleading. *See* G.S. 15-1 (stating that "[p]rovided, that if any pleading is defective, *so that no judgment can be given thereon*, another prosecution may be instituted for the same

offense, within one year after the first shall have been abandoned by the State") (emphasis added). Thus, the statute does not give the State additional time in which to issue a modified charge that changes the factual allegations or adds related charges. Further, G.S. 15-1 refers to institution of a new prosecution for the "same offense," which likewise limits the ability of the State to substitute or add charges after the two year period. On the other hand, where the pleading is fatally flawed and fails to confer jurisdiction on the trial court, a modified charge involving the same offense appears to be permissible if brought within the twelve-month period. For more information on pleading defects, see *infra* Chapter 8, Criminal Pleadings (2d ed. 2013).

Issuance of void warrant or invalid indictment. Under the previous version of G.S. 15-1, an invalid warrant did *not* toll or arrest the statute of limitations—that is, it did not stop the clock from running. *See State v. Hundley*, 272 N.C. 491 (1968). Thus, even though it was permissible as a matter of pleading practice for a prosecutor to issue a statement of charges to modify a void warrant, such a statement of charges was nevertheless barred if it was issued after the statute of limitations had expired (in most misdemeanor cases, two years from the offense date). *See State v. Madry*, 140 N.C. App. 600 (2000). The former statute allowed a defective indictment to be dismissed and reissued for the same offense, but only within the two-year period from the date of the offense.

In contrast, an invalid pleading does toll the statute of limitations under G.S. 15-1 as revised. The new statute provides that if a pleading obtained within the statute of limitations period is found to be defective, the State has one year from the time it abandons the pleading to correct the error and recharge the defendant.

Practice note: Three important limitations exist on the ability of the State to dismiss a timely pleading and refile after the expiration of the statute of limitations. One, the language of the statute indicates that the right to refile a pleading after it has been dismissed is limited to situations involving a fatally flawed pleading, one that fails to confer jurisdiction on the court. Not any defect will do; the pleading must be flawed in such a way that "no judgment can be given thereon." For example, a pleading that failed to charge the named offense but effectively charged a lesser-included offense would not appear to qualify—after the expiration of the two-year time period, the State would not be able to take a dismissal and refile the more serious offense (as the original pleading was not so flawed as to prevent a judgment thereupon). Two, the dismissal must be because of a defective pleading. A dismissal for other reasons, such as the court's denial of the State's continuance request, does not extend the statute of limitations. *See infra* 7.4E, District Court Proceedings (discussing this scenario). Three, any dismissal and recharging after the expiration of the two-year period is still limited to the same offense; the State may not add offenses or change the original offense with a new pleading after the two-year statute of limitations.

Effect of dismissal with leave and voluntary dismissal. G.S. 15A-932 authorizes dismissal with leave to reprosecute when the defendant has failed to appear or pursuant to a deferred prosecution agreement. *See also* G.S. 15A-1009 (permitting dismissal with leave if defendant found incapable to proceed [repealed effective for offenses committed

on or after Dec. 1, 2013]). Although there is no case law directly on point, it is reasonable to assume that the statute of limitations does not bar the State from reviving the same charges as long as the original process was timely issued. *See* G.S. 15A-932(b) (outstanding process retains its validity after dismissal with leave); *see also State v. Reekes*, 59 N.C. App. 672 (1982) (under repealed statutory speedy trial act, speedy trial clock stopped running when prosecutor entered dismissal with leave based on defendant's failure to appear, and clock did not start running again until proceedings were reinstituted; however, State was required to reinstitute proceedings within "reasonable time"); *State v. McKoy*, 294 N.C. 134 (1978) (a defendant who creates delay cannot claim violation of constitutional speedy trial right; in this case, State was cause of delay, and charges were dismissed for violation of speedy trial right).

Generally, the statute of limitations is not tolled when the prosecutor takes a voluntary dismissal pursuant to G.S. 15A-931(b). *See State v. Lamb*, 84 N.C. App. 569 (1987), *aff'd*, 321 N.C. 633 (1988). Because a voluntary dismissal completely terminates the charges, the prosecution would need to refile the charges within two years of the offense date to satisfy the statute of limitations for most misdemeanors. Thus, if the State dismissed because its witnesses were not present or the judge was unwilling to continue the case, the State would be unable to refile once two years had passed from the date of the offense. *See infra* 7.4E, District Court Proceedings (discussing this scenario). The additional one-year period time for refiling applies only to dismissals based on a fatally flawed pleading, discussed above.

For a further discussion of the impact of a dismissal in a case involving a claim of improper post-accusation delay, see *infra* "Effect of dismissal" and "Dismissal with leave under G.S. 15A-932" in § 7.3C, When Right Attaches. For a discussion of the effect of a dismissal after jeopardy has attached, see *infra* § 30.4, Effect of Dismissal.

C. Waiver of Statute of Limitations

G.S. 15A-954(a)(2) requires the court to dismiss charges against a defendant if the statute of limitations has run. The defendant must affirmatively raise the statute of limitations at or before trial to preserve the right to dismissal. *See State v. Brinkley*, 193 N.C. 747 (1927) (plea of guilty waived statute of limitations defense); *State v. Holder*, 133 N.C. 709 (1903) (statute of limitations defense could not be raised for first time on appeal).

The failure to raise the statute of limitations in district court probably does not waive the right to raise it in superior court on appeal for trial de novo. *See* G.S. 15A-953 ("except as provided in G.S. 15A-135 [stipulations to or express waivers of improper venue]**,** no motion in superior court is prejudiced by any ruling upon, or a failure to make timely motion on, the subject in district court").

In misdemeanor cases that originate in superior court (that is, misdemeanors joined with felonies or initiated by presentment), notice of intent to rely on the statute of limitations as an affirmative defense is not required as a matter of reciprocal defense discovery

obligations under G.S. 15A-905(c)(1). The defendant still must affirmatively raise the issue before trial under G.S. 15A-954 or the issue is waived.

D. Statutory Limitations on Jurisdiction of Juvenile Court

Based on juvenile's age. The juvenile court traditionally had exclusive, original jurisdiction over all offenses committed by a person who was less than sixteen years of age at the time of the offense. *See* G.S. 7B-1501(7). "Raise the Age" legislation recently passed in North Carolina expanded the jurisdiction of the juvenile court to people over the age of sixteen and under the age of eighteen for most offenses, effective for offenses committed on or after December 1, 2019.

In most cases, the jurisdiction of the juvenile court over any cause of action automatically terminates when a person reaches the age of eighteen. *See* G.S. 7B-1601(b). Amendments to G.S. 7B-1601 passed as a part of "Raise the Age" legislation allow the court to retain jurisdiction after age eighteen when the offense was committed by a person sixteen or seventeen years old and the court acquired jurisdiction while the person was a juvenile. *See* G.S. 7B-1601(b1). When a juvenile is committed to the custody of the Department of Juvenile Justice and Delinquency Prevention for placement in a youth development center for a serious felony, the juvenile court may retain extended jurisdiction until the juvenile reaches the age of nineteen or twenty-one, depending on the felony. *See* G.S. 7B-1602; *see also* NORTH CAROLINA JUVENILE DEFENDER MANUAL § 3.3, Jurisdiction (UNC School of Government, 2017). The rules on extended jurisdiction for juveniles in youth development centers apply whether the offense was committed before or after the effective date of the "Raise the Age" legislation.

In *State v. Dellinger*, 343 N.C. 93 (1996), the N.C. Supreme Court held that the State was barred from initiating a prosecution in superior court against an adult for an offense committed by that adult when he was less than sixteen years of age. At the time *Dellinger* was decided, there was no provision in the Juvenile Code giving the juvenile court jurisdiction over an adult offender and thus no court had jurisdiction to prosecute the case. The court in *Dellinger* therefore dismissed the prosecution for lack of subject matter jurisdiction.

North Carolina's juvenile code was thereafter revised to provide that the juvenile court may assert jurisdiction over a person 18 years of age or older, an adult, for the limited purpose of determining whether to dismiss or transfer to superior court any felony charges and related misdemeanors alleged to have been committed by the adult defendant when he or she was between the ages of thirteen and sixteen. *See* G.S. 7B-1601(d). This provision applies to offenses committed before or after December 1, 2019. In addition, for offenses committed on or after December 1, 2019, the court may assert jurisdiction over a person nineteen years old for any offense alleged to have been committed when the person was sixteen years old if jurisdiction was not obtained before the person was nineteen. *See* G.S. 7B-1601(d1). Similarly, the court may assert jurisdiction over a person twenty years old for any offense alleged to have occurred when the person was seventeen years old if jurisdiction was not obtained before the person was twenty years old. In both

instances, the court is limited to determining whether to dismiss the petition or transfer the matter to superior court. *Id.*

The juvenile code has similar rules extending the juvenile court's jurisdiction when a delinquency proceeding initially began in juvenile court. For offenses committed before December 1, 2019, when a delinquency proceeding has been initiated but is not concluded before the juvenile's 18th birthday, the juvenile court retains limited jurisdiction to determine whether the juvenile petition will be dismissed or the case will be transferred to superior court for trial as an adult. S*ee* G.S. 7B-1601(c). For offenses committed after December 1, 2019, the juvenile court likewise has extended jurisdiction to decide on transfer, but the length of time depends on whether the juvenile was under 16, at least 16 but under 17, and at least 17 but under 18 at the time of the offense. *See* G.S. 7B-1601(c), (c1).

If you represent a client in this situation and you believe that the delay in prosecution was intentional or strategic on the part of the State—an attempt, for example, to prosecute a case in superior court that likely would not have been bound over had it been prosecuted during the juvenile's minority—you would have a strong argument that due process was violated under the case law discussed *infra* in § 7.2, Pre-Accusation Delay. You might also have an equal protection argument that your client was unjustly singled out and denied the benefits of prosecution within the juvenile system granted to other similarly situated juveniles.

Based on time of filing of petition. In several decisions, the court of appeals considered the impact of G.S. 7B-1703(b), which requires that a juvenile petition be filed within 15 days after the complaint is received by the juvenile court counselor and allows an extension of up to 15 days in the chief court counselor's discretion. The court of appeals held that the trial court lacks jurisdiction to hear the matter if the petition is filed more than 15 days after the juvenile court counselor receives the complaint and the court counselor has not granted an extension *or* the petition is filed more than 30 days after receipt of the complaint. *See, e.g.*, *In re K.W.*, 191 N.C. App. 812 (2008); *In re M.C.*, 183 N.C. App. 152 (2007); *see also* NORTH CAROLINA JUVENILE DEFENDER MANUAL § 6.3C, Timeliness of Filing (UNC School of Government, 2017) (discussing court of appeals' decisions on time limit on juvenile petitions).

