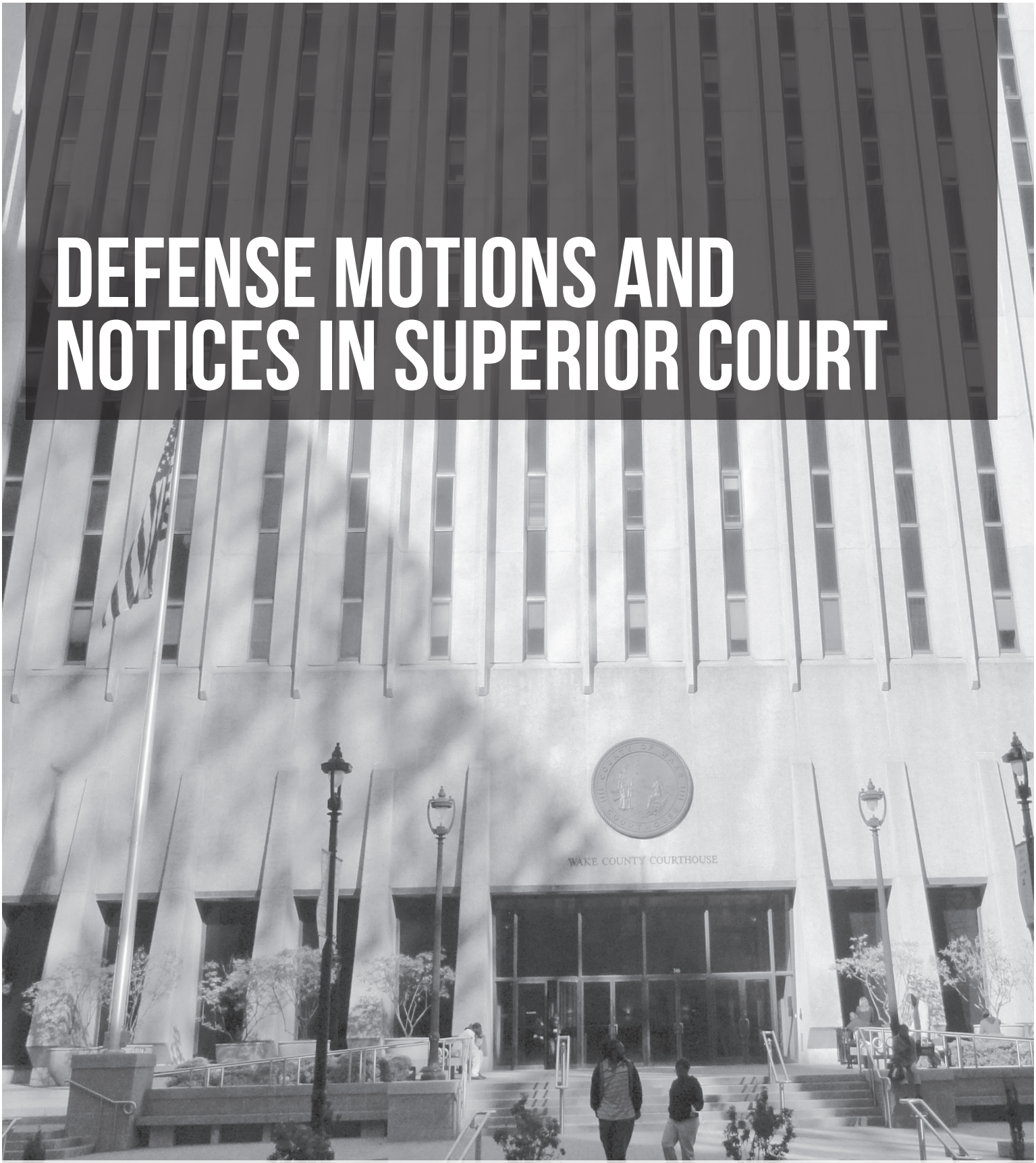
DEFENSE MOTIONS AND NOTICES IN SUPERIOR COURT



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PHILLIP R. DIXON JR.

Defense Motions and Notices in Superior Court

Phillip R. Dixon Jr.

Contents/Checklist

Below is a table of contents of the motions and notices in this practice guide. Readers may want to make a copy of the table in each case and use it as a checklist of potential motions and notices to file.

Defense Motions and Notices in Superior Court

This practice guide is intended as a primer on defense motions and notices in superior court. It is not meant to be an exhaustive list of all possible motions, nor a comprehensive analysis of the motions that are listed. Rather, it is a guide on the basic principles, authorities, and timelines of common defense motions at the trial level. Generally, the guide is formatted to identify

- the type of motion;
- the basic statutory or constitutional authority governing the motion, which can be cited in the motion along with other authority;
- any deadline for filing the motion;
- key principles applicable to the particular motion;
- practice tips, where applicable; and
- reference materials about the motion.

Comments and suggestions are welcome and may be sent to Phil Dixon, dixon@sog.unc.edu.

I. Principles for All Motions

Authority

Chapter 15A, Section 951 of the North Carolina General Statutes (hereinafter G.S.); various statutory and constitutional grounds.

Key Principles

Motions should be made in writing; state grounds with specificity; cite legal authority; request specific relief; be signed and filed with clerk; and be served on the opposing party, with a signed certificate of service attached.

Some motions have special timing rules or require an affidavit in support. It is vital to know the applicable statutory rules as well as local rules and practices. All motions should be made pretrial, with the exception of certain in-trial motions.

There must be a ruling on a motion or the issue is waived on appeal. A written order, signed by the judge and filed with the clerk, will ensure that rulings on pretrial motions are memorialized in the court file.

Object to adverse rulings on pretrial motions and object again at trial or the issue may be waived on appeal. If a ruling on a motion limits the ability to present evidence or explore a topic, an offer of proof must be made to preserve the issue.

Pursuant to G.S. 15A-952, the potential scope of motions is very broad. Any defense, objection, or request capable of being decided without ruling on the merits of the case may be addressed with motions.

Practice Tips

- Motions are a way to improve the posture of a case, obtain more information, narrow issues, improve a plea offer, and demonstrate your dedication and ability to the client and the State.

- Consider submitting briefs in support of complex motions.
- Where possible, constitutionalize every argument under both the state and federal constitutions.
- For significant or unusual motions, consider the need to formally present evidence at a motion hearing, particularly when the defense has the burden of proof on the subject of the motion.
- Be creative!

References

NORTH CAROLINA DEFENDER MANUAL Vol. 1, ch. 13 (Motions Practice) (UNC School of Government, 2d ed. 2013) (hereinafter N.C. DEFENDER MANUAL).

II. Discovery Motions

A. Request for Voluntary Discovery/Motion for Discovery
B. Motion to Compel Discovery
C. Motion for Sanctions (Discovery or Other Violation)
D. Motion for Prior Trial or Hearing Transcript
E. Motion to Preserve Evidence
F. Motion for Deposition

A. Request for Voluntary Discovery/Motion for Discovery

Authority

G.S. 15A-902; Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution; *Brady v. Maryland*, 373 U.S. 83 (1963), and progeny.

Deadlines

This request must be filed within ten days of probable cause hearing or after waiving probable cause hearing. If no probable cause hearing or waiver occurs, the request should be filed within ten days of service of indictment, consent to bill of information, or appointment of counsel, whichever occurs later.

Key Principles

The request is filed in superior court. A request for voluntary discovery must be filed before filing a motion for discovery or a motion to compel, although many practitioners combine the request with an alternative motion, as discussed in "Practice Tips," below.

A defense request for discovery gives the State the right to request certain discovery from the defendant, known as *reciprocal discovery*. The defense right to discovery is far broader than the State's reciprocal discovery right. Generally, the benefit of defense access to information far outweighs any risk of having to provide discovery to the State. Therefore, the defense should almost always request discovery.

The defendant must give notice of defenses and notice of testifying experts (discussed *infra* in Sections IV. C. and F., respectively), if the defense has requested discovery from the State and the State has requested discovery from the defense in return. The State usually makes its discovery request in or with the same document with which it provides notices of intent to use evidence subject to suppression deadlines or when it asks the defense to acknowledge receipt of discovery.

Practice Tips

- A request for voluntary discovery may be combined with an alternative motion for discovery, so as to avoid having to file two separate documents. The combination motion is largely the same as the request for voluntary discovery, but in the prayer for relief it asks the court to treat the request as a motion from which the court can issue orders, to the extent such orders become necessary in the case.

- The deadline to request discovery applies to statutory discovery only, not to constitutional discovery, but best practice is to include citations to both statutory and constitutional authority whenever formally requesting discovery.
- While the statute sets a deadline for requests for statutory discovery, in practice discovery motions are filed without regard to a timeline. Best practice is to file within the deadline and as soon as possible, but counsel should file a request or motion for discovery whenever the need arises.
- Tailor discovery requests to the particular type of case and relevant issues. Think about what information is needed before filing your request.
- Once you receive discovery, consider filing more specific motions for discovery or motions to compel on any other information needed. Examples of more specific discovery requests may include, for example, motions to obtain dispatch records, 911 recordings, dash or body camera video, records of drug or alcohol treatment, medical records, confidential informant file or identity, deals and concessions with witnesses, law enforcement personnel files, and basis for expert opinion.
- Where the pleading fails to give enough information to defend the case, consider filing a motion for a bill of particulars (discussed *infra* in Section III. J.).
- Where there is a legitimate concern about the loss or destruction of evidence, consider drafting a preservation letter to the agency in possession of the evidence and filing a motion to preserve evidence with the court (discussed *infra* in Section II. E.).

References

N.C. DEFENDER MANUAL Vol. 1, § 4.2 (Procedure to Obtain Discovery).

B. Motion to Compel Discovery

Authority

G.S. 15A-902; Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution.

Deadlines

If the State fails to respond or responds inadequately to a discovery request, this motion may be filed seven days after filing a request for voluntary discovery. It may be filed anytime by stipulation of the parties or for good cause.

Key Principles

The statute sets a minimum waiting period before a motion for discovery or to compel discovery may be filed. It does not set an outer limit by which the motion must be filed and, further, allows the motion to be heard at any time for good cause or by stipulation. Good cause may be shown by demonstrating a good faith belief that the evidence sought exists and would be material to the defense and that there is some reasonable explanation for the timing of the motion.

If a combination request for voluntary discovery/alternative motion for discovery has been filed, that should be sufficient to effectively serve as a motion from which the court can issue

discovery orders, including orders to compel discovery. Counsel should file a separate motion to compel where the State has not abided by discovery orders of the court or otherwise has refused to produce information to which the defendant is entitled.

Practice Tips

- Generally, the sooner a discovery motion is made and heard, the more likely it is to be granted. A motion for discovery or to compel discovery should not be made on the eve of trial or during trial unless there is a reasonable explanation for the timing of the motion, such as new evidence that could not have been discovered sooner through the exercise of due diligence (unless the motion is being filed immediately before trial for preservation purposes only).
- When filing a motion to compel, reference any earlier requests for the information (formal or informal) in the motion and consider attaching to the motion any such requests for the information, any prior court orders on discovery, and any transcript of previous hearings on the issue.

References

N.C. DEFENDER MANUAL Vol. 1, § 4.2 (Procedure to Obtain Discovery).

C. Motion for Sanctions (Discovery or Other Violation)

Authority

G.S. 15A-910; Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution.

Key Principles

The court may sanction a party for discovery violations. Sanctions may include dismissal, mistrial, exclusion of evidence, a recess or continuance, a finding of contempt, and any other remedy the court deems appropriate. The court has broad discretion to determine whether sanctions are warranted and to fashion an appropriate sanction.

Where there is evidence of willful disobedience of orders of the court, intentional wrongdoing, bad faith, or gross negligence, consider requesting that the court impose more serious sanctions. Violations of discovery obligations by the State may also implicate due process or other constitutional issues, as well as ethical concerns.

