

## V. Other Common Motions without Deadlines

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### 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); *State 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.