Since the issuance of those decisions, the N.C. Supreme Court has held that violation of these time limits *does not* deprive the district court of jurisdiction to act. According to the Court, the time limits are directory, not mandatory. *In re D.S.*, 364 N.C. 184 (2010). The court of appeals has expressed concern over this interpretation of the statutory time limits but has recognized it as binding. *See, e.g.*, *In re J.A.G.*, 206 N.C. App. 318, 322 (2010) (expressing concern that failure to comply with deadlines disregards best interests of children, but following supreme court's decision in *In re D.S.*).

The extent to which protections for pre-accusation delay and speedy trial rights under the state and federal constitutions apply in juvenile cases is not clear; no U.S. Supreme court or North Carolina court decision has decided the issue. Defense counsel should consider

arguing that these protections apply to juveniles in the appropriate case—from a policy standpoint, the justifications underlying speedy trial and related constitutional protections for adults may even be stronger in juvenile cases. Speedy trial and pre-accusation delay protections are discussed *infra* in § 7.2, Pre-Accusation Delay, and § 7.3, Post-Accusation Delay.

E. Rights of Prisoners

When a defendant who is incarcerated for a criminal offense has other criminal charges pending against him or her, there are statutorily defined time-frames for when the State must proceed on the other charges. A motion to dismiss for violation of these statutory provisions is not the same as a motion or demand for a speedy trial, which is governed by the United States and North Carolina Constitutions. *See State v. Doisey*, 162 N.C. App. 447 (2004); *see also infra* "Prisoners' right to a speedy trial" in § 7.3C, When Right Attaches. These statutory provisions enable a defendant to make the State proceed on pending charges while he or she is incarcerated elsewhere, which may facilitate a concurrent sentence on the pending charges, reduce the overall length of the defendant's sentence, and allow the defendant additional privileges while incarcerated. In some circumstances, the provisions also require dismissal of pending charges if the State fails to comply with the statutory requirements.

In-state prisoners. G.S. 15A-711 sets two deadlines for proceeding on pending in-state charges against a defendant incarcerated in North Carolina. First, a defendant who is incarcerated in North Carolina pursuant to a criminal proceeding and who has other state charges pending against him or her can require the prosecutor to "proceed" in the pending case by filing a written request with the clerk where the charges are pending and serving a copy of it on the prosecutor. *See* G.S. 15A-711(c). This provision protects defendants who are already serving a sentence of imprisonment on other charges or who are in pretrial custody awaiting trial. It allows defendants to request that the State proceed on pending charges whether or not the State has lodged a detainer against them. [A detainer is a notice to corrections officials that an inmate has other pending charges and should not be released except to the custody of another law enforcement or corrections officer. Detainers typically affect an inmate's privileges within prison, including the ability to work or participate in programs.] Within six months of a properly-filed request, the prosecutor must "proceed" by requesting that the defendant be returned to the custody of local law enforcement so that he or she can stand trial on the pending charges. *See* G.S. 15A-711(a). If the State fails to make a written request for temporary release within the six-month period, the charges must be dismissed. *See* G.S. 15A-711(c).

Second, G.S. 15A-711 sets a deadline of eight months for trial of a defendant following a properly-filed request, although that deadline is flexible and may be unenforceable under court opinions. The State has up to six months under G.S. 15A-711(c) to request custody of the defendant, plus a period of temporary release of up to 60 days under G.S. 15A-711(a), to try the defendant. The cases initially interpreting G.S. 15A-711 recognized that these provisions established an eight-month time limit for trying the defendant, although the State had some leeway in completing the trial. *See State v. Dammons*, 293 N.C. 263

(1977) (State made request for custody of defendant within six months, and case was scheduled to begin within eight months of defendant's request but was continued because of absence of key State's witness; G.S. 15A-711 not violated); *see also* G.S. 15A-711(b) (trial court has authority to decide precedence of trials). More recently, the court of appeals has held that the State complies with G.S. 15A-711 by making a written request to secure the defendant's presence at trial within six months of the defendant's request, whether or not the trial takes place within the eight-month statutory period. *See State v. Doisey*, 162 N.C. App. 447, 450–51 (2004); *see also State v. Howell*, 211 N.C. App. 613 (2011) (noting that G.S. 15A-711 is not a "speedy trial" statute and does not guarantee a trial within a specific time frame). Even under *Doisey*, G.S. 15A-711 continues to require dismissal if the State fails to request custody of the defendant within the six-month deadline. In *Doisey*, the court of appeals remanded the case for the trial court to determine whether the State had met that deadline. *See also State v. Williamson*, 212 N.C. App. 393 (2011) (case remanded to determine whether the prosecutor made a timely written request for the defendant's transfer; calendaring of case insufficient to comply with statute).

Another statute, G.S. 15-10.2, provides a similar mechanism for a prisoner to require the State to proceed to trial on pending criminal charges. A prisoner may proceed under both G.S. 15A-711 and G.S. 15-10.2, if applicable. G.S. 15-10.2 applies to people who are already serving a sentence in North Carolina and who have had a detainer lodged against them. *See State v. Wright*, 290 N.C. 45 (1976) (noting adverse consequences on prisoner of having detainer lodged against him or her). The statute explicitly provides that a prisoner must be brought to trial on pending charges within eight months of a properly-filed request by the prisoner. The time limit in G.S. 15-10.2 was not addressed in *Doisey*, so this provision may provide some relief for a prisoner subject to a detainer who is not tried within eight months. Note, however, that G.S. 15-10.2 allows the court to grant "any necessary and reasonable continuance." Thus, while the time frame of G.S. 15-10.2 may be firmer than that of G.S. 15A-711, neither provision guarantees the right to a trial within a particular time frame.

Practice note: The two statutes provide a useful mechanism for making the State move forward on pending charges when the defendant is imprisoned on other matters, but a defendant seeking relief for delay in trial of the case may need to look more to constitutional speedy trial authority and pertinent calendaring requirements, discussed further below. Where requests under G.S. 15A-711 or G.S. 15-10.2 are being made, counsel should therefore consider making a motion for speedy trial under the state and federal constitutions at the same time.

A prisoner who is requesting trial under G.S. 15A-711 or G.S. 15-10.2 must comply with the notice and service requirements described therein. The two statutes' provisions are similar but not identical. If the defendant fails to comply with the requirements, the request may be considered invalid and dismissal may be barred. *See State v. Pickens*, 346 N.C. 628 (1997) (request did not comply with G.S. 15A-711); *State v. Doisey*, 162 N.C. App. 447 (2004) (request complied with G.S. 15A-711); *State v. Hege*, 78 N.C. App. 435 (1985) (request did not comply with G.S. 15A-711); *State v. McKoy*, 294 N.C. 134

(1978) (request did not comply with G.S. 15-10.2). A properly-filed request under G.S 15A-711 must be in writing and filed with the clerk of court in the county where the charges sought to be resolved are pending, and a copy of the request must be served on the prosecutor. A request addressed to the wrong division of the trial court or without referencing the correct file number for the matter sought to be resolved is probably not sufficient. *State v. Armistead*, ___ N.C. App. ___, 807 S.E.2d 664 (2017). It is the defendant's burden to demonstrate proper form and service of a request under G.S. 15A-711. *Id.*

Three-recently enacted statutes address service of outstanding warrants while a prisoner is in custody. The statutes direct law enforcement agencies, the Division of Adult Correction, prosecutors, and the courts to identify and attempt to resolve outstanding warrants while other charges are pending or the defendant is in custody. *See* John Rubin, *What to Do about Outstanding Arrest Warrants*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jan. 5, 2016) (discussing G.S. 15A-301.1(o) on obligations of law enforcement, G.S. 15A-301.1(p) on obligations of courts [amended in 2017 to apply to in-custody defendants only), and G.S. 148-10.5 on obligations of corrections). These statutes do not mandate service of outstanding warrants, but the failure to do so may strengthen a speedy trial claim. *See infra* "Prisoners' right to a speedy trial" in § 7.3C, When Right Attaches.

Out-of-state prisoners. The Interstate Agreement on Detainers, a multi-article agreement codified at G.S. 15A-761, governs prisoners incarcerated outside North Carolina and charged with a North Carolina offense. Because it is an interstate compact, state courts are bound by federal law interpreting the agreement as well as North Carolina case law. *See Alabama v. Bozeman*, 533 U.S. 146, 148 (2001) (agreement "creates uniform procedures for lodging and executing a detainer"). The Agreement creates a number of distinct rights. *See generally* Donald M. Zupanec, Annotation, *Validity, Construction, and Application of Interstate Agreement on Detainers*, 98 A.L.R.3d 160 (1980); George L. Blum, Annotation, *Construction and Application of Article III of Interstate Agreement on Detainers (IAD)—Issues Related to "Speedy Trial" Requirement, and Construction of Essential Terms*, 70 A.L.R.6th 361 (2011).

First, when a person is serving a term of imprisonment outside of North Carolina, and North Carolina issues a detainer against him or her for untried offenses, the person is entitled to a trial within *180 days* of requesting disposition of the North Carolina charges. *See* G.S. 15A-761 (Article III(a)); *see also State v. Prentice*, 170 N.C. App. 593 (2005) (time begins to run only when "detainer" is lodged; case discusses meaning of "detainer"); *State v. Dunlap*, 57 N.C. App. 175 (1982) (Interstate Agreement on Detainers did not apply to defendant who was released from prison in New York after requesting disposition of N.C. charges but before 180 day period expired).

A prisoner in this situation seeking disposition of his or her charges must notify both the prosecutor and the court in the district where the charges are pending of: (i) his or her place of imprisonment; and (ii) his or her request for final disposition of the charges. *See* G.S. 15A-761 (Article III(a)); *State v. Schirmer*, 104 N.C. App. 472 (1991). The statutory period begins to run on the date the prosecutor receives the demand, not on the date the

prisoner sends it. *See State v. Treece*, 129 N.C. App. 93 (1998). If the defendant is not tried within the prescribed time period, the charges against him or her must be dismissed with prejudice. G.S. 15A-761 (Article III). However, the trial court may grant continuances where reasonable or necessary, thereby extending the 180-day period. G.S. 15A-761 (Article III(a)); *State. v. Capps*, 61 N.C. App. 225 (1983).