Practice Tips

- Sanctions against the State are not imposed lightly. Counsel should consider attempting to resolve the complaint with the State informally and outside of court before asking the court for sanctions.
- If a motion for sanctions does become necessary, attach any correspondence with the State that documents efforts to resolve the issue, as well as any relevant court orders, transcripts, or other pertinent evidence.
- Be creative in requesting relief on a motion for sanctions. Other than the relief listed in the statute, consider requesting alternative relief, such as additional peremptory strikes, last

argument despite putting on evidence, having a case declared non-capital, a jury instruction addressing the sanctioned conduct, or any other appropriate sanction.

References

N.C. DEFENDER MANUAL, Vol. 1, § 4.2J (Procedure to Obtain Discovery—Sanctions).

D. Motion for Prior Trial or Hearing Transcript

Authority

G.S. 7A-450(b); Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution; *Britt v. North Carolina*, 404 U.S. 226 (1971).

Key Principles

Where the defendant needs a transcript of a prior trial or proceeding in the case and is unable to afford the expense of the transcript, equal protection and due process under the state and federal constitutions require that a copy of the transcript be provided to the defendant at the State's expense.

The motion should demonstrate why the transcript is necessary to prepare the defense and why any available alternatives are insufficient. The fact that a transcript contains prior sworn testimony may be enough to overcome any proposed alternative.

Practice Tips

- Counsel should consider filing this motion whenever an earlier proceeding may be relevant to the current case. For instance, where the defendant has received a new trial or where a civil proceeding (such as a G.S. Chapter 50B domestic violence protective order hearing) bears on the current case, defense counsel will often need to review the transcript of a prior proceeding as a matter of effective representation.
- The need of counsel to review transcripts of earlier proceedings goes to defense counsel's trial strategy and may arguably be filed *ex parte* without notice or a copy to the State, although no North Carolina case directly addresses this issue. For more information on *ex parte* motions, see Sections 13.2C (Procedural Requirements in Superior Court—Ex Parte Motions) and 5.5A (Obtaining an Expert Ex Parte in Noncapital Cases—Importance of Ex Parte Hearing) of the N.C. DEFENDER MANUAL Vol. 1.
- The motion should identify the court, the court reporter, and the date(s) of the earlier proceeding(s), as well as the type(s) of proceeding(s). Counsel may also consider requesting that the court set a deadline for production of the transcript.

References

N.C. DEFENDER MANUAL Vol. 1, § 5.8B (Right to Other Assistance—Transcripts).

E. Motion to Preserve Evidence

Authority
Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution; G.S. 15A-903; G.S. 15-11.1(a).

Deadlines
This motion is not subject to the discovery motions deadlines and has no specific deadline. In order for a motion to preserve evidence to be effective, however, it should be filed as soon as possible. Defense counsel should consider the need for this motion when beginning to investigate the case as a part of discovery preparation.

Key Principles
This motion puts the State on notice that it must retain and preserve evidence for independent testing or examination. Therefore, consider making a motion to preserve when there is a risk that the State may destroy or fail to preserve evidence necessary for the defense—for example, 911 tapes, digital surveillance, forensics, or other physical evidence that is at risk of decay or destruction due to retention policies, testing, passage of time, or any other reason.

In addition to ensuring complete access by the defense to evidence that otherwise may be lost or destroyed, filing this motion can assist in establishing a statutory or constitutional violation for the loss or destruction of evidence.

Practice Tips
- A notice to preserve evidence should be tailored to a specific concern about particular evidence in the case. The notice should identify the evidence that is of concern, specify the importance of that evidence to the defense, and specify the nature and extent of the concern of loss or destruction of the evidence. For instance, jails and 911 call centers often have internal policies regarding retention of audio or video recordings, and labs often have policies regarding testing of small samples of materials that are likely to be destroyed in testing. Where possible, obtain and attach to the motion any policies of the entity with possession of the evidence that document the risk of loss or destruction of the evidence.

References
N.C. DEFENDER MANUAL Vol. 1, § 4.6C (Other Constitutional Rights—Lost or Destroyed Evidence).

F. Motion for Deposition

Authority
G.S. 8-74; N.C. R. CIV. P. 32.

Deadlines
The State must be notified at least ten days in advance of the deposition and be provided an opportunity to participate.

Key Principles

While rare in criminal cases, this statute allows for the use of depositions by the defense in limited circumstances. This is a potent discovery tool when available.

Where a material witness is ill, physically unable to attend trial, or resides in another state, the defendant may seek an order from the clerk of superior court of the jurisdiction where the criminal case is pending to take the deposition of the witness by filing an affidavit and request with the clerk.

The affidavit filed with the clerk must (1) include a statement that the testimony of the person sought to be deposed is important to the defense; (2) provide the witness's name; and (3) state that the witness is physically ill, incapacitated, or is not a resident of North Carolina and that the witness cannot attend the trial. By statute, the clerk is directed to appoint a person to take the deposition. Counsel may consider informing the trial judge ahead of time of the intent to seek this request from the clerk.

This provision about criminal depositions applies to the defendant only; the State has no statutory right to obtain a deposition in a criminal case. *State v. Hartsfield,* 188 N.C. 357 (1924).

If a deposition is obtained, the statute states that the testimony from the deposition may be read at trial in the same manner that depositions may be used at civil trials, per Rule 32 of the N.C. Rules of Civil Procedure.

References

N.C. DEFENDER MANUAL Vol. 2, § 29.1J (Securing the Attendance of Witnesses by Subpoena or Other Process—Defense Depositions in Criminal Actions).

III. Pre-Arraignment Motions

A. Generally
B. Request for Arraignment
C. Motion to Continue
D. Motion for Change of Venue
E. Motion to Dismiss for Improper Venue
F. Motion for Special Venire
G. Motion to Dismiss for Grand Jury Issues
H. Motion to Dismiss for Defective Pleadings
I. Motion to Strike Prejudicial or Inflammatory Language of Pleadings
J. Motion for Bill of Particulars
K. Motion for Joinder or Severance of Offenses and Co-Defendants

A. Generally

Authority

G.S. 15A-952.

Deadlines

Timing rules for these motions (discussed below) depend on whether a timely request for arraignment was filed, a request that has its own deadline (see *infra* Section III. B.). If the motions under this section are not filed within the timeline, they may be waived. The court may grant relief from waiver on any of these motions except on a motion to dismiss for improper venue (see *infra* Section III. E.).

If a request for arraignment was filed and arraignment is held before trial, all of the motions under this section are due before arraignment.

If a request for arraignment was filed but arraignment is not held before trial, the deadline is 5 p.m. on the Wednesday before trial.

If no request for arraignment is filed, the deadline for the motions discussed in headings B. through F. of this section is twenty-one days after return of the indictment.

Key Principles

Although not specifically addressed in G.S. 15A-952, a motion to dismiss an indictment for prosecutorial vindictiveness is arguably subject to this timeline per *State v. Frogge*, 351 N.C. 576 (2000).

Check your local rules and administrative policies on the timing of these motions. Some jurisdictions have local rules or practices that may affect (or purport to affect) the above statutory deadlines.

B. Request for Arraignment

Authority
G.S. 15A-941.

Deadlines
This request must be filed within twenty-one days of return of indictment or it is waived. If the defendant is unrepresented, the deadline is within twenty-one days of service of the indictment. This request, if timely, allows the defendant to assert the right to object to trial the same week as arraignment and extends the deadline for pre-arraignment motions (see *supra* Section III. A.).

Practice Tips
- Request arraignment in order to extend motions deadlines and to give the defense more control over the calendaring of the trial.
- If no discovery is received before the date of arraignment, move to continue the arraignment hearing.
- Many jurisdictions have local rules or administrative policies about arraignment that may obviate the need to file a request for arraignment. Check any applicable local rules and be familiar with the local practices of the jurisdiction.

References
N.C. DEFENDER MANUAL Vol. 1, § 13.1B (Types and Timing of Pretrial Motions—Motions and Requests after Appointment of Counsel).

C. Motion to Continue

Authority
G.S. 15A-952(g); Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution.

Deadlines
Technically, a motion to continue should be filed before arraignment (see *supra* Section III. A.). Practically, continuance motions may be filed whenever the need arises and are commonly filed and heard after the arraignment deadline. As a general rule, these motions should be filed immediately once counsel realizes the need for a continuance.

Key Principles
The court will consider the ends of justice, the complexity of the case, and the availability of other witnesses, among other factors, in deciding whether to grant a continuance.

Motions to continue are reviewed on appeal with an abuse of discretion standard if no constitutional grounds are asserted, so constitutional grounds should be alleged in the motion and any argument in support thereof. Constitutional grounds to support a continuance may include the right to prepare and present a defense, the right to effective representation, the right to confrontation, the right to counsel, and due process.

A timely motion, substantiated with a specific factual basis and asserting constitutional grounds, is more likely to result in relief.

Practice Tips

- Make these motions as early as possible and explain in detail why it is necessary for trial to be continued. Many jurisdictions have specific local rules on continuances for both administrative and trial settings, and counsel should be familiar with them.
- Where a continuance is sought to procure a witness, a record should be made about the expected testimony of the missing witness and how it would be useful to the defendant. A formal offer of proof of the absent witness's testimony is best; if a formal offer of proof is not possible, counsel should provide a forecast of the expected testimony.
- Consider including an affidavit with a specific factual showing of need or formally presenting evidence on the need for a continuance.

References

N.C. DEFENDER MANUAL Vol. 1, § 13.4A (Miscellaneous Motions—Motion for Continuance).

D. Motion for Change of Venue

Authority

G.S. 15A-957; Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 18 and 19 of the N.C. Constitution.

Deadlines

This motion is subject to the general deadlines for pre-arraignment motions. *See supra* Section III. A.

Key Principles

The motion must allege that the defendant is unable to receive a fair trial due to prejudice in the jurisdiction.

The court will consider the extent of bias in the community, the proposed new venue, the time and resources necessary to grant the request, and other potential effects on the parties and court.

The defendant has the burden of proof to demonstrate reasonable likelihood that he or she will not receive a fair trial. *State v. Jerrett*, 309 N.C. 239 (1983). Parties may stipulate to a change of venue.

Practice Tips

- Attach to the motion any documentary evidence of pretrial publicity, community polling, and any other evidence of bias in the community.
- A statistician or polling expert may be useful to support the grounds of the motion.
- As an alternative request for relief, consider asking for a special venire (see *infra* Section III. F.), individual *voir dire* of the jurors, or, possibly, a continuance (as a "cooling-off" period).

- Where a defendant faces multiple charges in multiple jurisdictions, changing venue to one jurisdiction may be advantageous in order to obtain a global resolution of all charges.

References
N.C. DEFENDER MANUAL Vol. 1, § 11.3 (Change of Venue).

E. Motion to Dismiss for Improper Venue

Authority
G.S. 15A-924(a)(3); G.S. 15A-952(b)(5).

Deadlines
This motion is subject to the general deadlines for pre-arraignment motions. *See supra* Section III. A.

Key Principles
This motion is waived if not raised in a timely manner. Thus, unchallenged venue becomes conclusive venue, and the trial court may not grant relief from a waiver of this motion. Improper venue does not deprive the trial court of jurisdiction.

A bill of particulars may be sought to identify the county of the offense when it is not identified in the pleading as an alternative to a motion to dismiss for improper venue.

Failure of a charging document to identify venue at all or failure to correctly identify it will not result in dismissal if not challenged in a timely manner. The manner of challenge is a motion to dismiss for improper venue filed before arraignment (or a bill of particulars to identify venue).

Dismissal for improper venue does not bar retrial on the charges as a matter of double jeopardy but may nonetheless have strategic value to the defense.

Once challenged, the State has the burden to prove proper venue by a preponderance of evidence. *State v. Bullard*, 312 N.C. 129 (1984).

Some offenses have specific venue rules in the relevant statutes (e.g., G.S. 163-278.27—illegal political campaign contributions).

References
N.C. DEFENDER MANUAL Vol. 1, § 11.2 (Challenging Improper Venue).

