

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, § 35.10 (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).