Second, if the prosecutor requests temporary custody of an out-of-state inmate for purposes of trial on outstanding charges, the inmate must be tried within *120 days* of arriving in North Carolina. *See* G.S. 15A-761 (Article IV(c)). If the defendant is not tried within the prescribed time period, the charges against him or her must be dismissed with prejudice. G.S. 15A-761 (Article IV). Again, the court may grant continuances where reasonable or necessary. G.S. 15A-761 (Article IV(c)).

Third, once North Carolina obtains custody of an out-of-state prisoner pursuant to the Agreement, the prisoner may not be returned to his or her original place of imprisonment without having been tried. If a state violates this requirement, known as the "antishuttling" provision, the case must be dismissed with prejudice. *See* G.S. 15A-761 (Article III(d), Article IV(e)); *Alabama v. Bozeman*, 533 U.S. 146 (2001) (charges were properly dismissed where the defendant, who was serving time in a Florida federal prison, was taken to Alabama for one day to address pre-trial matters on his pending state charges and was returned to Florida without having been tried by Alabama).

F. Pretrial Release

Although North Carolina no longer has a speedy trial statute, there is an older statute prohibiting lengthy pretrial incarceration. If a defendant is incarcerated in jail on a felony warrant and demands a speedy trial in open court, the defendant must either be indicted during the next term of court or released from custody, unless the State's witnesses are not available. Similarly, if an incarcerated person accused of a felony demands a speedy trial and is not tried within a statutorily set period (two terms of court, provided the two terms are more than four months apart), the person is entitled to release from incarceration. *See* G.S. 15-10; *State v. Wilburn*, 21 N.C. App. 140 (1974).

G. Other Statutory Deadlines

After issuance of summons. G.S. 15A-303(d) provides that "[e]xcept for cause noted in the criminal summons by the issuing official, an appearance date may not be set more than one month following the issuance or reissuance of a criminal summons."

DWI trials involving motor vehicle forfeitures. G.S. 20-28.3(m) provides that "[d]istrict court trials of impaired driving offenses involving forfeitures of motor vehicles pursuant to G.S. 20-28.2 shall be scheduled on the arresting officer's next court date or within 30 days of the offense, whichever comes first," and may only be continued for a "compelling reason."

Probable cause hearings. *See* G.S. 15A-606(d) (deadline for probable cause hearing). For a further discussion of probable cause hearings, see *supra* Chapter 3, Probable Cause Hearings.

Hearings on capacity to proceed. *See supra* Appendix 2-1, Summary of 2013 Legislation (deadline for supplemental hearing after defendant found incapable to proceed, effective for offenses committed on or after Dec. 1, 2013).

Probation violations. There are various deadlines for proceedings in cases involving alleged probation violations. For example, the court does not have jurisdiction to hold a hearing on an alleged violation of probation after the period of probation expires unless the State files a written violation report with the clerk before the period of probation expires indicating its intent to hold a hearing. *See* G.S. 15A-1344(f); *State v. High*, 230 N.C. App. 330 (2013) (trial court lacked jurisdiction to modify probation after expiration of original period of probation). Discussion of probation deadlines is beyond the scope of this manual.

7.2 Pre-Accusation Delay

A. Constitutional Basis of Right

The Sixth Amendment right to speedy trial does not attach before arrest, indictment, or other official accusation, but a defendant is protected from unfair or excessive pre-accusation delay by the Due Process Clause of the Fifth and Fourteenth Amendments. *See United States v. Lovasco*, 431 U.S. 783 (1977); *United States v. Marion*, 404 U.S. 307 (1971). Finding that sometimes pre-accusation delay is necessary to prevent post-accusation delay and that, generally, post-accusation delay is more harmful to a defendant, *Lovasco* emphasized that the due process right to timely accusation is limited. Due process is violated only when the defendant's ability to defend against the charge is impaired by the delay and the reason for the delay is improper. However, even relatively short delays may result in a due process violation in some circumstances. *See infra* § 7.2D, Case Summaries on Pre-Accusation Delay. In addition to protections against pre-accusation delay, the same constitutional due process protections apply to delays in sentencing. *See Betterman v. Montana*, ___ U.S. ___, 136 S. Ct. 1609 (2016) (holding due process may protect against "inordinate delay" in sentencing but finding speedy trial rights inapplicable).

B. Proving Prejudice

To establish a due process violation a defendant must demonstrate prejudice—that is, the defendant must show that the pre-indictment delay impaired his or her ability to defend against the charge. *See United States v. Lovasco*, 431 U.S. 783 (1977); *United States v. Marion*, 404 U.S. 307 (1971); *State v. McCoy*, 303 N.C. 1 (1981). General allegations that the passage of time has caused memories to fade are insufficient. *See State v. Goldman*, 311 N.C. 338 (1984) (prejudice not established by showing that defendant did

not recall date in question or could not account for his whereabouts on that date); *State v. Jones*, 98 N.C. App. 342 (1990). Instead, the defendant must establish that pre-accusation delay caused the loss of significant and helpful testimony or evidence. *See State v. Dietz*, 289 N.C. 488 (1976). Counsel also may have an obligation to ameliorate prejudice if possible. *See State v. Hackett*, 26 N.C. App. 239 (1975) (defense motion denied in part because defendant who alleged pre-accusation delay had not tried to remedy memory loss regarding underlying incident by moving for a bill of particulars or moving for discovery of the information).

C. Reason for Delay

A court reviewing pre-accusation delay not only must find actual prejudice, but also must consider the reason for the delay. *See United States v. Lovasco*, 431 U.S. 783 (1977). Delay in prosecution might be attributable to investigation, negligence, administrative considerations, or an improper attempt to gain some advantage over the defendant. To establish a due process violation, the defendant must show that the delay was intentional or at least the result of gross negligence or deliberate indifference on the part of a state actor.

Delay in violation of due process. U.S. Supreme Court and North Carolina decisions generally require proof of intentional delay by the State to show a due process violation. *See United States v. Gouveia*, 467 U.S. 180 (1984) (stating that due process requires dismissal of an indictment if the defendant proves that the government's delay caused actual prejudice and was a deliberate mechanism to gain an advantage over the defendant); *State v. Graham*, 200 N.C. App. 204 (2009) (applying same two-pronged test).

Proof of intentional delay may not be required in all cases, however. The government in *Lovasco* conceded that recklessness on the part of the State in failing to prosecute may give rise to a due process violation. *Lovasco*, 431 U.S. at 795 n.17; *see also State v. McCoy*, 303 N.C. 1 (1981) (describing showing required for due process violation and suggesting but not resolving that intentional delay may be required to establish violation). Justice Stevens, dissenting in *Lovasco*, suggested further that when the government had no reason for the delay, a constitutional violation may arise. 431 U.S. at 799–800. The Court of Appeals for the Fourth Circuit, interpreting *Lovasco*, has held that the proper approach to determining whether due process is violated is to balance the prejudice to the defendant against the reasons for the delay. *See Howell v. Barker*, 904 F.2d 889 (4th Cir. 1990) (defendant need not demonstrate an improper motive on the part of the prosecutor); *Jones v. Angelone*, 94 F.3d 900 (4th Cir. 1996) (following *Howell*, but noting that most other circuits do not use balancing approach and require a defendant to show that the government intentionally delayed prosecution to obtain an unfair tactical advantage or for other bad faith reasons); *see also State v. Dietz*, 289 N.C. 488 (1976) (in case decided before *Lovasco*, N.C. Supreme Court applied balancing approach).

Excusable delay. Courts have found no violation of due process where a delay in prosecuting a case is attributable to the exigencies of investigation. *See United States v.*

Lovasco, 431 U.S. 783 (1977) (investigative delay acceptable; investigation before indictment should be encouraged); *accord State v. Goldman*, 311 N.C. 338 (1984); *State v. Netcliff*, 116 N.C. App. 396 (1994) (holding that pre-indictment delay was acceptable, based in part on end date of undercover drug operation in relation to date of indictment), *overruled in part on other grounds by State v. Patton*, 342 N.C. 633 (1996); *State v. Holmes*, 59 N.C. App. 79 (1982) (delay excusable where necessary to protect identity of undercover officer).

Also, courts have found no constitutional violation where the delay in prosecution is the result of delay in reporting crimes to law enforcement. *See State v. Martin*, 195 N.C. App. 43 (2009) (delay of six years before Department of Social Services reported sexual offenses against child; DSS is not the prosecution or the State for purposes of delay inquiry); *State v. Stanford*, 169 N.C. App. 214 (2005) (fifteen year delay before victim filed report of sexual offenses committed when she was thirteen and fourteen years old); *State v. Everhardt*, 96 N.C. App. 1 (1989) (offense reported three years after commission), *aff'd*, 326 N.C. 777 (1990); *State v. Hoover*, 89 N.C. App. 199 (1988) (sexual offense against child not reported for six years, then prosecuted promptly).

D. Case Summaries on Pre-Accusation Delay

Due process violation found. In the following cases, the courts found a due process violation.

State v. Johnson, 275 N.C. 264 (1969) (due process violated by four to five year delay in prosecuting defendant where reason for delay was that law enforcement hoped to arrest an accomplice and pressure defendant to testify against the accomplice once he was arrested; court found prejudice where pre-accusation delay led to defendant serving a prison term that might otherwise have run concurrently with earlier sentence)

Howell v. Barker, 904 F.2d 889 (4th Cir. 1990) (due process violated where State conceded that several year delay in prosecuting defendant resulted in lost witness and reason for delay was administrative convenience; court applied balancing test between prejudice and reason for delay)

Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965) (per curiam) (seven month delay between offense and indictment violated due process where undercover officer made hundreds of drug buys during seven month period, officer could not specifically remember defendant, defendant could not recall events of date in question, and delay deprived defendant of opportunity to offer alibi witness)

No due process violation found. In the following cases, the court found no due process violation.