F. Motion for Special Venire

Authority
G.S. 9-12; G.S. 15A-952(b)(3); G.S. 15A-958; Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 18 and 19 of the N.C. Constitution.

Deadlines
This motion is subject to the general deadlines for pre-arraignment motions. *See supra* Section III. A.

Key Principles

The defendant has the burden to demonstrate the existence of prejudice in the county to a degree that a fair trial would be impossible. *State v. Robinson*, 355 N.C. 320 (2002). If granted, the venire will be composed of jurors from another county.

Practice Tips

- This motion may be combined with an alternative request to change venue. From a practical and logistical perspective, moving venue may be preferable to bringing in a special venire from another county. Jurors in a special venire may react unfavorably to having to travel.

References

N.C. DEFENDER MANUAL Vol. 1, § 11.4A (Alternative Relief—Special Venire).

G. Motion to Dismiss for Grand Jury Issues

Authority

G.S. 15A-955; G.S. 9-3; G.S. 15A-621 through G.S. 15A-631; G.S. 15A-1211; Fifth, Sixth, and Fourteenth Amendments (especially Equal Protection) to the U.S. Constitution; Article I, Sections 18 and 19 of the N.C. Constitution.

Deadlines

This motion is subject to the general deadlines for pre-arraignment motions. *See supra* Section III. A.

Key principles

This motion includes challenges to the array of the grand jury, such as improper selection or exclusion of grand jurors, improper selection of the foreperson, that a qualified number of grand jurors did not agree, that all witnesses before the grand jury were unqualified or that the evidence before them was incompetent, as well as fair cross-section issues.

The manner of challenge is a motion to dismiss or motion to quash the indictment. Challenges to the grand jury are waived if not brought in a timely manner.

Practice Tips

- While grand jury proceedings are secret and not recorded, the clerk of court keeps minutes of the indictments, which are public record and may be reviewed by counsel in investigating potential grand jury challenges. Additionally, the identity of individual grand jurors is also public record. This information may be requested from the clerk of superior court in the jurisdiction of the criminal case. Such a request could be informal, by subpoena, or by public records request.
- Minor, technical, or clerical mistakes in the return of the indictment by the grand jury are unlikely to result in dismissal or an order quashing the indictment. Where there is a substantive issue with the grand jury process, counsel should identify the issue and applicable law and address it with the court with a motion to dismiss or motion to quash.

References
N.C. DEFENDER MANUAL Vol. 1, § 9.4 (Challenges to Grand Jury Procedures).

H. Motion to Dismiss for Defective Pleadings

Authority
G.S. 15A-924; Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution.

Deadlines
This motion is subject to the general deadline for pre-arraignment motions. *See supra* Section III. A. However, pleading defects that deprive the court of jurisdiction may be raised at any time without regard to timing.

Key Principles
These motions apply where a pleading is defective, such as where it fails to charge an offense or an element of an offense; misidentifies the victim or defendant; lacks an allegation of ownership for certain offenses; as well as for date, time, or place deficiencies or for other pleading defects.

A proper pleading, at a minimum, must confer jurisdiction on the court and provide notice of the charges to the defendant. Many offenses have specific pleading requirements. Many pleading defects are capable of amendment by the State before trial. The scope of all potential pleading defects is beyond the scope of this guide, but the reference materials listed below are helpful resources in this area. A citation requires less formality than other more formal pleadings and may confer jurisdiction even where it fails to allege an element of the crime or suffers some other defect that would be fatal for an indictment. *State v. Jones*, ___ N.C. App. ___, 805 S.E.2d 701 (2017). Counsel may object to trial by citation and demand a more formal pleading under G.S. 15A-922(c).

Practice Tips
- Think carefully about the timing and remedy of motions under this section. While these motions are listed in this "Pre-Arraignment Motions" section with the attendant deadline, certain pleading defects deprive the court of jurisdiction and are, therefore, fatal defects which may be raised at any time, even post-conviction.
- Any proceeding begun with a fatally defective pleading will have to be abandoned if the court determines that the pleading fails to confer jurisdiction. Jeopardy does not attach to a fatally defective pleading, and the State therefore may be allowed to reinstate the charges, but the defendant is usually better situated by reserving this objection for trial. Misdemeanor charges that are dismissed for a fatally flawed pleading may not be re-filed beyond the statute of limitations in G.S. 15-1.
- Minor pleading defects or mistakes that are capable of amendment pretrial may nonetheless result in a fatal variance of proof between the allegation and the evidence at trial. A fatal variance occurs when an otherwise valid indictment contains factual allegations that do not conform to the evidence in some material way, such as a factual allegation that supports an

element of the crime. Variance arguments are waived unless raised in the trial court. Variance is raised in a motion to dismiss at the close of the State's evidence and is waived on appeal unless raised in the trial court. (For more information on variances, including the required language to use in making the motion, see *infra* Section VI. G.).

- Under G.S. 15A-924(b), a motion may be filed to request that the State elect between multiple offenses charged in a single count of the indictment. This is known as a duplicitous pleading, and it is a type of pleading defect. If the State makes an election between the charges or obtains leave to seek superseding indictments, this defect is not fatal. If the State fails to make election between duplicitous counts of an indictment, the court may dismiss the duplicitous count of the indictment upon request of defense counsel.

References

N.C. DEFENDER MANUAL Vol. 1, ch. 8 (Criminal Pleadings), particularly § 8.5 (Common Pleading Defects in Superior Court).

See also Jessica Smith, *The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment*, ADMIN. OF JUST. BULL. No. 2008/03 (UNC School of Government, July 2008), for more information on superior court pleadings issues and offense-specific pleading requirements.

See also John Donovan and Amanda Maris, *District Court Pleadings to Go* (Checklist) (Spring Public Defender Conference, May 2011), for more information on misdemeanor pleadings.

I. Motion to Strike Prejudicial or Inflammatory Language of Pleadings

Authority

G.S.15A-924(f).

Deadlines

This motion is subject to the general deadline for pre-arraignment motions. *See supra* Section III. A.

Key Principles

If a pleading contains surplus language that is inflammatory or needlessly prejudicial, this motion allows the defendant to request that the court strike the offensive language from the pleading.

Practice Tips

- An indictment cannot be read to the jury, but the statement of charges in the indictment may form the basis of the court's description of the charges to the jury. In bench trials, the finder of fact will read the indictment or other pleading. Additionally, once the case is resolved, the charging document will remain in the file and will be accessible by the public unless the matter is expunged. Therefore, counsel should consider moving to strike any objectionable language from the pleadings when appropriate to best protect the defendant in these situations.

J. Motion for Bill of Particulars

Authority
G.S. 15A-925; Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution.

Deadlines
This motion is subject to the general deadline for pre-arraignment motions. *See supra* Section III. A.

Key Principles
This motion is used to request specific facts related to the offense that are not contained in the pleading. It is a request made to the State to supplement the pleadings with more information.

The motion must request specific information and allege that such information is essential to adequately prepare and conduct a defense. Information such as the particular theory of the case or time, date, and location information about an offense may be obtained this way.

If the motion is granted, the proceedings are stayed until the bill of particulars is filed with the court and served on the defendant.

This motion, if granted, ties the State to the information contained in its bill of particulars; the State's proof at trial must then conform to the information in the bill.

Practice Tips
- The State's oral representations in response to a motion for a bill of particulars do not operate like a written bill; a bill of particulars must be in writing to have any effect. *State v. Stallings*, 107 N.C. App. 241 (1992).
- This is a particularly effective tool where the offense allows conviction based on different prongs or theories.

References
N.C. DEFENDER MANUAL Vol. 1, § 8.4 (Felonies and Misdemeanors Initiated in Superior Court).

K. Motion for Joinder or Severance of Offenses and Co-Defendants

Authority
G.S. 15A-926(a); G.S. 15A-927; Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution.

Deadlines
These motions are subject to the general deadline for pre-arraignment motions. *See supra* Section III. A.

Joinder of Offenses (G.S. 15A-926)
If offenses are related, the defendant may move to have the offenses joined for trial. The motion must be made pretrial and within the deadline, unless the basis for the motion is discovered at trial.

The standard for joinder of offenses is whether the offenses are based on the same act or transaction or the same series of acts or transactions. The court will consider the closeness in time and space of the offenses, similarities of the alleged victims, motive, modus operandi, types of evidence, and other relevant factors in deciding the issue.

Failure to make a timely motion to join offenses for trial results in waiver of the right of either party to have offenses joined for trial.

Where the State could have sought to join related offenses and did not, a motion to dismiss may be made and granted as to the subsequent trial of a related offense, subject to the exceptions in G.S. 15A-926(c)(2).

Severance of Offenses (G.S. 15A-927)

The defendant should move to have related offenses severed for trial whenever a separate trial is necessary for a fair determination of guilt or innocence. The court considers the number of offenses, complexity of evidence, and whether the jury can distinguish the evidence and apply the law intelligently to each offense in deciding the motion.

If joining offenses will impair the ability of the defendant to present a defense as to one or both charges, counsel should move to sever the offenses (and oppose any request for joinder from the State).

A defense motion to sever offenses that is granted during trial results in a mistrial; the State cannot move for severance of offenses after trial has begun unless the defendant consents.

Joinder of Co-Defendants (G.S. 15A-926(b))

For co-defendants to be joined for trial, each must be charged with full accountability for each offense or the charges must all be part of the same plan, scheme, act, or otherwise be so connected that separating proof of each charge from the others would be difficult. The court will consider if the defendants are joinable under the statute and, if so, whether joinder of them for trial will deny any defendant the right to a fair trial.

The State typically makes this motion to join co-defendants for trial under G.S. 15A-926(b). *See* G.S. 15A-927(c) for objections to joinder of co-defendant trials.

Severance of Co-Defendants (G.S. 15A-927)

If a joint trial will deny any defendant the right to a fair trial, one defendant may move to sever his or her trial from that of any co-defendants, even if the cases of the defendant and the co-defendants are otherwise eligible for joinder.

Examples of when a joint trial will not be fair include but are not limited to situations where a defendant has made an admission admissible against the speaker but not the other co-defendants, where defenses among the co-defendants are in opposition to one another, or where a joint trial would otherwise be confusing to the jury.

Practice Tips

- The prejudice to the client caused by joinder of offenses or co-defendants is potentially significant, and counsel should be prepared to oppose such requests in a timely manner.
- Joinder of offenses may be beneficial to the defendant, insofar as multiple cases may be resolved at once. On the other hand, joinder of offenses may be detrimental to the defendant where the strength of the evidence in each case differs or where facts relating to some

offenses may risk prejudicing the jury as to the other offenses. Counsel should carefully consider the strategic impact of joinder or severance of offenses.

- Joinder of co-defendants for trial may implicate *Bruton* issues where one co-defendant has made an admission that implicates the guilt of another co-defendant but the statement is only admissible against the declarant. In that situation, counsel should consider requesting redaction of the admission to excise any reference to the non-declarant defendant, as well as a limiting instruction. *See* G.S. 15A-927(c)(1), *Bruton v. U.S.*, 391 U.S. 123 (1968), and the "References" section, below, for more information on this point.
- Request limiting instructions or redaction as to any other evidence that is presented or limited as a result of the joinder or severance. For instance, if character evidence is presented against one co-defendant and not the other, it may be appropriate to request that the jury be instructed that such evidence should not be considered for any purpose for the other co-defendant.
- If a defense motion for joinder or severance of offenses or co-defendants is denied pretrial, counsel must renew the motion at the close of all evidence to preserve the issue for appellate review.

References

N.C. DEFENDER MANUAL Vol. 1, ch. 6 (Joinder and Severance).

IV. Other Pretrial Motions and Notices with Deadlines

A. Motion to Suppress
B. Motion to Recuse Trial Judge
C. Notice of Defenses
D. Chapter 90 Notice and Demand
E. Chapter 20 Notice and Demand
F. Notice of Expert Testimony
G. Notice of Intent to Use Residual Hearsay
H. Notice of Intent to Use Convictions Older than Ten Years

A. Motion to Suppress

Authority

G.S. 15A-971 through G.S. 15A-979; Fourth, Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19, 20, and 23 of the N.C. Constitution; substantial statutory violations of G.S. Chapter 15A.

