UNC SCHOOL OF GOVERNMENT

NORTH CAROLINA Judicial COLLEGE

Advanced Criminal Procedure for Superior Court Judges

March 4 - 7, 2024
UNC School of Government, Chapel Hill, N.C.

Monday, March 4

1:00pm	**Welcome & Introductions** Jacqui Greene, Albert and Gladys Hall Coates Distinguished Term Associate Professor UNC School of Government
1:15pm	**Motions to Suppress** [.75 hrs CJE] Judge Michael O'Foghludha, Senior Resident Superior Court Judge, Judicial District 16
2:05pm	**Break**
2:15pm	**Double Jeopardy** [.75 hrs CJE] Joseph L. Hyde, Assistant Professor of Public Law and Government, UNC School of Government
3:05pm	**Break**
3:15pm	**Capacity Issues** [.75 hrs CJE] John Rubin, Albert Coates Professor of Public Law and Government, UNC School of Government
4:05pm	**Break**
4:15pm	**Capacity Issues, continued** [.75 hrs CJE]
5:00pm	**The Self-Represented Defendant** [.50 hrs CJE] Judge Allen Baddour, Senior Resident Superior Court Judge, Judicial District 18
5:30pm	**Recess**
6:30pm	**Dinner at Carolina Brewery** (460 W. Franklin St.)

Tuesday, March 5

9:00am	**Discovery Issues** [1 hr CJE] Judge Alyson Grine, Resident Superior Court Judge, Judicial District 18
10:00am	**Break**
10:10 am	**Counsel Issues** [.75 hrs CJE] Phil Dixon Jr., Teaching Assistant Professor; Director, Public Defense Education, UNC School of Government

11:00am **Break**

11:10am **High-Profile Trials: Access and Control** [.75 hrs CJE]
Shea Denning, Professor of Public Law and Government; Director, North Carolina Judicial College, UNC School of Government

12:00pm **Lunch**

1:00pm **Pretrial Accountability & Release: Current Issues & Innovations** [.75 hrs CJE]
Jessica Smith, William R. Kenan, Jr. Distinguished Professor of Public Law and Government; Director, Criminal Justice Innovation Lab, UNC School of Government
Ethan Rex, Data Manager, Criminal Justice Innovation Lab, UNC School of Government

1:50pm **Break**

2:00pm **Habitual Offenses** [.75 hrs CJE]
Jeff Welty, Professor of Public Law and Government; Senior Associate Dean for Faculty Affairs, UNC School of Government

2:50pm **Break**

3:00pm **Jury Argument** [.75 hrs CJE]
Judge Greg Horne, Resident Superior Court Judge, Judicial District 35

3:50pm **Break**

4:00pm **Criminal Non-Jury Trials** [.50 hrs CJE]
Judge Gale Adams, Resident Superior Court Judge, Judicial District 14

4:30pm **Recess**

Wednesday, March 6

9:00am **Criminal Procedure & Confrontation Rights** [1 hr CJE]
Brittany Bromell, Assistant Professor of Public Law and Government, UNC School of Government

10:00am **Break**

10:10am **Jury Management** [.75 hrs CJE]
Judge Robert Ervin, Senior Resident Superior Court Judge, Judicial District 36

11:00am **Break**

11:10am **When to Intervene Without an Objection** [.75 hrs CJE]
Judge Robert Ervin, Senior Resident Superior Court Judge, Judicial District 36
Judge Valerie Zachary, North Carolina Court of Appeals

12:00pm **Lunch**

1:00pm **Compassion Fatigue – The Price We Pay as Professional Problem Solvers** [1 hr CJE]
Candace Hoffman, Field Coordinator, North Carolina Lawyer Assistance Program

2:00pm **Break**

2:15pm **Leave for Tour of State Crime Lab, Raleigh** [3.25 hrs CJE]

5:30pm **Return to Chapel Hill**
Transportation provided

Thursday, March 7

9:00am **Advanced Sentencing Procedures** [.75 hrs CJE]
Jamie Markham, Professor of Public Law and Government, UNC School of Government

9:50am **Break**

10:00am **Probation Violation Hearings Procedure** [1 hr CJE]
Jamie Markham , Professor of Public Law and Government, UNC School of Government

11:00am **Break**

11:10am **Motions for Appropriate Relief** [1 hr CJE]
Joseph L. Hyde, Assistant Professor of Public Law and Government, UNC School of Government

12:10pm **Adjourn**

This program will have **18.25 hours** of instruction, all of which will qualify for general continuing judicial education credit under Rule II.C of Continuing Judicial Education.