State v. Floyd, 238 N.C. App. 110 (2014) *reversed in part on other grounds*, 369 N.C. 329 (2016) (pre-accusation delay of two years did not cause prejudice where defendant failed to show that significant evidence was lost due to the delay)

State v. Goldman, 311 N.C. 338 (1984) (six year investigative delay in obtaining indictment did not violate due process where only prejudice was defendant's assertions of faded memory about dates and events in question)

State v. McCoy, 303 N.C. 1 (1981) (eleven month delay between offense and trial did not violate either due process or speedy trial right; reasons for delay were hospitalization of defendant and overcrowding of court docket, and defendant was unable to show specific prejudice)

State v. Dietz, 289 N.C. 488 (1976) (four and one half month delay between offense and indictment did not violate due process where reason for delay was to protect identity of undercover officer and only claim of prejudice was faded memory; court applied balancing test between reason for delay and prejudice)

State v. Graham, 200 N.C. App. 204 (2009) (general assertion of prejudice based on faded memory does not show actual prejudice; defendant did not claim that any particular witness would give testimony helpful to him)

State v. Everhardt, 96 N.C. App. 1 (1989) (spouse abuse case where three year delay in initiating prosecution was caused primarily by victim's procrastination in reporting abuse; defendant showed witness unavailability but did not prove that witnesses would have been available at an earlier time), *aff'd*, 326 N.C. 777 (1990)

State v. Hackett, 26 N.C. App. 239 (1975) (six month delay in prosecuting defendant to protect identity of undercover agent did not violate due process)

E. Investigating Pre-Accusation Delay

If there has been a significant delay in bringing charges against your client, you should document the resultant prejudice. The following steps may be helpful.

- If defense witnesses cannot be found, do not automatically assume that your client was mistaken about their identity; investigate the possibility that the witnesses were previously available but have moved away.
- If important records or documents have been destroyed, find out when this occurred.
- If a defense witness can no longer recall significant facts, determine whether the situation would have been different at an earlier date.
- As you obtain access to warrants, witness statements, or other items in the prosecutor's file, establish the chronology and sequence of events. For example, you should note whether a witness complaint predates the arrest warrant by many months; if so, you can point out to the court that the State had the evidence necessary to charge the defendant at an earlier date.
- Collect jail and prison records to establish that your client was in custody during the delay, could have been served with the charges by the State, and was deprived of the opportunity to receive a concurrent sentence.

- Document any other steps taken by the defendant or defense counsel to mitigate potential prejudice stemming from the delay, whether successful or not.

F. Motions to Dismiss

A motion to dismiss for untimely prosecution may be brought under G.S. 15A-954(a)(4), which provides that the court must dismiss the charges in a criminal pleading if violation of the defendant's constitutional rights has caused irreparable prejudice. *See State v. Parker*, 66 N.C. App. 293 (1984). G.S. 15A-954(c) permits such a motion to be made "at any time." However, to avoid the risk of waiver, such motions should be made at or before trial. *See generally State v. Brinkley*, 193 N.C. 747 (1927) (plea of guilty waived statute of limitations defense); *State v. Holder*, 133 N.C. 709 (1903) (statute of limitations defense could not be raised for first time on appeal). A sample motion to dismiss for pre-accusation delay is available in the noncapital motions bank on the Office of Indigent Defense Services (IDS) website, www.ncids.org (select "Training & Resources," then "Motions Bank, Non-Capital").

Where there are contested issues of fact regarding a motion to dismiss, the defendant is entitled to an evidentiary hearing. *See State v. Goldman*, 311 N.C. 338 (1984). In the motion to dismiss you should specifically request a hearing. *See State v. Dietz*, 289 N.C. 488 (1976) (failure to hold hearing not error absent defense request).

7.3 Post-Accusation Delay

A. Constitutional Basis of Right

The defendant's right to a speedy trial is based on the Sixth Amendment and on article I, section 18 of the N.C. Constitution. *See Klopfer v. North Carolina*, 386 U.S. 213 (1967) (Sixth Amendment speedy trial right applicable to states); *State v. Tindall*, 294 N.C. 689 (1978). North Carolina no longer has a speedy trial statute. The statutory speedy trial provisions of Article 35 of Chapter 15A (G.S. 15A-701 through G.S. 15A-710) were repealed effective October 1, 1989.

B. Test for Speedy Trial Violation

The leading case on the Sixth Amendment standard for assessing speedy trial claims is *Barker v. Wingo*, 407 U.S. 514 (1972). *Barker* held that four factors must be balanced in determining whether the right to speedy trial has been violated. These four factors are:

- length of the pretrial delay,
- reason for the delay,
- prejudice to the defendant, and
- defendant's assertion of the right to a speedy trial.

Barker emphasized that there is no bright-line test for determining whether the speedy trial right has been violated; the nature of the right "necessarily compels courts to approach speedy trial cases on an ad hoc basis." *Id.* at 530. "No single [*Barker*] factor is regarded as either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial." *State v. McKoy*, 294 N.C. 134, 140 (1978). All the factors must be weighed and balanced against each other. *See State v. Groves*, 324 N.C. 360 (1989); *State v. Washington*, 192 N.C. App. 277 (2008) (court conducted analysis of four *Barker* factors and found constitutional violation).

Length of delay. The length of delay serves two purposes. First, it is a triggering mechanism for a speedy trial claim. "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. 514, 530; *see also State v. Jones*, 310 N.C. 716 (1984) (length of delay not determinative, but is triggering mechanism for consideration of other factors). In felony cases, courts generally have found delay to be "presumptively prejudicial" as it approaches one year. *See Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992); *State v. Webster*, 337 N.C. 674 (1994) (delay of sixteen months triggered examination of other factors); *State v. Smith*, 289 N.C. 143 (1976) (delay of eleven months prompted consideration of *Barker* factors); *State v. Wilburn*, 21 N.C. App. 140 (1974) (ten months).

Second, the length of delay is one of the factors that must be weighed. The longer the delay, the more heavily this factor weighs against the State. *See Doggett v. United States*, 505 U.S. 647 (1992) (delay of eight years required dismissal); *State v. Chaplin*, 122 N.C. App. 659 (1996) (particularly lengthy delay establishes prima facie case that delay was due to neglect or willfulness of prosecution and requires State to offer evidence explaining reasons for delay and rebutting prima facie showing; constitutional violation found where case was calendared for trial every month for three years but was never called for trial and defendant had to travel from New York to North Carolina for each court date); *State v. Washington*, 192 N.C. App. 277 (2008) (four years and nine months between arrest and trial found to be unconstitutional delay in conjunction with other *Barker* factors); *State v. McBride*, 187 N.C. App. 496 (2007) (delay of three years and seven months did not violate right to speedy trial where the record did not show the reason for the delay and defendant did not assert the right until trial and did not show prejudice).

Practice note: In misdemeanor cases tried in district court, which the State is generally capable of disposing of in well less than a year, a shorter time period may be considered prejudicial for speedy trial purposes. *See generally Barker v. Wingo*, 407 U.S. 514, 531 (1972) ("the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge"); *State v. Brooks*, 287 N.C. 392, 406 (1975) **(**"The purpose of our de novo procedure is to provide all criminal defendants charged with misdemeanor violations the right to a 'speedy trial' in the District Court and to offer them an opportunity to learn about the State's case without revealing their own.").

In *State v. Friend*, 219 N.C. App. 338 (2012), the court of appeals measured the delay for speedy trial purposes from the time of the defendant's appeal to superior court to the time of trial in superior court. The court stated that it did not need to consider the delay in district court because the defendant did not make a speedy trial demand until after he appealed for a trial de novo in superior court; therefore, only the delay in superior court was relevant. This interpretation seems inconsistent with the four-factor analysis for speedy trial claims in *Barker v. Wingo*, 407 U.S. 514 (1972), under which a request for a speedy trial is one factor and not determinative. Notwithstanding its initial statement, the court in *Friend* went on to consider the entire delay in assessing and ultimately rejecting the defendant's speedy trial claim. In light of the court's initial statement, however, if counsel believes that the State has unduly delayed bringing a case to trial in district court, counsel should raise the speedy trial claim in district court as well as in superior court in the event of appeal. The defendant did so in the subsequent case of *State v. Sheppard*, 225 N.C. App. 655 (2013) (unpublished), a DWI case in which the defendant filed frequent requests for a speedy trial in district court and then in superior court after appealing for a trial de novo. The court of appeals upheld the superior court's dismissal of the charge on speedy trial grounds, basing its decision on the 14-month delay from the defendant's arrest to her trial in district court.

For a further discussion of the district court's authority to address delay, see *infra* § 7.4E, District Court Proceedings.

Reason for delay. The length of delay must be considered together with the reason for delay. The court in *Barker* held that different weights should be assigned to various reasons for delay. "A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered . . . . Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay." *Barker*, 407 U.S. 514, 531; *see also State v. Pippin*, 72 N.C. App. 387 (1985) (negligence by State may support claim; right to speedy trial violated where State issued three defective indictments before getting it right). North Carolina courts have held generally that the defendant has the burden of showing that trial delay is due either to neglect or willfulness on the part of the prosecution. *See State v. McKoy*, 294 N.C. 134 (1978); *State v. Chaplin*, 122 N.C. App. 659 (1996). However, an exception to the general rule lies where the delay is exceptionally long. Then the burden shifts to the State to explain the delay. *See State v. Branch*, 41 N.C. App. 80 (1979); *see also State v. Washington*, 192 N.C. App. 277 (2008) (constitutional violation found where reason for delay was not a neutral factor but instead resulted from the prosecutor's failure to submit evidence to SBI lab for analysis).

Establishing a violation of the defendant's constitutional right to a speedy trial does not require proof of an improper prosecutorial motive. A speedy trial claim may lie where the reason for the delay was administrative negligence. *See State v. Kivett*, 321 N.C. 404 (1988) (holding that the defendant's speedy trial rights were not violated where there was no evidence that: (1) other cases were not being tried, (2) the State was trying more recent cases while postponing the subject case, or (3) insignificant cases were being tried

ahead of the subject case); *State v. Pippin*, 72 N.C. App. 387 (1985) (speedy trial violation found where State was negligent in obtaining valid indictment); s*ee also State v. Webster*, 337 N.C. 674, 679 (1994) (court "expressly disapprove[s]" of practice of repeatedly placing a case on the trial calendar without calling it for trial).

Valid administrative reasons, including the complexity of a case, congested court dockets, and difficulty in locating witnesses, may justify delay. *See State v. Smith*, 289 N.C. 143 (1976) (eleven month pretrial delay caused by congested dockets and difficulty in locating witnesses acceptable); *State v. Hughes*, 54 N.C. App. 117 (1981) (no speedy trial violation found where reason for delay was congested dockets and policy of giving priority to jail cases). However, overcrowded courts do not necessarily excuse delay. *See Barker*, 407 U.S. 514, 531 ("overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant"); *State v. Williams*, 144 N.C. App. 526 (2001) (concurring opinion recognizes that congested dockets do not excuse violation of defendant's right to speedy trial), *aff'd per curiam*, 355 N.C. 272 (2002).