Deadlines

Timing rules for a suppression motions in felony cases depend on the type of evidence to be suppressed and whether the State gives notice of intent to use certain evidence. Generally, motions to suppress must be made before trial. "Before trial" means before jeopardy attaches. *State v. Tate*, 300 N.C. 180 (1980). If the State provides timely notice of its intent to use "certain evidence", this triggers an earlier deadline for suppression motions addressing that evidence (discussed in more detail below). If the grounds for suppression could not have been identified before trial through the exercise of reasonable diligence, or if there was no opportunity to make the motion before trial, the motion may be made during trial.

If the State provides notice to the defendant of the State's intent to use "certain evidence" at least twenty business days before trial, any motion to suppress addressing that evidence is due ten business days after receipt of the State's notice. "Certain evidence" includes statements by the defendant, evidence obtained by warrantless search, or evidence obtained by a search warrant when the defendant was not present at the time of the search. *See* G.S. 15A-975. If the State fails to give formal notice of intent to use that evidence, a suppression motion addressing that evidence may be made at trial. This deadline applies only to motions to suppress under G.S. 15A-974 (state or federal constitutional grounds and substantial violations of the Criminal Procedure Act, G.S. Chapter 15A); it does not apply, for example, to a motion to exclude inadmissible evidence under the N.C. Rules of Evidence.

The deadline for suppression motions for certain evidence applies only to cases originating in superior court and does not apply to misdemeanor appeals. Motions to suppress in misdemeanor appeals cases must nonetheless be filed before trial if the grounds for the motion are known. *State v. Simmons*, 59 N.C. App. 287 (1982), *overruled on other grounds by State v. Roper*, 328 N.C. 337 (1991).

Local rules may impose other deadlines as well, and counsel should be familiar with them.

Key Principles

The scope of these motions is wide and may include stop, arrest, or search issues (lack of reasonable suspicion, lack of probable cause, improperly obtained test results, etc.); *Miranda* or other issues concerning statements by the defendant; pretrial identification issues; and any other evidence obtained in violation of a defendant's constitutional or statutory rights.

In certain instances (identified above), suppression motions may be made during the course of trial, although the better practice is usually to file the motions pretrial. Pretrial hearings on motions to suppress may give defense counsel a preview of testimony not otherwise available, may resolve the case without the need for a trial, and will generally be favored by trial courts in the interest of judicial economy.

Motions to suppress require (1) a detailed affidavit from counsel that provides specific factual support of the motion and (2) a statement of the specific legal grounds that would support an order of suppression.

Failure to attach a sufficiently detailed affidavit or to state specific legal grounds supporting suppression can result in summary denial of the motion. *State v. Phillips*, 132 N.C. App. 765 (1999) (affidavit without facts, merely reciting that discovery was reviewed by counsel and that grounds exist to grant motion, was insufficient; summary dismissal affirmed); *State v. Davis*, 210 N.C. App. 491 (2011) (unpublished) (affidavit incorporating motion by reference and attesting to truth of motion on information and belief was insufficient; summary denial appropriate); *State v. Hall*, 73 N.C. App. 101 (1985) (summary denial appropriate where motion failed to state specific legal grounds on which suppression could be ordered).

It is the defendant's burden to challenge the evidence in a timely manner and in proper form. Generally, the State has the burden of proof on the merits of the motion by a preponderance of the evidence standard. *State v. Williams*, 225 N.C. App. 636 (2013).

The procedure for a statutory "*Franks*" challenge (for false or misleading information in a search warrant) is found in G.S. 15A-978. This is a specific type of suppression motion with different standards than a typical motion to suppress. For instance, the defendant has the burden to make a substantial showing that material representations in the warrant application were falsely made by law enforcement intentionally or recklessly. *See Franks v. Delaware*, 438 U.S. 154 (1978).

Practice Tips

- These motions are often dispositive, and counsel should take great care to investigate all possible grounds for suppression and to file timely motions to suppress.
- The State typically gives notice of its intent to use certain evidence as a part of its response to the defense discovery request, which triggers the timeline of ten business days for the defense to move to suppress the "certain evidence" subject to that deadline (discussed in more detail above).
- If the State provides notice of its intent to use the "certain evidence" covered by G.S. 15A-975, the deadline is relatively short for defense counsel to file a suppression motion addressing such evidence. Consider requesting that the court extend the deadline for suppression motions where necessary and appropriate. Motions to extend deadlines are discussed *supra* in Section V. H.

- If the defendant pleads guilty after the denial of a motion to suppress, the defendant must clearly and explicitly state in the plea transcript and on the record before entering the plea that he or she is reserving the right to appeal the denial of the motion in order to preserve the suppression issue for appeal. *See State v. Pimental*, 153 N.C. App. 69 (2002) (plea transcript reading "Defendant preserves his right to appeal any and all issues which are so appealable pursuant to . . . law" was found insufficient to preserve motion to suppress for appellate review). Language such as "The defendant hereby pleads guilty on the express condition that the right to appeal the trial court's denial of the defendant's motion to suppress is preserved" should suffice. In other words, defense counsel must give the court and the State notice of the intent to appeal the denial of the suppression motion in the plea transcript in order to preserve the right to appeal the denial of the motion.
- Any appeal following the denial of a suppression motion is from the final judgment in the case, and any written notice of appeal must reference the final judgment of the case (not the order denying the suppression motion). Failure to properly give notice of appeal can result in dismissal of the appeal, even if the suppression issue was otherwise properly preserved. For more on notices of appeal, see *infra* Section VIII. A.

References

N.C. DEFENDER MANUAL Vol. 1, ch. 14 (Suppression Motions).

B. Motion to Recuse Trial Judge

Authority

G.S. 15A-1223; Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Section 19 of the N.C. Constitution; N.C. Code of Judicial Conduct canon 3.

Deadlines

This motion must be filed at least five days before trial, unless the grounds for recusal are not reasonably known at the time or for other good cause.

Key Principles

These motions must be in writing and accompanied by an affidavit factually supporting the motion.

The judge should recuse himself or herself if the judge is biased against either party, closely related by blood or marriage to either party, a witness in the case, or for any other reason that impairs the ability of the judge to be fair and impartial.

The defendant has the burden to demonstrate by reasonable grounds that there is cause to question the judge's impartiality. *State v. Poole*, 305 N.C. 308 (1982).

Practice Tips

- Counsel may request that the judge refer this motion to another judge for hearing.
- Documentary evidence in support of the motion should be attached and referenced in the motion.
- Present evidence at the hearing on the motion if appropriate.

References

N.C. DEFENDER MANUAL Vol. 1, § 13.4C (Miscellaneous Motions—Motion to Recuse Trial Judge).

C. Notice of Defenses

Authority

G.S. 15A-905(c).

Deadlines

The defendant must give notice of defenses within twenty business days of the case being set for trial if the defendant requests any discovery, the State provides discovery or is ordered to do so, and the State requests discovery from the defendant, unless the court sets a different deadline.

Key Principles

Generally, defendants are required by statute to give written notice of an intent to rely on the defenses of alibi, duress, entrapment, insanity, mental infirmity, diminished capacity, self-defense, accident, automatism, or involuntary or voluntary intoxication. To avoid any challenges, defendants should consider giving notice of defenses not enumerated in the statute, such as necessity, defense of others or property, mistake, etc.

For the defense of alibi, on motion of the State, the court may order disclosure of alibi witnesses no later than two weeks before trial.

For other enumerated defenses (duress, entrapment, insanity, automatism, or involuntary intoxication), the notice of defense must contain specific information about the nature and extent of the defense.

For insanity, the defense has special rules per G.S. 15A-959.

Practice Tips

- Failure to give proper notice of defenses may result in a sanction by the court, up to and including prohibiting presentation of the defense. Err on the side of giving notice; the notice may be withdrawn later.
- Provide timely, written notice for each potential defense and, if required for that defense, provide specific details.
- If the deadline is missed, argue that the defendant should not be punished for the error of counsel and that a lesser sanction is appropriate. The sanction of prohibiting presentation of a defense should be met with constitutional objections.
- Consider requesting that the judge refrain from mentioning defenses to the jury until it is clear that evidence on the defenses will be presented. Pursuant to G.S. 15A-905(c)(1), notice of defenses is not admissible against the defendant. However, G.S. 15A-1213 directs the trial judge to inform prospective jurors of any affirmative defenses for which the defendant has given notice. If the defendant does not want the jury to be informed of a defense and the judge will not defer informing the jurors of the defense, defense counsel may have to withdraw the defense or allow the jury to be so informed.

References

N.C. DEFENDER MANUAL Vol. 1, §§ 4.8E (Prosecution's Discovery Rights—Defenses), 13.1D (Types and Timing of Pretrial Motions—Motions before Trial).

D. Chapter 90 Notice and Demand

Authority

G.S. 90-95(g).

Deadlines

If the State gives notice to the defendant at least fifteen business days before trial of its intent to introduce at trial the evidence described below and provides a copy of the evidence, then the defendant must file a written objection or "demand" at least five days before trial.

Key Principles

This statute allows the admission into evidence of a lab report, analyst affidavit, and chain of custody statement without authentication and without the testimony of the analyst if the State meets the above requirements and no timely demand for the witness is made by the defendant.

Failure to object and demand the live witness is a waiver of the right to confront such witnesses. This statutory procedure satisfies the Confrontation Clause under the Sixth Amendment. *State v. Steele*, 201 N.C. App. 689 (2010).

Practice Tips

- Look carefully at the form and substance of any notice by the State, as well as at its timing. The State has the burden to prove its compliance with these requirements and that the defendant waived the right to confront by failing to object to the State's proper notice. Arguably, if the State's notice is ineffective, the evidence should not be admissible without the live testimony of the analyst, even in the absence of a timely demand by the defendant.
- To preserve the issue at trial, an objection that the State failed to comply with the requirements of the Chapter 90 notice and demand statute should state specifically how the State failed to comply, as well as assert more general Confrontation Clause and hearsay arguments. In addition to any pretrial objections, counsel must object to the admission of this evidence when it is introduced during trial to preserve appellate review.
- If the analyst attends the trial and the defendant is convicted, the defendant must pay a $600 expert witness fee unless waived by the court. This fee is in addition to the lab analysis fee of $600. *See generally* G.S. 7A-304.

References

N.C. DEFENDER MANUAL Vol. 1, § 13.1D (Types and Timing of Pretrial Motions—Motions before Trial).

E. Chapter 20 Notice and Demand

Authority
G.S. 20-139.1(c1), (c3)(3), and (e2).

Deadlines
If the State gives notice to the defendant at least fifteen business days before trial of its intent to introduce at trial the evidence described below and provides the defendant a copy of the evidence within fifteen business days of the State receiving it, then the defendant must file a written objection or "demand" at least five business days before trial. Unlike the G.S. Chapter 90 notice and demand procedure discussed in the section immediately above, "trial" here is defined as the next court setting. Thus, the defense has five business days before the next court date in which to file a demand after timely receipt of the State's proper notice, regardless of when trial is or may actually be scheduled. Failure to file a demand within that window constitutes waiver of the right to demand the presence of the witness.

Key Principles
This statute allows the admission into evidence of the results of any chemical analysis (breath, blood, or urine), chain of custody statement, and analyst affidavit without authentication and without the testimony of the analyst if the State meets the above requirements and no timely demand for the witness is made by the defendant.

Failure to file a timely, written objection or demand at the time of the receipt of the State's notice is binding at all subsequent court settings. Conversely, once the defendant has filed a timely objection, the objection remains effective at any subsequent court settings and need not be renewed.