A common reason for delay is that the State is awaiting laboratory results from a crime lab. North Carolina courts have treated these delays as a neutral reason, at least where the defendant made no showing of negligence or purposeful delay by the State or lab. *State v. Johnson*, ___ N.C. App. ___, 795 S.E.2d 126 (2016) (concluding that 18-month delay for crime lab results was a neutral factor where the defendant failed to show delay was the result of negligence or intentional delay by the State). *Accord State v. Goins*, 232 N.C. App. 451 (2016). The approach of categorizing crime lab delays as a neutral reason for delay seems to conflict with the U.S. Supreme Court's directive that it is ultimately the State's responsibility to ensure that trial occurs in the timely manner. *Barker* commands that such administrative delays should be weighed less heavily against the prosecution than intentional delays, not that such delay is completely neutral. *See Barker* at 531. *Accord Strunk v. United States*, 412 U.S. 434 (1973).

In *Johnson*, the court distinguished backlogs at the crime lab from overcrowded court calendars, finding that the prosecution had direct control over court calendars but not the crime lab. 795 S.E.2d at 132; *see also State v. Dorton*, 172 N.C. App. 759 (2005). Courts in other jurisdictions have treated the crime lab as an extension of the State and weighed this reason against the State. *See State v. Magnusen*, 646 So. 2d 1275 (Miss. 1994); *State v. Torolito*, 950 P.2d 811 (N.M. 1997). Other factors also may be appropriate to consider, such as delays in sending the evidence the lab, the typical time it takes to complete testing, the availability of alternative testing options, whether a request to expedite testing was made by the prosecutor, delays following the return of the test results, and the sheer length of delay at the crime lab. *See generally Doggett v. U.S.*, 505 U.S. 647, 657 (1992) ("official negligence compounds with time").

If the defendant causes the delay, the defendant is unlikely to succeed in claiming a violation of speedy trial rights. *See State v. Groves*, 324 N.C. 360 (1989) (no speedy trial violation where defendant repeatedly asked for continuances); *State v. Tindall*, 294 N.C.

689 (1978) (delay caused largely by defendant's fleeing the state and living under an assumed name); *State v. Leyshon*, 211 N.C. App. 511 (2011) (delay caused by defendant's failure to state whether he asserted or waived his right to counsel at four separate hearings); *State v. Pippin*, 72 N.C. App. 387 (1985) (speedy trial claim does not arise from delay attributable to defense counsel's requested plea negotiations; State has burden of establishing delay attributable to that purpose). Where the State and the defendant share responsibility for the delay, courts have subtracted the amount of time attributable to the defendant's acts from the total, leaving open a viable claim based on the delay attributable to the State. *See, e.g. State v. Ward*, 597 N.W.2d 614 (Neb. 1999).

Public defenders and counsel appointed to represent defendants are not state actors for purposes of a speedy trial claim, and the State ordinarily is not responsible for delays they cause. *See Vermont v. Brillon*, 556 U.S. 81 (2009) (delay caused by appointed defense counsel not attributable to State when determining whether a defendant's speedy trial right violated; State may be responsible if there is an institutional breakdown of the public defender system, however).

Prejudice to defendant. To prevail on a speedy trial claim, defendants must show that they were prejudiced by the delay. *Barker*, 407 U.S. 514, 532, identified three types of prejudice that may result from a delayed trial:

- oppressive pretrial incarceration;
- the social, financial, and emotional strain of living under a cloud of suspicion; and
- impairment of the ability to present a defense.

The strongest prejudice claims are those in which a defendant can show that his or her ability to defend against the charges was impaired by the delay. *See, e.g., State v. Chaplin* 122 N.C. App. 659 (1996) (loss of critical defense witness); *State v. Washington*, 192 N.C. App. 277 (2008) (witnesses' memories of key events had faded, interfering with defendant's ability to challenge their reliability; witnesses also were allowed to make in-court identifications of defendant nearly five years after the date of offense, which increased the possibility of misidentification). However, courts have found prejudice where a defendant was subjected to oppressive pretrial incarceration or where delay resulted in financial loss or damage to the defendant's reputation in the community. *See United States v. Marion*, 404 U.S. 307, 320 (1971) (formal accusation may "interfere with defendant's liberty, . . . disrupt his employment, drain his financial resources, curtail his associations, . . . and create anxiety in him, his family and his friends"); *State v. Pippin*, 72 N.C. App. 387 (1985) (dismissal of charges upheld despite no real prejudice to defense where negligent delay in prosecuting case caused drain on defendant's financial resources and interference with social and community associations); *Washington*, 192 N.C. App. at 292 (that defendant was incarcerated for 366 days as a result of pretrial delay was an "important consideration"). For incarcerated defendants with pending charges, prejudice may occur in relation to the defendant's custody classification within the prison, which can impact the defendant's ability to participate in prison programs and limit or prevent the defendant's accumulation of "gain time" credit. *See State v. Armistead*, ___ N.C. App. ___, 807 S.E.2d 664 (2017) (considering but rejecting this

argument as unsupported by the record). In some cases, courts have found delay to be so long, or so inexplicable, that prejudice is presumed. *See Doggett v. United States*, 505 U.S. 647 (1992) (prejudice assumed where trial delayed for over eight years); *State v. McKoy*, 294 N.C. 134 (1978) (willful delay of ten months outweighed lack of real prejudice to defendant; speedy trial violation found).

Some North Carolina cases have stated that where there is a legitimate reason for the delay of prosecution, the defendant is required to show "actual or substantial prejudice resulting from the delay," a statement that appears to conflate the standards for a claim for pre-accusation delay under the Due Process Clause with a Sixth Amendment speedy trial claim. *See State v. Armistead*, ___ N.C. App. ___ (2017) (citing *State v. Goldman*, 311 N.C. 338 (1984) (a case involving a due process claim on pre-accusation delay). The language may mean only that in balancing the *Barker* factors, the court may consider the strength of the defendant's showing of prejudice when the State's reason for delay is legitimate. To the extent the language establishes a higher standard, it appears to be inconsistent with U.S. Supreme Court case law.

Assertion of right. *Barker* rejected a demand-waiver rule for speedy trial claims—that is, the court rejected a rule whereby a defendant who failed to demand a speedy trial would waive his or her right to one. Instead, *Barker* held that the defendant's assertion of or failure to assert his or her right to a speedy trial is one factor to be weighed in the inquiry into the deprivation of the right. 407 U.S. 514, 528. This factor will be weighed most heavily in favor of defendants who have repeatedly asked for a trial and who have objected to State motions for continuances. *See State v. McKoy*, 294 N.C. 134 (1978) (defendant asked eight or nine times for trial date and moved to dismiss for lack of speedy trial); *State v. Raynor*, 45 N.C. App. 181 (1980) (stressing importance of objecting to State's continuance motions). Conversely, the failure to assert the right to a speedy trial will weigh against a defendant. Failing to assert the right in a timely manner may be interpreted by reviewing courts as consent or complicity by the defendant in the delay. *See State v. Farmer*, ___ N.C. App. ___, 822 S.E.2d 556 (2018) ("Thus, the defendant himself acquiesced in the delay by waiting almost five years after indictment to assert a right to speedy trial."); *State v. Webster*, 337 N.C. 674 (1994); *State v. McCollum*, 334 N.C. 208 (1993) (defendant made no attempt to assert right to speedy trial for thirty-two months; factor weighed against defendant); *cf. State v. Washington*, 192 N.C. App. 277 (2008) (this factor weighed in favor of defendant, although defendant did not formally assert right until two years and ten months after indictment; assertion was still one year and eight months before trial began, and defendant complained about delay in examination of physical evidence before formal assertion). Therefore, if a speedy trial is to a defendant's advantage, counsel should assert the right whenever possible.

C. When Right Attaches

Defendant must be charged with crime. The Sixth Amendment right to a speedy trial attaches at arrest, indictment, or other official accusation, whichever occurs first. *See Doggett v. United States*, 505 U.S. 647 (1992); *Dillingham v. United States*, 423 U.S. 64 (1975) (per curiam); *State v. McKoy*, 294 N.C. 134 (1978). Even when the defendant is

unaware that he or she has been charged with a crime, the defendant's speedy trial right attaches and the clock begins to run on issuance of the indictment or other official accusation. *See Doggett*, 505 U.S. at 653 (defendant unaware of indictment until arrest eight years later); *see also State v. Kelly*, 656 N.E.2d 419 (Ohio Ct. App. 1995) (citing both *Doggett* and an earlier North Carolina case, *State v. Johnson*, 275 N.C. 264 (1969), for the proposition that delay in arresting defendant following indictment was subject to speedy trial protection).[1] However, lack of knowledge can affect the prejudice analysis in a speedy trial claim. A defendant who does not know of an indictment or arrest warrant cannot claim anxiety or disruption of social relationships as a source of prejudice. On the other hand, since the defendant cannot make a demand for a speedy trial in this situation, the lack of a demand does not hurt the defendant in the speedy trial analysis.

Effect of dismissal. G.S. 15A-931 permits the State to take a voluntary dismissal of charges. Refiling of the same or a different charge is permitted following dismissal as long as jeopardy has not attached (and, in a misdemeanor case, the statute of limitations is not a bar).[2] *See State v. Muncy*, 79 N.C. App. 356 (1986).

However, if the State rearrests or reindicts the defendant for the same offense, the defendant can add together the pretrial periods following each arrest or indictment for speedy trial purposes. *See State v. Sheppard*, 225 N.C. App. 655 (2013) (unpublished) (adding together periods of delay before State took voluntary dismissal and after State refiled charges); *State v. Pippin*, 72 N.C. App. 387 (1985) (reindictment case); *United States v. Columbo*, 852 F.2d 19, 23–24 (1st Cir. 1988) ("Were it otherwise, the government would be able to nullify a defendant's speedy trial right by the simple expedient of dismissing and reindicting whenever speedy trial time was running out on its prosecution."); *see also* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 18.1(c), at 121-22 (4th ed. 2015) (date of original arrest or charge is usually controlling for speedy trial purposes, although time between dismissal and recharging are not counted).

1. *Doggett* makes it clear that speedy trial rather than due process protections apply once a person has been indicted *or* arrested. In *State v. McCoy*, 303 N.C. 1 (1981), issued before *Doggett*, the N.C. Supreme Court left open the question of whether speedy trial protections attached when an arrest warrant has been issued but the defendant has not yet been arrested. Although the language in *Doggett* suggests that speedy trial protections apply after any formal accusation is issued, jurisdictions have reached differing results on this question. *See Williams v. Darr*, 603 P.2d 1021 (Kan. Ct. App. 1979) (speedy trial right attaches on issuance of arrest warrant, which commences prosecution); *see also generally* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 18.1(c), at 121 (4th ed. 2015) (at the least, if a charging document short of an indictment is sufficient to give a court jurisdiction to proceed to trial, such as an arrest warrant for a misdemeanor to be tried in district court, speedy trial right attaches when charging document is issued regardless of whether defendant is aware of charge).

2. The procedure in G.S. 15A-931 differs from North Carolina's former nolle prosequi statute, which permitted the State to dismiss cases with leave and then restore them to the trial docket without filing new charges. In *Klopfer v. North Carolina*, 386 U.S. 213 (1967), the U.S. Supreme Court held that the nolle prosequi procedure violated the defendant's speedy trial rights because the charges against the defendant remained pending, the prosecutor could restore them to the calendar for trial at any time, and there was no means for the defendant to obtain dismissal of the charges or have them called for trial. Now, the State may only take a dismissal with leave in narrow circumstances, discussed later in the text.

For a further discussion of possible barriers to refiling of charges, see *infra* § 7.4E, District Court Proceedings.

Dismissal with leave under G.S. 15A-932. G.S. 15A-932 permits the prosecutor to take a dismissal with leave when a defendant has failed to appear in court (or pursuant to a deferred prosecution agreement). *See also* G.S. 15A-1009 (permitting dismissal with leave after finding of incapacity to stand trial [repealed effective for offenses committed on or after Dec., 1, 2013]). A case dismissed with leave is removed from the trial calendar. However, the criminal prosecution is not terminated; the indictment remains valid, and charges may be reinitiated without a new indictment. *See State v. Lamb*, 321 N.C. 633 (1988).

A defendant whose case is dismissed with leave pursuant to G.S. 15A-932 still has a speedy trial right, although the courts generally will not find a constitutional violation when the delay is caused by the defendant's own actions. *See Barker v. Wingo*, 407 U.S. 514 (1972); *State v. Tindall*, 294 N.C. 689 (1978) (delay caused by defendant fleeing jurisdiction; no speedy trial violation). Once the defendant has been arrested or otherwise appears, he or she has the right to proceed to trial; the State may not unduly delay calendaring the case for trial or refuse to calendar the case altogether. *See generally Klopfer v. North Carolina*, 386 U.S. 213 (1967) (discussed *supra* note 2 in "Effect of dismissal" in this subsection C.); *see also* G.S. 20-24.1(b1) (if defendant has failed to appear on motor vehicle offense, which results in revocation of license, he or she must be afforded an opportunity for a trial or hearing within a reasonable time of his or her appearance).

Prisoners' right to a speedy trial. Defendants who have been convicted of an unrelated crime do not lose the Sixth Amendment right to a speedy trial while in prison. *See Smith v. Hooey*, 393 U.S. 374 (1969); *State v. Wright*, 290 N.C. 45 (1976); *State v. Johnson*, 275 N.C. 264 (1969). However, courts have held that prisoners cannot claim prejudice based solely on pretrial incarceration, reasoning that they would have been incarcerated in any event. *See State v. Vaughn*, 296 N.C. 167 (1978); *State v. McQueen*, 295 N.C. 96 (1978). A defendant also may argue that he or she was prejudiced by losing the opportunity to serve sentences concurrently, a type of prejudice that has been recognized in the pre-accusation delay context. *See State v. Johnson*, 275 N.C. 264 (1969) (due process violated by four to five year delay in prosecuting defendant where reason for delay was that law enforcement hoped to arrest an accomplice and pressure defendant to testify against the accomplice once he was arrested; court found prejudice where pre-accusation delay led to defendant serving a prison term that might otherwise have run concurrently with earlier sentence); *see also supra* § 7.1E, Rights of Prisoners (discussing prisoners' statutory rights).

Three-recently enacted statutes may strengthen a prisoner's speedy trial claim in cases in which the State fails to serve an outstanding warrant while the prisoner is in custody. The statutes direct law enforcement agencies, the Division of Adult Correction, prosecutors, and the courts to identify and attempt to resolve outstanding warrants while other charges are pending or the defendant is in custody. *See* John Rubin, *What to Do about*

Outstanding Arrest Warrants, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jan. 5, 2016) (discussing G.S. 15A-301.1(o) on obligations of law enforcement, G.S. 15A-301.1(p) on obligations of courts [amended in 2017 to apply to in-custody defendants only), and G.S. 148-10.5 on obligations of corrections). Although the statutes do not mandate service of outstanding warrants or identify remedies for violations, they recognize the importance of resolving pending criminal proceedings. Thus, the failure to serve an outstanding warrant on a prisoner may strengthen a claim of prejudice. Further, because the statutes require that notice of the defendant's location be given to the law enforcement agency responsible for any unserved warrants, it may be more difficult for the State to justify delays in service. The failure to serve and proceed on outstanding process also may support a Due Process claim based on pre-accusation delay. *See supra* n.1 in this subsection B. (discussing potential applicability of Due Process to delay in arrest after issuance of arrest warrant).

D. Case Summaries on Post-Accusation Delay

Speedy trial violation found.

Doggett v. United States, 505 U.S. 647 (1992) (speedy trial violation found where there was an eight and one-half year delay between indictment and trial, largely because of prosecution's negligence in locating defendant; excessive delay is presumptively prejudicial as it "compromises the reliability of a trial in ways that neither party can prove or . . . identify")

State v. McKoy, 294 N.C. 134 (1978) (twenty-two month delay between arrest and trial, with ten months of delay attributable to willful negligence by prosecution; speedy trial violation found despite minimal prejudice to defendant where defendant requested he be brought to trial eight or nine times)

State v. Sheppard, 225 N.C. App. 655 (2013) (unpublished) (court of appeals upheld the dismissal of case on speedy trial grounds in the following circumstances: defendant was charged in September 2009 with impaired driving; case was continued multiple times, once for defendant to confer with counsel after initial appointment and remaining times at the State's request; defendant filed numerous requests for a speedy trial in district court and, when the State requested another continuance after an 11-month delay since defendant's arrest, the district court denied the continuance; the State took a voluntary dismissal and recharged and rearrested defendant the same day; defendant made further requests for a speedy trial and moved for dismissal on speedy trial grounds, which the district court denied; defendant was tried and convicted in district court after a total of 14 months from her arrest to trial; defendant appealed for a trial de novo, made additional speedy trial requests, and then prevailed on her speedy trial motion; the court of appeals held that the four *Barker* factors supported the superior court's ruling and ruled, among other things, that defendant did not waive her speedy trial rights by objecting to the chemical analyst's affidavit and asserting her right to confront the analyst, recognizing that a defendant may not be required to give up one constitutional right to assert another)

State v. Washington, 192 N.C. App. 277 (2008) (speedy trial violation where trial was delayed nearly five years, reason for delay was repeated neglect and underutilization of court resources on part of prosecutor's office, much of delay was caused by State's failure to submit physical evidence to SBI lab to be examined, there was no indication that delay was caused by factors outside of prosecution's control, delay resulted in actual particularized prejudice to defendant, and defendant asserted his right to speedy trial)

State v. Chaplin, 122 N.C. App. 659 (1996) (speedy trial violation found where trial was delayed for almost three years, even though the defendant did not assert the right until less than 30 days before trial, where the case was repeatedly calendared but not called and, according to defendant's unrefuted allegation, State waited for defense witness to be paroled, making it more difficult for defendant to secure that witness's testimony)

State v. Pippin, 72 N.C. App. 387 (1985) (upholding trial court's finding that speedy trial right denied where trial was delayed for fourteen months based primarily on State's repeated mishandling of process of obtaining indictment; prejudice to defendant was anxiety and drain on family's financial resources)

No speedy trial violation found.

Betterman v. Montana, 578 U.S. ___, 136 S. Ct. 1609 (2016) (Speedy Trial Clause does not apply after the defendant has pled guilty or been found guilty at trial; no violation where defendant spent 14 months in jail awaiting sentencing after pleading guilty; due process may still protect against "inordinate delay" in sentencing)

Barker v. Wingo, 407 U.S. 514 (1972) (no speedy trial violation despite five year delay in bringing case to trial where State delayed so that it could obtain conviction of co-defendant and use co-defendant as witness against defendant; court found minimal prejudice and found that defendant had acquiesced in delay)

State v. Webster, 337 N.C. 674 (1994) (no speedy trial violation despite sixteen month delay where there was no showing of an improper purpose or motive by the State and the defendant could not show concrete prejudice)

State v. Groves, 324 N.C. 360 (1989) (twenty-six month delay in bringing case to trial did not deny defendant right to speedy trial where defendant had not objected to delay and had asked for thirteen continuances; defendant also could not show prejudice beyond stating that delay resulted in State having additional jailhouse witnesses against him)

State v. Smith, 289 N.C. 143 (1976) (no constitutional violation where trial was delayed eleven months and there was no showing that delay was purposeful or oppressive or reasonably could have been avoided by State; delay was due to congested dockets, understandable difficulty in locating out-of-state witnesses, and good faith efforts to obtain absent co-defendant)

State v. Evans, ___ N.C. App. ___, 795 S.E.2d 444 (2017) (nearly three year delay in misdemeanor prosecution was enough to trigger review of other *Barker* factors; defendant has the burden to make a prima facie showing that the delay was attributable to the willful or negligent acts of the State, a burden not carried here; while demand was timely, defendant failed to show prejudice based on pretrial incarceration where he was also incarcerated for other, unrelated charges)

State v. Armistead, ___ N.C. App. ___, 807 S.E.2d 664 (2017) (no violation for 4 year delay between indictment and trial in driving while impaired case; delay was presumptively unreasonable and attributable to the negligence of the State where prosecutor removed case from docket after defendant failed to appear and prosecutor by "reasonable effort" could have located defendant, who was serving an active sentence in North Carolina state prison; however, there was no demand for a speedy trial for more than three years and an insufficient showing of prejudice)