Practice Tips
- Look carefully at the form and substance of any notice by the State, as well as at its timing. The State has the burden to prove its compliance with these requirements and that the defendant waived the right to confront by failing to object to the State's proper notice. Arguably, if the State's notice is ineffective, the evidence should not be admissible without the live testimony of the analyst, even in the absence of a timely demand by the defendant.
- To preserve the issue at trial, an objection that the State failed to comply with the requirements of the Chapter 20 notice and demand statute should state specifically how the State failed to comply, as well as assert any more general Confrontation Clause and hearsay objections. In addition to any pretrial objections, counsel must object to the admission of this evidence when it is introduced during trial to preserve appellate review.
- If the analyst attends the trial and the defendant is convicted, the defendant must pay a $600 expert witness fee unless waived by the court. This fee is in addition to any laboratory analysis fee. *See generally* G.S. 7A-304.

References
N.C. DEFENDER MANUAL Vol. 1, § 13.1D (Types and Timing of Pretrial Motions—Motions before Trial).

See also Shea Denning, *Amendments to Notice and Demand Provisions for DWI Cases*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 22, 2016).

F. Notice of Expert Testimony

Authority
G.S. 15A-905(c)(2).

Deadlines
The defendant must give notice of expert witnesses within a reasonable time before trial if the defendant requests any discovery, the State provides discovery or is ordered to do so, and the State requests discovery from the defendant, unless the court sets a different deadline.

Key Principles
The defendant must provide notice of any experts expected to testify at trial, along with their expert opinions, a report of their tests or examinations, the underlying basis for their opinion, and the experts' resumes or curricula vitae. The State is required to disclose all of the same information pursuant to its discovery obligations and upon the request of the defendant.

The obligation of defense counsel to disclose expert witnesses applies only if the defendant intends to call the expert as a witness at trial. The defendant is not obligated to disclose non-testifying experts to the State.

Practice Tips
- The notice provision protects both parties from unfair surprise and may be used to exclude expert evidence where notice was not provided or was insufficient. A reasonable time before trial" means enough time for the opposing party to adequately prepare to meet and object to the expert testimony.
- If notice is untimely, the expert may be excluded from trial. However, cases indicate that the sanction of evidence exclusion against the defendant is harsh and should be used only if other sanctions are insufficient.
- On receipt of a notice of expert witnesses from the State, consider the need for your own expert if you have not already done so, both to affirmatively counter the State's evidence and to assist the defense in effective cross-examination of the State's expert.
- Consider the possibility of requesting a pretrial *voir dire* of the State's experts to challenge their expert qualifications under N.C. Rule of Evidence 702 or under any other grounds. (See *infra* Section VII. B).

References
N.C. DEFENDER MANUAL Vol. 1, § 13.1D (Types and Timing of Pretrial Motions—Motions before Trial).

See also John Rubin, *What Are Permissible Discovery Sanctions Against the Defendant*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 12, 2013).

G. Notice of Intent to Use Residual Hearsay

Authority
N.C. R. EVID. 804(b)(5).

Deadlines
Written notice of an intent to rely on residual hearsay must be provided sufficiently in advance of its use so that the opposing party has a fair opportunity to prepare for and contest the use of the evidence.

Key Principles
A notice under this rule must state the proponent's intention to use the statement at issue, provide the particulars of the statement, and include the name and address of the declarant, in addition to meeting the "fair opportunity to contest" timing rule noted above.

In addition to the notice requirement, residual hearsay must also meet the requirements of Evidence Rule 804(b)(5) to be admissible at trial. Those requirements include that the witness is unavailable, the statement is offered as evidence of a material fact, the statement is more probative on the point for which it was offered than any other evidence which the proponent can reasonably obtain, and the general purposes of the Rules of Evidence and the interest of justice will be best served by admission of the statement.

References
N.C. DEFENDER MANUAL Vol. 1, § 13.1D (Types and Timing of Pretrial Motions—Motions before Trial).

See also Jessica Smith, *Hearsay Exceptions: The Residual Exceptions*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Mar. 4, 2014).

H. Notice of Intent to Use Convictions Older than Ten Years

Authority
N.C. R. EVID. 609(b).

Deadlines
Written notice of intent to use older convictions must be provided to opposing counsel sufficiently in advance of their use for the opposing party to have a fair opportunity to contest the use of the older convictions.

Key Principles
The notice should identify the older convictions by offense, date, and location. It should further explain the specific facts and circumstances that support a finding that the use of such convictions is more probative than prejudicial for the case at hand.

Practice Tips
- Defense lawyers should always request criminal records for all witnesses in discovery and should verify such information with independent research. Impeachment of State witnesses

with criminal convictions is a powerful trial tool, and use of this notice ensures that the fact finder will hear as many prior convictions as possible.

- Consider attaching a certified criminal record to the notice, and list the convictions desired to be used with specificity in the body of the motion, along with the reasons their use should be allowed under the facts of the case.

References

KENNETH S. BROWN, BRANDIS & BROWN ON NORTH CAROLINA EVIDENCE 339 (7th ed. 2011).

V. Other Common Motions without Deadlines

A. Generally
B. Motion for Bond Reduction/Modification
C. Motion for Speedy Trial and Related Motions
D. *Ex Parte* Motion for Expert Funds
E. *Ritchie* Motion (Motion for Records in Possession of Third Parties)
F. Motions *in Limine*
G. Motion to Determine Capacity to Proceed
H. Motion to Extend Motions Deadline

A. Generally

These motions do not have specific deadlines, but it will generally be better to prepare and file them as soon as the need for them is apparent.

B. Motion for Bond Reduction/Modification

Authority

G.S. 15A-533 through G.S. 15A-543; Fifth, Fourteenth, and Eighth Amendments to the U.S. Constitution; Article I, Sections 19, 21, and 27 of the N.C. Constitution.

Key Principles

A defendant charged with a non-capital offense is entitled to bail. In capital cases, bail is in the discretion of the court. There is a rebuttable presumption that no condition of release will secure the defendant's attendance for certain situations set out in G.S. 15A-533 (for example, defendants with repeat drug trafficking, criminal gang, or firearms offenses). Pursuant to G.S. 15A-534.1 through G.S. 15A-534.6, some offenses have specific restrictions as to pretrial release conditions (domestic violence, impaired driving, certain crimes against minors, and manufacturing methamphetamine).

The court should consider the nature and circumstances of the offense charged; the weight of the evidence; the defendant's family ties, financial resources (including the ability of the defendant to pay), character, and mental condition; whether the defendant is intoxicated; the length of the defendant's residency in the community; the defendant's criminal record, history of flight, or failure to appear; and any other pertinent evidence.

The rules of evidence do not apply at bond hearings. A hearing may be formal or informal.

Practice Tips

- The judge may modify the bond in either direction at a bond hearing and has wide latitude in setting conditions of pretrial release.
- Where sworn testimony is presented at the district court level, consider having it recorded. If the defendant makes statements at the hearing, the statements will likely be considered party

admissions at any later trial. Counsel is cautioned to consider the risks of having the defendant testify at the bond hearing.

- A well-drafted bond motion with supporting documentation attached is more likely to result in consent from the State or relief by the court. Presenting documentation to the court, such as leases or deeds, proof of employment, character reference letters, and any other evidence of family or community ties and support, is helpful.
- Counsel may appeal a district court bond determination to the superior court per G.S. 15A-538. Counsel may alternatively challenge a bond via writ of habeas corpus, discussed *infra* in Section VIII. D. Defendants may also seek review of superior court bond determinations through the court of appeals, but relief is rare. *See In re Reddy*, 16 N.C. App. 520 (1972) (treating appeal of superior court bond determination as a petition for habeas corpus).

References

N.C. DEFENDER MANUAL Vol. 1, § 1.8 (Procedure for Bond Reduction Motion).

C. Motion for Speedy Trial and Related Motions

Authority

Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 18 and 19 of the N.C. Constitution; G.S. 15A-711; G.S. 15A-761; G.S. 15-1; G.S 15-10; G.S. 15-10.1-2.

Speedy Trial

North Carolina has no general speedy trial statute.

Speedy trial rights under the Sixth Amendment and comparable state constitutional provisions attach after formal accusation. The court will consider the four factors from *Barker v. Wingo*, 407 U.S. 514 (1972), in deciding the motion (the length of delay, the reason for the delay, the time and manner in which the defendant asserted the right, and the degree of prejudice the delay has caused the defendant).

While no deadline exists for a speedy trial motion, courts will consider the timing and frequency of requests for a speedy trial in determining whether there is a constitutional violation. Therefore, counsel should make the motion for speedy trial early and frequently, formally renewing the motion in writing as often as every sixty to ninety days.

A speedy trial motion should specify the prejudice to the defendant, as well as address the other *Barker* factors.

Be prepared for trial if making this motion.

For more information on speedy trial protections, see Section 7.3 (Post-Accusation Delay) of the N.C. DEFENDER MANUAL, Vol. 1.

Due Process (Pre-Accusation Delay)

Where a defendant is significantly prejudiced by pre-accusation delay caused by a state actor, a due process claim may be available. *United States v. Lovasco*, 431 U.S. 783 (1977). This is separate from a speedy trial claim, as speedy trial rights attach only upon formal accusation.

Because formal accusation may be delayed for legitimate reasons, the due process protections for pre-accusation delay are more limited than the post-accusation protections.

For more information on due process protections against pre-accusation delay, see Section 7.2 (Pre-Accusation Delay) of the N.C. DEFENDER MANUAL, Vol. 1.

Statute of Limitations

For misdemeanors, the statute of limitations generally requires that charges be initiated within two years of the date of offense. *See* G.S. 15-1.

Statute of limitations is an affirmative defense that must be raised at or before trial. This statutory defense, where applicable, may be asserted along with a constitutional speedy trial violation claim.

There is no statute of limitations in North Carolina for felony charges. A defendant charged with a felony in North Carolina is protected from unreasonable post-accusation delay only by state and federal constitutional speedy trial provisions.

For more information on statute of limitations issues, see Section 7.1 (Statutory Protections against Delayed Prosecution) of the N.C. DEFENDER MANUAL, Vol. 1.

Prisoner Demands for Trial

Pursuant to G.S. 15A-711, a prisoner confined in North Carolina may demand to be tried on any other offense pending in the state. The prisoner demand must meet the specific statutory requirements as to its form and service. Where the requirements for the demand are met, the defendant may be entitled to dismissal of the charge at issue if trial has not occurred within six months of the prisoner's demand. However, the statute allows for an extension of that time period under certain circumstances, and the courts have found various exceptions to this rule.

G.S. 15-10.2 is a similar statute that applies to in-state prisoners that are subject to a *detainer*. A detainer is a notice to corrections officials that the inmate has other pending charges and should not be released except to the custody of another law enforcement or correctional agency. The detainer typically prevents an inmate from receiving full privileges while in prison. This demand by the prisoner must also meet specific statutory requirements as to its form and service. Where those requirements are met, a prisoner may be entitled to dismissal of the charge resulting in the detainer if trial has not occurred within eight months of the prisoner's demand. However, the statute allows for continuance of the trial for any necessary reason. Thus, an actual trial within the eight-month time period is not necessarily guaranteed.

Demands by prisoners under G.S. 15A-711 and G.S. 15-10.2 may utilize both procedures, where applicable.

When making demands for trial under these statutes, defense counsel should consider also asserting a speedy trial claim to maximize the potential for relief. See G.S. 15A-761 for similar provisions for out-of-state prisoners with pending N.C. charges.

See G.S. 15-10 for provisions regarding a defendant charged with a felony and held in pretrial detention. In limited circumstances, a defendant so situated who demands a speedy trial in open court may be entitled to bail or release.

For more information on prisoner demands for trial, see Section 7.1E (Statutory Protections against Delayed Prosecution—Rights of Prisoners) of the N.C. DEFENDER MANUAL, Vol. 1.

References
N.C. DEFENDER MANUAL Vol. 1, ch. 7 (Speedy Trial and Related Issues).

D. *Ex Parte* Motion for Expert Funds

Authority
Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution; G.S. 7A-450 and G.S. 7A-454; *Ake v. Oklahoma*, 470 U.S. 68 (1985); S*tate v. Ballard*, 333 N.C. 515 (1993).