State v. Kpaeyeh, 246 N.C. App. 694 (2016) (3 year delay in child sex abuse case did not violate speedy trial right where delay due in large part to substitutions of defense counsel; prejudice argument rejected where defendant claimed loss of ability to locate alibi witnesses, but DNA results showed he was the father of the child born of the victim)

State v. Johnson, ___ N.C. App. ___, 795 S.E.2d 126 (2016) (28 month delay sufficient to trigger review of other *Barker* factors but most of that delay was attributable to the crime lab backlog; defendant conceded that "it is unclear the State had the ability to speed up" the testing process; some of the additional delay was caused by the defendant's indecision about defense counsel and defense counsel's schedule; no proper demand for speed trial was made for more than 24 months; evidence of prejudice was speculative)

State v. Friend, 219 N.C. App. 338 (2012) (case involved following sequence: defendant was charged in March 2006 with impaired driving; case was continued 11 times, six of which were attributable to defense, two of which were by consent, and three of which were attributable to State; in July 2007, when State was not ready to proceed, district court refused to continue case and State took voluntary dismissal and refiled charges nine days later; district court dismissed case in October 2007 in light of its earlier refusal to grant continuance; and case moved between district and superior court until February 2010 for review of dismissal order and trial in district and superior court; under these circumstances, court of appeals found that length of delay, one of the four factors in speedy trial analysis, was not caused by State because continuances in district court were attributable to both defendant and State and proceedings to review dismissal order was neutral factor)

State v. Lee, 218 N.C. App. 42 (2012) (twenty-two month delay, including ten-month delay in holding of capacity hearing after psychiatric evaluation of defendant, prompted consideration of *Barker* factors, but no speedy trial violation where record was unclear as to reasons for delay; courts states that while troubled by delay in holding of capacity hearing, it could not conclude that delay was due to State's willfulness or negligence

where, among other things, defendant repeatedly requested removal of trial counsel and victim was out of country for medical treatment for injuries)

State v. Branch, 41 N.C. App. 80 (1979) (two year delay was presumptively unreasonable and burden shifted to State to explain delay, but no constitutional violation found because defendant failed to show sufficient prejudice; defendant failed to make record about testimony that lost witness would have given)

E. Remedy for Speedy Trial Violation

Dismissal is the only remedy for violation of a defendant's constitutional right to a speedy trial. *See Barker*, 407 U.S. 514, 522; G.S. 15A-954(a)(3) (court must dismiss charges if defendant has been denied constitutional right to speedy trial); *see also Strunk v. United States*, 412 U.S. 434 (1973) (court cannot remedy violation of right to speedy trial by reducing defendant's sentence); *State v. Wilburn*, 21 N.C. App. 140 (1974) (recognizing that dismissal is only remedy after determination that constitutional right to speedy trial has been violated).

F. Motions for Speedy Trial

To assert the right to a speedy trial, the defendant should (1) demand a speedy trial, and (2) move to dismiss the charges for lack of a speedy trial. To enhance the chances of having charges dismissed, the demand and motion to dismiss should be made repeatedly, as often as every sixty to ninety days.

Timing of motion. G.S. 15A-954(c) states that a defendant may make a motion to dismiss for lack of a speedy trial at any time. However, for the motion to have a meaningful chance of success, and to avoid the risk of waiver, it should be made before trial. *See State v. Joyce*, 104 N.C. App. 558 (1991) (making motion for speedy trial at trial reduced issue to mere formality); *see also State v. Thompson*, 15 N.C. App. 416 (1972) (speedy trial claim cannot be raised for first time on appeal). As a practical matter, counsel will want to raise the issue as soon as he or she is ready for trial. The more demands a defendant makes for a speedy trial, the more likely his or her chances of obtaining a dismissal for lack of a speedy trial.

Content of speedy trial motion. The motion to dismiss should articulate the effect of pretrial delay on each of the factors enumerated in *Barker*. *See State v. Groves*, 324 N.C. 360 (1989) (defendant has burden of showing prejudice, history of assertions of right, and negligence or willfulness of State; in this case, defense motion failed to establish prejudice to preparation of defense); *State v. Lyszaj*, 314 N.C. 256, 262 (1985) ("bald contentions" of prejudice and improper reasons for delay not sufficient to support speedy trial claim). A sample motion to dismiss for a speedy trial violation is available in the noncapital motions bank on the IDS website, www.ncids.org (select "Training & Resources," then "Motions Bank, Non-Capital").

Hearing on motion. If the defendant's motion presents questions of fact, the court is required to conduct a hearing and make findings of fact and conclusions of law. *See State v. Dietz*, 289 N.C. 488 (1976); *State v. Chaplin*, 122 N.C. App. 659 (1996). If there is no objection, the evidence may consist of statements of counsel; however, the North Carolina courts have clearly expressed that the better practice is to present evidence and develop the record through affidavits or testimony. *See State v. Pippin*, 72 N.C. App. 387 (1985); *see also State v. Sheridan*, ___ N.C. App. ____, 824 S.E.2d 146 (2019) (trial court erred by not considering all the *Barker* factors and failing to make findings; remanded for proper *Barker* analysis); *State v. Wilkerson*, ___ N.C. App. ___, 810 S.E.2d 389 (2018) (following remand of case to resolve speedy trial motion, trial court failed to allow parties to present new evidence or arguments; where defendant makes a prima facie showing of speedy trial violation, an evidentiary hearing should be held and an order with findings on the *Barker* factors should be made).

7.4 Prosecutor's Calendaring Authority

A. Generally

North Carolina vests the prosecutor with considerable authority over the calendaring of criminal cases for trial. *See* G.S. 7A-49.4; G.S. 7A-61. The authority to calendar cases is a powerful tool, which may be subject to abuse. Prosecutors have misused their calendaring authority in at least three identifiable ways:

- by failing to call particular cases and thus subjecting defendants to excessive pre-trial detention or multiple futile trips to court;
- by calendaring far more cases than can possibly be heard in a session, leaving defense lawyers unable to predict the trial schedule or adequately prepare for trial; and
- altering the calendar with inadequate notice to defendants and their attorneys.

Calendaring abuses may violate a defendant's right to a speedy trial or due process. *See State v. Chaplin*, 122 N.C. App. 659 (1996) (basing finding of speedy trial violation in part on calendaring abuses). However, even in situations where a speedy trial, due process, or other constitutional violation cannot be shown, a defendant who has been prejudiced by the State's strategic use of its calendaring authority may be able to obtain relief by arguing that the State has failed to comply with its statutory calendaring duties. This section discusses the scope and limits of the prosecutor's calendaring authority and suggests ways in which a defendant may challenge abuses of this power. *See generally* Paul M. Green & Shannon Tucker, *Abuses of Calendaring Authority* (Fall Public Defender Conference, Nov. 2008).

B. *Simeon v. Hardin*

Calendaring abuses have been difficult to challenge as part of the criminal case in which they occur because many such cases are resolved through plea bargains (in some instances, the prosecutor's purpose is to force a plea).

In *Simeon v. Hardin*, 339 N.C. 358 (1994), North Carolina Prisoner Legal Services used a civil approach to challenging calendaring abuses. *Simeon* involved a civil complaint alleging that the Durham County district attorney's office regularly used its calendaring authority to the tactical advantage of the State. In particular, the plaintiffs alleged that the calendaring power was used to select judges, to pressure jailed defendants to accept plea offers, and to inconvenience disfavored defense attorneys. The plaintiffs, who were criminal defendants in Durham County, sought a declaration that the calendaring statutes were unconstitutional and requested a remedial order placing control of the calendar under the supervision of the court.

The superior court in Durham County dismissed the plaintiffs' claims for lack of subject matter jurisdiction and failure to state a claim. On appeal, the N.C. Supreme Court reversed the summary dismissal. The supreme court held that the challenged statutes, which vested calendaring authority in the prosecutor, were not unconstitutional on their face. The Court held further, however, that the plaintiffs' complaint raised genuine issues of material fact as to whether the statutes in question were being applied in an unconstitutional manner and therefore summary dismissal of the complaint was improper. *Id.* at 372. The decision recognized that the plaintiffs' allegations stated a claim that their right to due process had been violated by, among other things, imposition of punishment before an adjudication of guilt. In addition, the plaintiffs had raised claims that they had been denied their right to a speedy trial and that their right to trial by jury and to effective assistance of counsel had been impaired. *Id.* at 377–78. The case was remanded to the Durham County superior court, where it was eventually settled through the development of a criminal docket plan.

C. Calendaring Statute

After *Simeon*, the North Carolina General Assembly rewrote the statute governing superior court criminal case docketing. G.S. 7A-49.3 was repealed and replaced with G.S. 7A-49.4, effective January 1, 2000. The statute requires the district attorney in each superior court district to create a criminal case docketing plan, in consultation with the resident superior court judges and the defense bar. *See* G.S. 7A-49.4(a). It also imposes specific limitations on calendaring, discussed below, with which the local plan must comply. *See generally* John Rubin, *1999 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 99/05, at 9–11 (UNC School of Government, Oct. 1999) (summarizing calendaring provisions).

Setting of trial dates. The calendaring statute requires that an administrative setting be held for each felony case within sixty days of indictment. One of the purposes of the administrative setting is to set a trial date. Unless the State and defendant agree, the trial date may not be sooner than 30 days after the final administrative setting. *See* G.S. 7A-49.4(b). The statute also gives a defendant whose case has not been scheduled for trial within 120 days of indictment the right to ask the senior resident superior court judge, or that judge's designee, to set a trial date. *See* G.S. 7A-49.4(c). Thus, defendants whose cases are delayed should not only demand a speedy trial, but should also seek the additional statutory remedy of asking a judge to set a trial date.

Trial calendars. The calendaring statute provides that a trial calendar must be published at least ten working days before trial and that "the trial calendar shall schedule the cases in the order in which the district attorney anticipates they will be called for trial and should not contain cases that the district attorney does not reasonably expect to be called for trial." G.S. 7A-49.4(e). At each session of court, the prosecutor must announce the order in which he or she intends to call the cases on the calendar. Deviations from the announced order require approval of the presiding judge if the defendant objects. *See* G.S. 7A-49.4(f).

Cases that have been placed on the trial calendar may be continued only with the consent of the prosecutor and defendant or by order of the judge. If all of the cases on the calendar are not reached before the end of the session of court, the prosecutor must schedule a new trial date in consultation with the defendant. *See* G.S. 7A-49.4(f).

Remedies for violations. Although the calendaring statute still gives prosecutors considerable authority over trial calendaring, it creates some concrete limitations that were not in the former statute. The calendaring statute does not specify a remedy for violations; however, given that the amendments to the criminal case docketing statute were intended to curtail abuse, a defendant who can show that his or her case was scheduled in violation of G.S. 7A-49.4, and that he or she was prejudiced by the violation, may be entitled to relief, including possibly dismissal. *See generally State v. Messer*, 145 N.C. App. 43 (2001) (scheduling of case for trial in violation of former calendaring statute required reversal of defendant's conviction for failure to appear), *aff'd per curiam*, 354 N.C. 567 (2001). Claims of prejudice might include: (i) oppressive pretrial incarceration; (ii) unfair surprise or lack of adequate time to prepare for trial; (iii) loss of witnesses or evidence as a result of either delay or short notice; (iv) judge shopping (on this last point, a defendant may be on stronger ground if he or she can show a pattern of the State using its calendaring power to avoid a judge); or (v) undue pressure to accept a plea offer.

D. Other Limits

The calendaring statute does not affect the court's authority to modify the calendar. *See* G.S. 7A-49.4(h) ("Nothing in this section shall be construed to affect the authority of the court in the call of cases calendared for trial"). This authority gives the defendant the ability to challenge the prosecutor's calendaring decisions but also potentially allows modifications of the calendar by the court to the defendant's disadvantage. *See State v. Monk*, 132 N.C. App. 248 (1999) (under prior calendaring statute, judge had authority to call case that prosecutor had inadvertently left off calendar; case was related to other cases on calendar against defendant); *State v. Thompson*, 129 N.C. App. 13 (1998) (under prior calendaring statute, no error where trial court on its own motion consolidated joinable charge that had not been calendared with calendared charge and defendant failed to show prejudice).

The court's calendaring authority remains subject to the time limits on trial after arraignment. *See* G.S. 15A-943 (in counties in which there are twenty or more weeks of

superior court criminal sessions a year, defendant may not be tried in same week of arraignment without his or her consent); *State v. Cates*, 140 N.C. App. 548 (2000) (violation of statutory requirement of one-week period between defendant's arraignment and trial constitutes automatic reversible error).

E. District Court Proceedings

The calendaring statute for superior court does not apply to misdemeanors tried in district court. Nevertheless, the district court has authority to manage cases once they are on the court's docket. In *Simeon v. Hardin*, 339 N.C. 358 (1994), which addressed calendaring in superior court, the court recognized the trial court's authority over its docket. In finding that the previous calendaring statute was not unconstitutional on its face, the court stated:

> [W]e do not believe that the statutes which authorize district attorney calendaring vest the district attorney with judicial powers in violation of separation of powers or intrude upon the trial court's inherent authority. In the civil context, we have recognized that the "trial court is vested with wide discretion in setting for trial and calling for trial cases pending before it." *Watters v. Parrish*, 252 N.C. 787, 791, 115 S.E.2d 1, 4 (1960). We likewise believe that the criminal superior court has wide discretion in managing criminal cases which are pending before it. However, the vesting of calendaring authority in the district attorney does not intrude upon the court's authority.

Id. at 375–76. Under the reasoning of *Simeon*, once a case is on the district court docket, the trial judge has "wide discretion" over the case, including determining when the case will be heard and compelling compliance with its orders. Thus, a trial judge may refuse to grant a request for a continuance by the State, compelling the State to proceed or take a voluntary dismissal. *See* G.S. 15A-952(g) (factors in determining whether to allow continuance).

In *State v. Friend*, 219 N.C. App. 338 (2012), the court of appeals addressed the district court's authority when, after the court refuses to allow a continuance, the State takes a voluntary dismissal and subsequently refiles the case. In *Friend*, the State voluntarily dismissed an impaired driving charge after the district court denied the State's motion for a continuance; and when the State refiled a new impaired driving charge nine days later based on the same incident, the district court dismissed the charge in light of its earlier refusal to grant the State a continuance. The court of appeals found that dismissal was not a proper remedy. The court found that the State's taking of a voluntary dismissal and reinstitution of the charges after the district court's denial of a continuance did not interfere with the district court's authority over the calendar and therefore did not constitute a separation of powers violation. The court also found in the circumstances of the case that proceeding with prosecution of the case did not violate the defendant's speedy trial and due process rights.

In *State v. Sheppard*, 225 N.C. App. 655 (2013) (unpublished), the court of appeals further considered the problem of delay in district court, upholding the dismissal of the charges on speedy trial grounds. In *Sheppard*, as in *Friend*, the defendant was charged with impaired driving. Also as in *Friend*, when the district court denied the State's continuance motion (in *Sheppard* after an 11-month delay from the date of arrest), the State took a voluntary dismissal and later the same day refiled the charges and rearrested the defendant. The district court denied the defendant's motion to dismiss for a speedy trial violation, and the defendant was tried and convicted in district court, but on appeal for a trial de novo the superior court granted the motion to dismiss for a speedy trial violation. The court of appeals affirmed the superior court's ruling, holding that the fourteen-month delay from the defendant's arrest to trial in district court supported the motion.

In *State v. Loftis*, ___ N.C. App. ___, 792 S.E.2d 886 (2016), the court of appeals addressed the authority of the court to dismiss for failure to prosecute. The district court entered a preliminary indication in an impaired driving case, granting the defendant's motion to suppress the stop of the defendant's vehicle. That ruling was affirmed on appeal by the superior court. Following the affirmance and remand to district court, the trial judge allowed the State an additional "last" continuance for the State to prepare a petition for writ of certiorari to the appellate division on the suppression issue. When the State failed to file the petition before the next court date, the trial judge refused to continue the case again and directed the State to call the matter for trial or dismiss the case. The State refused to take either action, and the court dismissed the matter for failure to prosecute, which was again affirmed by the superior court. Citing *Simeon*, the court of appeals affirmed the dismissal, noting that the trial court retains the inherent authority to manage its own calendar. (Relying on 2009 Formal Ethics Opinion 15 (Jan. 15, 2010), which addressed dismissal of charges by prosecutors, the court also recognized that prosecutors have an ethical obligation not to call cases for trial for which they have no admissible evidence.)

The general takeaways from *Friend*, *Sheppard*, and *Loftis* on calendaring in district court can be summarized as follows:

1. Per *Simeon*, the district court has ultimate authority over its calendar and may refuse to grant a request for a continuance by the State. *Friend* and *Sheppard* reinforce this principle. Likewise, district courts may adopt deadlines for bringing cases to trial and refuse to allow continuances beyond those deadlines. *See* Michael Crowell, *Control of the Calendar in Criminal District Court* (UNC School of Government, July 2010) (author concludes that district court has authority to adopt such rules—for example, a rule requiring that the State bring a case to trial within 120 days of arrest—under its authority to control the calendar; although written before issuance of *Friend* and *Sheppard*, conclusions are consistent with reasoning of *Friend*). (Note that G.S. 20-139.1(e2) contains special provisions on continuances in impaired driving cases involving testimony by a chemical analyst; the statute was not directly at issue in either case.)

2. If the district court refuses to grant a continuance, the State must proceed with the case or take a voluntary dismissal. If the State refuses to take either action, the court may dismiss for failure to prosecute per *Loftis*. The State may not ignore the court's order denying a continuance and unilaterally reschedule the case to a different date. *See generally* Crowell at 4. If the State does not take a voluntary dismissal, the district court may order the State to call its first witness and, if the State does not proceed, may dismiss the case under *Loftis*. Other jurisdictions have also held that the court may acquit the defendant for a failure of proof. *See State v. Watts*, 35 So.3d 1, 7 (Ala. Crim. App. 2009); *People v. Mooar*, 416 N.E.2d 81, 84 (Ill. App. Ct. 1981).
3. If the State takes a voluntary dismissal and subsequently refiles the charges, the district court may not dismiss the case solely because the court previously denied the State's request for a continuance. Although refiling of the charges may seem in derogation of the court's prior scheduling orders, *Friend* found that refiling does not unconstitutionally interfere with the court's authority over the calendar.
4. A district court has the authority to dismiss a case after refiling if prosecution of the charges violates other of the defendant's rights. (Note that G.S. 20-38.6 contains special provisions on dismissal motions in impaired driving cases.) Thus:
    - If the two-year statute of limitations for misdemeanors has run (measured from the offense date to the refiling date), the defendant is entitled to dismissal. *See supra* "Effect of dismissal with leave and voluntary dismissal" in § 7.1B, Compliance with Statute of Limitations.
    - If there was delay in prosecution of the case before the State took a dismissal, the district court may consider that delay along with any delay after refiling of the case in ruling on a motion to dismiss for violation of the right to a speedy trial. *See supra* "Effect of dismissal" in § 7.3C, When Right Attaches; *see also supra* "Length of delay" (Practice note) in § 7.3B, Test for Speedy Trial Violation (discussing potential need for defendant to raise speedy trial violation in district court to obtain benefit of this rule).
    - A due process violation also may provide grounds for dismissal. In *Simeon*, 339 N.C. at 377–78, the Court found that the plaintiffs' allegations about the district attorney's calendar practices were sufficient to state a claim of a due process violation, and the case was remanded for further proceedings. The plaintiffs alleged that the practices included, among other things: manipulating the calendar to exact pretrial punishment on incarcerated defendants and pressure defendants to plead guilty; calling cases for trial without adequate notice, thereby impairing the quality of representation; and calendaring cases repeatedly and causing defendants unnecessary expense and inconvenience. *Friend* found no violation of due process; *Sheppard* did not address the issue.
5. If the State refiles the charges after taking a voluntary dismissal and issues an arrest warrant rather than a criminal summons, rearrest may lend support to a claim of a speedy trial violation per the prejudice factor in *Barker v. Wingo*, 407 U.S. 514 (1972), or a due process violation per *Simeon v. Hardin*. While the court probably cannot dictate the criminal process to be used by the State should it decide to refile, the court certainly could unsecure any bond for a defendant if rearrested.

Practice note: To protect the client's rights, counsel should keep a record of continuances. In some districts, such a record is kept in the court file or "shuck." This practice eliminates disputes over which party requested the continuance. When the defense is ready to proceed, counsel should object to any motion to continue by the State and, if the motion is allowed, insist on a notation that the matter was continued for the State over the defendant's objection. Some judges are willing to state that this will be the "last" continuance, a fact that should also be noted in the court file.