Key Principles
This motion may include requests for funds for investigators, mental health professionals, DNA or other forensic analysts, technology experts, accounting experts, legal experts, immigration experts, or any other necessary specialists.

Practice Tips
- This motion may be heard *ex parte*, without notice or a copy to the State under *Ake v. Oklahoma*, 470 U.S. 68 (1985). This motion may be filed at the district court level while a felony is pending there. The motion must make an adequate showing of specific necessity and demonstrate a reasonable likelihood of material assistance from the expert.
- Failing to file the motion in a timely manner may undercut the argument that the expert is needed.
- The court may order that the motion and order granting or denying the motion be filed under seal with the court or may order that defense counsel retain the motion and order until the conclusion of the case. See form AOC-G-309, Application And Order For Defense Expert Witness Funding In Non-Capital Criminal And Non-Criminal Cases At The Trial Level.

References
N.C. DEFENDER MANUAL Vol. 1, ch. 5 (Experts and Other Assistance).

E. *Ritchie* Motion (Motion for Records in Possession of Third Parties)

Authority
Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution; *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987).

Key Principles
This is essentially a discovery motion for protected records in the custody of a third party, such as the Division of Social Services or a mental health care provider. The documents may be released to counsel or reviewed by the trial court *in camera*. The records may pertain to the defendant, the victim, or other witness.

The court may enter a protective order, limiting potential disclosure beyond the parties and their counsel.

These motions may reveal defense strategy and may arguably be filed *ex parte*, although no North Carolina court opinion has directly addressed the issue.

The defendant has the initial burden to demonstrate that the evidence sought is material or favorable to the defense by a "plausible showing." This has alternatively been described as a "substantial basis."

Practice Tips

- A *Ritchie* motion should request release of the records to defense counsel or an *in camera* review in the alternative. If access to the records is denied, or is granted on a limited basis only, counsel should ensure that the unreleased records are sealed in the court file for appellate review. Also, consider making an offer of proof regarding the expected contents of any records to which access is denied.
- If you are seeking confidential records other than those of the defendant, it is usually better to proceed by motion. A subpoena for confidential records will often draw an objection from the records custodian, and a court hearing will therefore be necessary anyway. Further, a court order, signed by a judge, provides greater assurance to the defense that access to confidential information is proper.

References

N.C. DEFENDER MANUAL Vol. 1, § 4.6 (Other Constitutional Rights) (discussing rights in discovery context).

F. Motions *in Limine*

Authority

Common law; various rules of evidence; various constitutional provisions.

Key Principles

These are motions to have the trial court rule on the admissibility of evidence before trial. A motion *in limine* is typically made by a party to exclude evidence, although it may also be used to seek an order allowing the presentation of certain evidence or to establish the permissible scope of examination, among other purposes.

Where the admissibility of evidence is or may be contested under the Rules of Evidence, a motion *in limine* should be filed pretrial to prevent the jury from hearing inadmissible evidence. Grounds potentially supporting such a motion are broad and can include any evidentiary issue, but they often focus on prejudice and relevance. Examples include, but are not limited to, motions to exclude character or 404(b) evidence; to exclude inflammatory, prejudicial, or cumulative evidence; to challenge competency of a witness; to address hearsay issues; to redact partially admissible evidence; or to allow or prohibit certain lines of questioning or argument.

Practice Tips

- These motions can assist counsel in developing trial strategy, insofar as a pretrial ruling on certain evidence can shape how a trial may progress and what evidence may be presented to the jury.

- Note that N.C. Evidence Rule 412 (Rape Shield) **requires** a hearing before questioning a witness on sexual behavior; a motion *in limine* should be filed to address this issue before trial.
- If there is an adverse ruling on the motion, an objection must be made at trial to preserve the issue for appellate review.
- Where counsel is limited in the presentation of evidence or cross-examination by a ruling on a motion *in limine*, counsel must make a formal offer of proof and have the substance of the excluded matter placed into the record to best preserve appellate review.
- Because these motions may reveal how defense counsel views the significance and admissibility of evidence, there may be strategic reasons to file the motion as late as possible. There is no statutory deadline for motions *in limine*, although certain topics addressed by way of these motions may have their own deadlines (e.g., use of residual hearsay). Local rules of court may also impose deadlines for pretrial motions.

References

N.C. DEFENDER MANUAL Vol. 1, § 13.1F (Types and Timing of Pretrial Motions—Motions in Limine).

G. Motion to Determine Capacity to Proceed

Authority

G.S. 15A-1001 through G.S. 15A-1008; Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution.

Key Principles

Where the defendant suffers from a mental illness or defect and cannot understand the nature and object of the proceedings, cannot understand his or her situation in regards to the proceedings, or cannot assist in his or her defense in a reasonable manner, the statutes and due process prohibit trial of the defendant.

Capacity to proceed may be raised by any party at any time.

A finding of lack of capacity prevents the prosecution from moving forward and may result in the involuntary commitment of the defendant to a mental health treatment facility, which will attempt to restore capacity.

This motion should specifically note why capacity is in question, and counsel should be prepared to present evidence on the issue at hearing. An expert opinion will often be helpful and is likely necessary when the motion is opposed by the State.

The defendant has the burden to demonstrate a lack of capacity by a preponderance of the evidence.

Practice Tips

- Before filing a motion challenging the defendant's capacity, consider obtaining a mental health expert exclusively for the defense with an *ex parte* motion for funds (see *supra* Section V. D.).

- Where the State seeks to have the defendant evaluated, request that the scope and use of the evaluation be limited by way of a protective order, so as to prevent use by the State to strengthen its case.
- Consider making a request to attend or witness the evaluation or to have it recorded.
- A finding of lack of capacity may result in dismissal of the case in some circumstances (see G.S. 15A-1008).

References

N.C. DEFENDER MANUAL Vol. 1, ch. 2 (Capacity to Proceed).

H. Motion to Extend Motions Deadlines

Authority

Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution; fundamental fairness; inherent authority of the court.

Key Principles

This is a way to exert control over motions deadlines and to set a motions hearing date. There are short deadlines for pre-arraignment motions, certain motions to suppress, and other motions. Consider asking for additional time to prepare and investigate before filing potentially dispositive motions.

Practice Tips

- Try to obtain the consent of the State to this motion. No particular form or content is required, other than a showing of a need for additional time. This is particularly useful and likely to be granted where there is extensive discovery or in an unusually complex case.

VI. Trial-Specific Motions

A. Motion for Full Recordation
B. Motion for Sequestration of Witnesses
C. Witness Lists
D. Motion for Individual *Voir Dire* of Jurors
E. Motion to Record Race of Potential Jurors
F. Motion to Allow (or Prohibit) Notetaking by Jurors
G. Motion to Dismiss for Insufficiency of the Evidence
H. Request for Jury Instructions
I. Motion to Poll Jury
J. Motion for Mistrial

A. Motion for Full Recordation

Authority

G.S. 15A-1241(b).

Key Principles

By the terms of the statute, this motion must be granted on request.

Without complete recordation, jury selection, opening statements, closing arguments, and bench conferences are not recorded by the court reporter. To preserve potential error for appellate review during these parts of the trial, they must be recorded.

Practice Tips

- Judges may discourage counsel from insisting on complete recordation. North Carolina Court of Appeals and Supreme Court opinions make clear that unrecorded errors are not preserved, and thus counsel must insist on complete recordation as a matter of effective assistance of counsel.
- If a motion for full recordation is not made and some error or improper argument is presented during an unrecorded portion of the trial, counsel must attempt to reconstruct the error for the record.
- This motion may be made orally in open court, but the better practice is to file a written request pretrial.
- Some attorneys prefer to not include bench conferences in this request, in an effort to allow the parties and the bench some ability to quickly go off the record and have private conversations with the court (as well as to avoid inconvenience to the court reporter in having to transcribe conferences at the bench). If this is done, it is vital to re-state the substance of any arguments and rulings from the bench on the record during or following an unrecorded bench conference.

B. Motion for Sequestration of Witnesses

Authority

N.C. R. EVID. 615; G.S. 15A-1225; Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution.

Key Principles

The purposes of sequestration are to avoid conscious or unconscious tailoring of testimony by one witness based on the testimony of another witness and to assist the fact finder in detecting false or less than candid testimony.

Sequestration may be granted on motion of either party or on the court's motion. The decision to order sequestration is in the discretion of the court.

Practice Tips

- This motion should be made as a matter of course when going to trial.
- A specific showing of the need for sequestration based on the facts of the case should be included in the motion, such as the existence of close family ties among witnesses, possible financial or employment-based interest or incentives by the witnesses, prior inconsistent witness statements, or a desire to please the State, among other potential reasons.
- In addition to requesting physical sequestration, the motion should ask the court to instruct the witnesses not to discuss their testimony or the case with other witnesses during the trial.
- In addition to the statute, argue that sequestration is required as a matter of due process and best practices. The Official Commentary to Evidence Rule 615 notes that sequestration should ordinarily be granted on request.
- This motion may be made orally in court, but the better practice is to prepare a detailed written motion.
- Violation of an order of sequestration can result in sanctions, including contempt, declaration of a mistrial, exclusion of the witness's testimony, cross-examination of the witness on the violation, a jury instruction on the credibility of the witness who violated the order, or other relief. Counsel should be vigilant in ensuring that all witnesses are following any sequestration order.

References

N.C. DEFENDER MANUAL Vol. 2, § 29.3 (Sequestration of Witnesses).

C. Witness Lists

Authority

G.S. 15A-905(c)(3).

Key Principles

At or before the beginning of jury selection, counsel must provide a written list of witnesses who are reasonably expected to testify. This requirement arguably only applies if the defendant requests discovery.

Practice Tips

- There is no requirement that a witness listed on the witness list be called to testify. However, failure to list a witness on the witness list may result in the judge prohibiting the witness from testifying, absent good cause for the omission. Under G.S. 15A-905(c)(3), if the defendant makes a good faith showing that he or she did not reasonably expect to call a witness (and therefore failed to list the witness), the court must allow the witness to testify. Further, the court can always allow an undisclosed witness to testify in the interest of justice.
- Rebuttal witnesses should also be disclosed as a part of this obligation. Rebuttal evidence generally is addressed in G.S. 15A-1226, which provides that both parties have the right to present rebuttal evidence and which gives the trial court discretion to allow additional evidence any time before verdict. If the need to call a rebuttal witness who was not listed arises, argue under G.S. 15A-905(c)(3) that the rebuttal witness was not reasonably expected to be called or that it is otherwise in the interest of justice to allow the testimony.

D. Motion for Individual *Voir Dire* of Jurors

Authority

G.S. 15A-1214(j); Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution.

Key Principles

For good cause in capital cases, the court may order that jurors be selected one at a time and be sequestered before and after selection, by the terms of the statute. Where the facts of the case warrant such a procedure, counsel may consider requesting individual *voir dire* of jurors even in non-capital cases as a constitutional matter and as within the judge's discretion.

This procedure substantially lengthens the amount of time required to complete jury selection and is likely to be granted in non-capital cases only in limited circumstances.

Practice Tips

- Many courts typically allow some individual *voir dire* of individual jurors without such a motion, particularly in serious cases or where sensitive issues are raised during *voir dire*. Counsel should therefore consider the impact of filing such a motion on the *voir dire* process, as the motion may draw more attention to the defense *voir dire* than would otherwise be paid to it.
- As an alternative to full *voir dire* of each juror individually, consider requesting other accommodations when necessary, such as permission to individually *voir dire* a juror on any particularly sensitive topics of *voir dire*, use of a juror questionnaire, the ability to have a juror answer a question at the bench or otherwise privately, or any other reasonable method designed to provide the jurors an opportunity to answer *voir dire* questions openly and honestly.

References

N.C. DEFENDER MANUAL Vol. 2, § 25.3 (Voir Dire).

See also Jeff Welty, *Individual Voir Dire*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Nov. 28, 2011).

E. Motion to Record Race of Potential Jurors

Authority

Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution; *Batson v. Kentucky*, 476 U.S. 79 (1986).

Key Principles

To preserve appellate review of *Batson* issues, the trial transcript must reflect the race of the jurors who were peremptorily struck by the State, as well as the race of the jurors who were seated. *State v. Brogden*, 329 N.C. 534 (1991). Thus, whether or not a motion on the subject was filed pretrial, when the concern arises during trial defense counsel should move to have the race of each juror peremptorily struck by the State entered into the record.

Practice Tips

- If *Batson* issues are a concern, counsel should consider filing a pretrial motion to record the race of the jurors. Counsel may move to have each prospective juror state his or her race at the beginning of examination by the court. *Batson* challenges are beyond the scope of this guide, but the materials below are excellent resources for this area of law.

References

N.C. DEFENDER MANUAL Vol. 2, § 25.5 (Peremptory Challenges).

See also ALYSON A. GRINE & EMILY COWARD, RAISING ISSUES OF RACE IN NORTH CAROLINA CRIMINAL CASES ch. 7 (UNC School of Government 2014).

F. Motion to Allow (or Prohibit) Notetaking by Jurors

Authority

G.S. 15A-1228.

Key Principles

Consider making the request to allow notetaking by jurors where there are voluminous amounts of evidence or where the trial will take considerable time to complete.

The decision to grant this motion is in the court's discretion. Any party or the court itself may make this motion.

Practice Tips

- Consider making this request in a long or unusually complex trial.
- Reasons to oppose notetaking by the jurors may include the potential for distraction among jurors, overreliance on the notes by jurors in deliberations, and the possibility of inconsistent notes between jurors.

- When making the request to allow notetaking, it may be helpful to have the court provide paper and pens to be used by the jurors as a practical matter.

G. Motion to Dismiss for Insufficiency of the Evidence

Authority

G.S. 15-173; G.S. 15A-1227; N.C. R. APP. P. 10(a)(3); Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 18 and 19 of the N.C. Constitution; *Jackson v. Virginia*, 443 U.S. 307 (1979).

Key Principles

This is a specific type of motion to dismiss based on the State's failure to present substantial evidence of each element of the offense charged (or of a lesser-included charge) and of the identity of the defendant as the perpetrator.

The standard for deciding the motion is whether a reasonable fact finder could find that the case has been proven beyond a reasonable doubt, viewing the evidence in the light most favorable to the State. Evidence that raises a mere suspicion or conjecture of guilt is not sufficient.

Where the proof at trial varies in a material way from the allegations in the pleading, the defense should also move to dismiss for a fatal variance. This is effectively a more specific type of motion to dismiss for insufficiency of the evidence, and any variance argument should be explicitly made alongside any sufficiency motion.

This motion must be made at the close of the State's evidence and, if the defense presents evidence, renewed at the close of all evidence to preserve appellate review of the issue. Sufficiency of the evidence and variance as to each and every element should be raised at the time of this motion in every case, in order to best protect the defendant and to preserve all potential sufficiency issues for appeal.

Note that G.S. 15A-1227(d) and 15A-1446(d)(5) both purport to allow a sufficiency of evidence issue to be preserved for appellate review without any objection or motion at trial. These statutes conflict with N.C. Rule of Appellate Procedure 10(a)(3), which requires an objection or motion to preserve the issue. The state appellate courts have consistently ruled that the rules of appellate procedure control on this issue. Thus, a timely motion must be made to preserve appellate review of any sufficiency argument.

When granted, a motion to dismiss for insufficiency of the evidence generally has the effect of an acquittal for purposes of double jeopardy, although if the motion is granted on grounds of a fatal variance, the State likely can re-charge any offenses not properly charged by the defective pleading.

Practice Tips

- Whether or not defense counsel has a specific argument as to a failure of proof, this motion should be made as a matter of course at the conclusion of the State's evidence (and at the close of all evidence if the defense presents evidence).

- Whenever making a motion to dismiss for insufficiency of the evidence, defense counsel should make a "global" motion to dismiss. In addition to arguing for any specific failures of evidence and any specific variance, defense counsel must move to dismiss for insufficiency as to each and every element of the offense in order to preserve review of each element. If a specific element of an offense is argued and no more general motion made as to other elements, only the element argued will be preserved for review. *State v. Walker*, ___ N.C. App. ___, 798 S.E.2d 529 (2017).
- This motion should be made outside of the presence of the jury and is not typically written.

References

N.C. DEFENDER MANUAL Vol. 2, ch. 30 (Motions to Dismiss Based on Insufficient Evidence).

H. Request for Jury Instructions

Authority

G.S. 15A-1231 through G.S. 15A-1234; Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution.

Key Principles

At the close of all evidence, the court will hold a charge conference to determine how to instruct the jury. A written request for jury instructions should be filed early in the course of the trial in preparation for the charge conference. It must be requested before the jury is actually instructed. Any request for instructions should be written, signed, filed with the court, and served on the State.

Consider requesting instructions (and which instructions may be sought by the State) from the N.C. Pattern Jury Instructions, such as lesser-included offenses, defenses, and reasonable doubt, among others.

Consider requesting special jury instructions that are not covered by the pattern instructions to define legal terms or otherwise explain the applicable law to the jury. Legally correct statements of law, supported by the evidence, must be given by the court on request. *State v. Lamb*, 321 N.C. 633 (1988).

Practice Tips

- Despite the language of G.S. 15A-1231(d) (purporting to allow appellate review of erroneous jury instructions without an objection), counsel must object at the charge conference to the denial of any requested instructions or requested modification of instructions to preserve the issue for appeal, at least where no written request for instruction was filed and ruled on by the court. *State v. Bennett*, 308 N.C. 530 (1983).
- Objections to proposed instructions should specifically state what part of the instruction is objectionable or why the instruction or failure to give a proposed instruction is prejudicial.
- Objections to jury instructions should be made on constitutional grounds as a matter of state and federal due process.

References
N.C. DEFENDER MANUAL Vol. 2, ch. 32 (Instructions to the Jury).

I. Motion to Poll Jury

Authority
G.S. 15A-1238.

Key Principles
This motion must be granted on the request of either party. It requires the court to question each juror individually to ensure that the verdict is unanimous.

If the poll reveals that the jury is not in fact unanimous, the court must order the jury to return to deliberations.

This motion is made orally in open court after the verdict has been announced but before the jury has been released.

J. Motion for Mistrial

Authority
G.S. 15A-1061 through G.S. 15A-1065; Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 18 and 19 of the N.C. Constitution.

Key Principles
Where conclusion of the trial is a physical impossibility, the jury is unable to perform their function, or where a fair trial is no longer possible for either party due to substantial and irreparable prejudice, a mistrial may be declared. In many instances, a defendant may be tried again following a mistrial. However, depending on the reasons for the mistrial and whether the defendant objected, double jeopardy may preclude further prosecution in some circumstances.

The court has wide discretion to declare a mistrial, but a mistrial must be supported by a manifest necessity to overcome double jeopardy concerns. *State v. Sanders*, 347 N.C. 587 (1998). Firmly established grounds supporting a manifest necessity to declare a mistrial include the death or disability of the judge or a juror, a hung jury, or a fatally flawed pleading that fails to confer jurisdiction.

Where the defendant requests the mistrial, joins in the request, or consents to it, there is usually no double jeopardy problem. *State v. White*, 322 N.C. 506 (1988) (but recognizing an exception for prosecutorial misconduct designed or intended to cause a mistrial). While the law of mistrials and double jeopardy is beyond the scope of this guide, counsel should be aware of what may constitute a manifest necessity and what will not.

Practice Tips
- Depending on the issue resulting in the motion for a mistrial, consider whether some lesser sanction would be appropriate, such as a limiting instruction, recess, or other relief.

- Depending on which party is seeking the mistrial and the reasons for the motion, counsel may consider opposing the request.
- Failure to object to the declaration of a mistrial is likely considered consent to the mistrial and will constitute a waiver of any double jeopardy claim. *State v. Cummings*, 169 N.C. App. 249 (2005).
- Because the grounds for a mistrial will not be known before trial, this motion is made orally in open court.

References

N.C. DEFENDER MANUAL Vol. 2, ch. 31 (Mistrials).

VII. Other Motions to Consider

A. Motion for Advance Notice of 404(b) Evidence
B. Motion for *Voir Dire* of Expert/Incompetent Witness/Others
C. Motion to Appear and Testify Before Grand Jury
D. Notice of Assertion of Rights to Remain Silent, Refuse Consent, etc.
E. Motion for Remote Testimony

A. Motion for Advance Notice of 404(b) Evidence

Authority

G.S. 15A-903; Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution.

Key Principles

Under the Federal Rules of Evidence, notice of the prosecution's intent to use Federal Rule 404(b) evidence of other crimes, wrongs, or bad acts at trial must be provided on request. Note that N.C. Rule of Evidence 404 has no comparable subsection requiring the provision of notice of intent upon request.

As a matter of statutory open-file discovery and due process under the state and federal constitutions, counsel should consider requesting advance notice of the State's 404(b) evidence a reasonable time before trial.

B. Requests for *Voir Dire* of Expert/Incompetent Witness/Others

Authority

N.C. R. EVID. 601, 702, and 404; G.S. 9-3; Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution.

Key Principles

Counsel may request that witnesses be questioned outside the presence of the jury to establish that they are competent to testify or to otherwise establish whether their testimony would be admissible at trial, such as with expert testimony under N.C. Rule of Evidence 702 or character evidence under Rule 404. This may be useful when faced with a child witness, witnesses with intellectual or other disabilities, character evidence witnesses, expert witnesses, or any other witness where the admissibility of the testimony is in dispute.

Practice Tips

- Where the competency of a witness to testify is in question, counsel should request a pretrial hearing and determination of the issue with this motion.
- A motion to exclude 404(b) testimony may request an evidentiary hearing or *voir dire* of the witness on the question of admissibility of the evidence.

- Where the State is offering expert testimony, a motion should be filed seeking a pretrial hearing on the qualification of the expert and the admissibility of his or her opinion. Consider obtaining or consulting with a defense expert to best prepare for a hearing seeking to exclude an expert.
- To preserve any objections to the court's ruling on the admissibility of testimony, an objection must be made during trial to the testimony; the court's ruling on the issue pretrial is not sufficient to preserve the issue for review.

C. Motion to Appear and Testify Before Grand Jury

Authority
G.S. 15A-626(d).

Key Principles
Although generally a person in North Carolina has no right to call witnesses or appear before the grand jury, this section of the statute allow a person to petition the judge or district attorney (D.A.) to testify before the grand jury. In the discretion of the judge or D.A., the person may be allowed to do so. This presumably includes the defendant.

D. Notice of Assertion of Rights to Remain Silent, Refuse Consent, etc.

Authority
Fourth, Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution.

Key Principles
While arguably unnecessary after the appointment of counsel, some jurisdictions have had issues with law enforcement or other state agents approaching defendants in custody to obtain statements, obtain permission for searches, discuss unrelated cases, or for other purposes, even after the appointment or general appearance of counsel. If it is a concern, filing a notice that the defendant asserts all constitutional rights (such as to remain silent) can have a deterrent effect on law enforcement. Where a notice is filed and improper actions by the State subsequently occur, a violation of the defendant's rights may be more easily established.

E. Motion for Remote Testimony

Authority
G.S. 15A-1225.1; G.S. 15A-1225.2; *Maryland v. Craig*, 497 U.S. 836 (1990); *State v. Jackson*, 216 N.C. App. 238 (2011).

Key Principles

Where there are serious public policy concerns about a witness appearing in person before the court, a motion to allow the witness to testify by way of remote testimony may be made. This most commonly arises in sex offense prosecutions involving child victims where there is a serious risk of emotional or psychological harm to the child by physically being present in court and seeing the defendant.

To satisfy the Confrontation Clause, when the State moves for remote testimony the court must find that the use of remote testimony (and consequent denial of confrontation rights) furthers a significant public policy interest and that the remote testimony is reasonably assured to be reliable. The statute identifies findings that the court must make before authorizing remote testimony, and the determination of whether or not remote testimony should be used is made on a case-by-case basis.

The procedure for remote testimony should be one that allows all of the parties to the case and the fact finder to view the witness while he or she testifies, such as by use of closed-circuit television, so that the demeanor of the witness may be observed. This method preserves and protects all methods of confrontation other than literal "face-to-face" confrontation.

Whether the use of remote testimony for witnesses other than child sex victims can satisfy the Confrontation Clause is an open question.

Practice Tips

- Defense counsel should oppose a request by the State for remote testimony as a violation of the defendant's confrontation rights by filing a motion *in limine* or other objection. If the testimony is allowed, an objection on confrontation grounds should be renewed during trial when the remote testimony is presented.
- Defense counsel may consider moving the court to allow a defense witness to testify remotely where compelling circumstances exist. Because the State does not have a constitutional right to confrontation, a defense motion for remote testimony may be more easily granted.
- The State will often use an expert to establish the need for remote testimony, such as a child psychologist to establish the potential for trauma to the child in the event the child had to testify in person. Defense counsel should consider consulting with or retaining his or her own mental health expert to counter such evidence.

References

N.C. DEFENDER MANUAL Vol. 2, § 29.8 (Remote Testimony).

VIII. Select Post-Conviction Motions and Writs

A. Notice of Appeal
B. Motion to Withdraw Plea
C. Motions for Appropriate Relief (M.A.R.s)
D. Writ of Habeas Corpus

A. Notice of Appeal

Authority

G.S. 15A-1444; N.C. R. APP. P. 4(b).

Deadlines

Notice of appeal to the appellate division must be made within fourteen days of entry of final judgment in criminal cases. Notice of appeal in civil matters, such as appeals from satellite-based monitoring orders, must be made in writing within thirty days of entry of judgment.

Key Principles

In a criminal case, the defendant may give oral notice of appeal at the time of judgment. After judgment, the defendant must provide written notice of appeal within the deadline.

Written notice of appeal for a criminal case must note which party is taking the appeal, identify the final judgment of conviction being appealed, identify the court within the appellate division to which the appeal is being taken, be signed by counsel, and contain proof of service. An insufficient notice of appeal does not confer jurisdiction on the appellate court and is reason for the appellate division to deny review.

Oral notice is insufficient for civil orders; civil matters must be appealed **in writing** within thirty days of judgment. Further, civil notices of appeal must identify the order from which the appeal is being taken, as opposed to the final judgment that is required for criminal notices of appeal.

Where there is no right of appeal, or where the deadline to give notice of appeal has passed, the defendant may seek appellate review by way of a petition for writ of certiorari.

Although uncommon, the trial court is permitted to set an appeal bond and stay conditions of the judgment pending resolution of the appeal. *See* G.S. 15A-536. Judgments imposing probation are automatically stayed upon notice of appeal; judgments imposing active sentences are not.

Practice Tips

- When giving notice of appeal from superior court, it is helpful to confer with the clerk to ensure that he or she has completed the Appellate Entries and that they contain all of the correct information, including all dates of each of the hearings in the case and each of the court reporters involved in each stage of the trial proceedings.
- Consider giving oral notice of appeal for criminal judgments to avoid complications that might arise with written notice of appeal and to ensure that the clerk and the court are notified of the intention to appeal as soon as possible. When oral notice of appeal is given,

trial counsel may request that appellate counsel be appointed and may request an appeal bond and a stay of the judgment where appropriate. Addressing these issues at the time of judgment is generally more efficient than trying to have the court address them at a later time.

References

N.C. DEFENDER MANUAL Vol. 2, § 35.1O (Appeals by the Defendant—Trial Counsel's Obligations regarding Defendant's Right to Appeal after Superior Court Conviction).

B. Motion to Withdraw Plea

Authority

Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Section 19 and 23 of the N.C. Constitution; *State v. Handy*, 326 N.C. 532 (1990). *See also* G.S. 15A-1335.

Deadlines

There is no deadline in which a motion to withdraw a guilty plea must be made, but the timing of the request can have a significant impact on whether the motion is granted. Thus, a motion to withdraw the plea should be made as soon as possible after the defendant expresses the desire to undo the plea. Further, as discussed below, different standards are applied to review of decisions on motions to withdraw pleas, depending on whether the motion is made before or after sentencing.

Key Principles

There is no general right to withdraw a plea, but motions to withdraw guilty pleas may be granted under certain circumstances. The standard the court will use in determining whether to grant a motion to withdraw the plea depends on its timing.

Where the defendant has not yet entered a plea, he or she has an absolute right to withdraw from the plea agreement, regardless of any prejudice that may result to the prosecution. The State, by contrast, may withdraw a plea agreement before the defendant enters the plea if the defendant has not detrimentally relied on the plea.

Where the defendant has entered a plea but has not yet been sentenced, a motion to withdraw the plea should be granted liberally for any fair and just reason. The court will consider the defendant's assertion of innocence, the weakness of the State's evidence, the length of time between the entry of the plea and the desire to withdraw it, any misunderstanding or confusion on the defendant's part as to the terms or consequences of the plea, and the status of defense counsel, among other factors, when deciding whether to grant the motion.

After the defendant has entered a guilty plea and has been sentenced, the motion to withdraw the plea will only be allowed to avoid manifest injustice, a much higher burden for the defendant to meet. The motion under these circumstances will be treated as a Motion for Appropriate Relief (discussed *infra* in Section VIII. C.).

Practice Tips

- A defendant who successfully withdraws a plea after it was entered will often be faced with a more significant sentence than what was contained in the first plea bargain. Such a result is explicitly authorized by statute in G.S. 15A-1335. Counsel may consider having the client sign an acknowledgment that the attorney has advised the client fully on the terms and consequences of the plea and the potential effects of withdrawing it.

References

N.C. DEFENDER MANUAL Vol. 2, § 23.4E (The Plea Procedure—Defendant's Right to Withdraw Plea).

See also Jessica Smith, *Challenging a Plea*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Aug. 24, 2015).

C. Motions for Appropriate Relief (M.A.R.s)

Authority

G.S. 15A-1411 through G.S. 15A-1422; various state and federal constitutional grounds.

Deadlines

Non-capital motions for appropriate relief (M.A.R.s) have a ten-day deadline from the time of entry of judgment for certain claims, briefly discussed below under "Ten-Day M.A.R." Claims not falling within the purview of that section may be made at any time after verdict, briefly discussed below under "M.A.R. After Ten Days Since Judgment." Capital M.A.R.s have special deadline rules that are set out in G.S. 15A-1415(a). M.A.R.s based on newly discovered evidence having a direct and material bearing on the defendant's culpability must be filed within a reasonable time of the discovery of the new evidence.

Key Principles

With the exceptions of a writ of habeas corpus and a claim of factual innocence to the N.C. Innocence Commission, M.A.R.s are the statutory mechanism through which all post-trial motions are made, including motions to arrest judgment, to set aside the verdict, or to grant a new trial.

Unless the motion is made in open court before the same judge who heard the trial or plea during the same session of court and within ten days of entry of judgment, the motion must be in writing, filed with the clerk, and served on the prosecution.

The motion must include an affidavit supporting the basis for relief if the basis for relief is not apparent from the record. Err on the side of attaching an affidavit that supports the claim for relief.

The motion must include a written certification from the attorney that there is a sound legal basis for the motion, that the motion is being made in good faith, that trial counsel for the defendant and the State have been notified of the motion, and that the attorney has reviewed the transcript or made a good faith determination that the motion does not necessitate reading the entire trial transcript.

Failure to comply with the procedural requirements of the motion can result in summary dismissal of the motion.

The defendant has the burden of proof by a preponderance of the evidence at a hearing on a M.A.R.

A M.A.R. will usually be filed in the trial court. If the case is pending in the appellate division, the M.A.R. must be filed there pursuant to G.S. 15A-1418. The decision of whether to file a M.A.R. in the appellate division or to wait for the resolution of the appeal to file the M.A.R. in the trial court can be complicated and should be made in consultation with experienced post-conviction counsel.

There are two types of these motions, as discussed below, that the defendant may file. The State has limited rights to file a M.A.R. pursuant to G.S. 15A-1416.

Ten-Day M.A.R.

Under G.S. 15A-1414, a defendant may file a M.A.R. within ten days of entry of judgment to correct any trial errors. Unless listed in G.S. 15A-1415 (M.A.R. claims that may be asserted at any time), any trial errors must be addressed through G.S. 15A-1414.

Claims for relief under G.S. 15A-1414 include errors of law. Some examples of such claims include that the court erroneously failed to grant a motion to dismiss, that the court ruled contrary to the law on motions before or during trial, that the jury instructions were erroneous, that the verdict was contrary to the weight of the evidence, or that, for any other reason, the defendant did not receive a fair trial or sentence. For a comprehensive list of possible claims here, see G.S. 15A-1414.

Where the defendant asserts that the sentence was not supported by the evidence, the motion must be addressed to the sentencing judge.

M.A.R. After 10 Days Since Judgment

The claims for relief in this statute may be asserted at any time once more than 10 days from the entry of judgment have passed, but only the grounds listed in the statute may serve as a basis for relief.

Claims for relief under this section include lack of jurisdiction, that the statute under which the defendant was convicted violates the state or federal constitution, or that the sentence received by the defendant was not authorized by law, among several others. For a comprehensive list of possible claims here, see G.S. 15A-1415.

Practice Tips

- Post-conviction discovery is available to post-conviction counsel, both from the State and the defense attorney who represented the defendant at trial, pursuant to G.S. 15A-1415(f).
- All M.A.R.s are subject to the procedural default provisions of G.S. 15A-1419, which provide that a M.A.R. must be denied in the circumstances listed there. Procedural default issues are beyond the scope of this guide, but the materials below are useful resources in this complex area of law.
- There are limited exceptions to the procedural default provisions in the statute. To ensure that the client's rights are protected and to avoid inadvertently defaulting on any potential claims,

defense counsel should be familiar with the M.A.R. statutes and case law before pursuing a claim.

- Consider consulting with an experienced post-conviction attorney before commencing any M.A.R. litigation. Competent post-conviction litigation also requires some knowledge of appellate rules and procedure, as well as federal habeas law, which also have their own default provisions.

References

N.C. DEFENDER MANUAL Vol. 2, § 35.3 (Motions for Appropriate Relief).

See also Jessica Smith, *Motions for Appropriate Relief*, ADMINISTRATION OF JUSTICE BULLETIN No. 2010/03 (UNC School of Government, June 2010).

D. Writ of Habeas Corpus

Authority

G.S. 17-1 through G.S. 17-46; Article I, Section 9 of the U.S. Constitution; Article I, Section 21 of the N.C. Constitution.

Key Principles

The writ of habeas corpus is the mechanism by which a person can challenge the lawfulness of his or her detention. It is not an appeal and is not a mechanism for the court to consider legal challenges to a conviction. Rather, the sole issue before the court on a habeas petition is whether the continued detention of the petitioner is legal.

A writ of habeas corpus must be written and signed by the applicant.

A proceeding on a writ of habeas corpus may be brought before any justice or judge of the appellate or superior court division in the state, regardless of location and regardless of whether or not the court is in session.

The remedy on a writ of habeas corpus is release of the petitioner from custody.

Practice Tips

- The ability to choose the forum in which a habeas petition is heard is a notable feature of the writ.
- This writ is also the mechanism by which a defendant can challenge the legality of detention pursuant to a Governor's Warrant in extradition proceedings.

References

N.C. DEFENDER MANUAL Vol. 2, § 35.4 (State Habeas Corpus).

About the Author

Phillip R. Dixon Jr. joined the School of Government as Defender Educator in 2017. Previously he worked for eight years as an attorney in Pitt and surrounding eastern North Carolina counties, focusing primarily on indigent defense and related matters. He earned a B.A. from the University of North Carolina at Chapel Hill and a J.D. with highest honors from North Carolina Central University. He works with the indigent education group at the School. He can be reached at dixon@sog.unc.edu.

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