Advanced Criminal Procedure for Superior Court Judges

About the Speakers

Judge Gale Adams obtained her B.A. from UNC-Chapel Hill and J.D. from N.C. Central University School of Law before joining the U.S. Navy as a JAG officer. After her military service, she worked as an Assistant District Attorney in Cumberland County before joining the Office of the Federal Public Defender where she served more than twenty years as an Assistant Federal Public Defender. In 2012, I was elected to my current position, Superior Court Judge for Cumberland County, now the 14th Judicial District.

Judge Allen Baddour has served as a Resident Superior Court Judge since 2006, conducting criminal and civil trials across the state. Prior to becoming a Superior Court Judge, Baddour was the Managing Assistant District Attorney for Chatham County. He obtained a degree in Political Science from UNC-CH, and a law degree from the UNC School of Law. Judge Baddour serves on the Administrative Office of the Courts (AOC) Judicial Forms Committee, as a liaison to the N.C. Conference of Superior Court Judges. Judge Baddour served as a Vice-President of the North Carolina Bar Association's Board of Directors 2020. He has served on the Bench-Bar Committee and has served on the Membership Committee since 2019. He served from 2007-2018 on the NCBA's Technology Advisory Committee, acting as liaison to the N.C. Conference of Superior Court Judges. Volunteer work has always been an important extension of Judge Baddour in the community. He has served on the Board of the YMCA of the Triangle (2015-16) and serves on the Chatham YMCA Board of Directors (which he chaired from its inception until 2017).

Brittany Bromell is an expert in criminal law and procedure, with expertise in domestic violence and computer crimes. As a faculty member, Bromell teaches and advises courtroom professionals, including judges, magistrates, prosecutors, defense attorneys, and law enforcement officers. She joined the School of Government in July 2020. Prior to joining the School, she received a bachelor's degree from Duke University and a J.D. from the North Carolina Central University School of Law*, summa cum laude*, where she served as the notes and comments editor for the *North Carolina Central Law Review*. Bromell is a member of the North Carolina State Bar.

Shea Riggsbee Denning is not only a UNC School of Government faculty member; she is a double Tar Heel. After earning an AB with distinction in journalism and mass communication from the University in 1994, and a JD with high honors from the UNC School of Law in 1997, she began her legal career by clerking for the Honorable Malcolm J. Howard, US District Judge for the Eastern District of North Carolina, in Greenville. She then practiced law in Atlanta with the firm of King & Spalding before returning to North Carolina to work as a research attorney and then as an assistant federal defender for the Eastern District of North Carolina. She joined the SOG faculty in 2003 and currently serves as director of the North Carolina Judicial College. Denning's scholarship focuses on motor vehicle law and criminal law and procedure. She teaches and advises judges, magistrates, prosecutors, defense attorneys, and law enforcement officers. She has written extensively about North Carolina's motor vehicle laws, including a book on the law of impaired driving.

Phil Dixon Jr. joined the School of Government in 2017. Previously he worked for eight years as an attorney in Pitt and surrounding eastern North Carolina counties, focusing primarily on criminal defense and related matters. Dixon served as assigned counsel to indigent clients throughout his career and represented adult and juvenile clients charged with all types of crimes at the trial level. He earned a BA from the University of North Carolina at Chapel Hill and a JD with highest honors from North Carolina Central University. He works with the public defense education group at the School to provide training and consultation to public defenders and defense lawyers, as well as to research and write about criminal law issues.

Judge Robert C. Ervin is a native of Morganton, NC. After practicing law in Charlotte for several years, Ervin joined the Morganton law firm Byrd, Byrd, Ervin, Whisnant, McMahon and Ervin. He practiced with that firm from 1988 until shortly after he was elected to an eight-year term as a Superior Court judge by voters in District 25A in 2002. In 2008, he was appointed by the chief justice of the North Carolina Supreme Court to serve on the Indigent Defense Services Commission and the Rural Courts Commission. He has presided over numerous high-profile cases. Judge Ervin graduated from Davidson College with a BA in 1982 and earned his JD from Harvard Law School in 1985.

Judge Alyson A. Grine was appointed by Governor Roy Cooper in January of 2021 Grine to serve as a Superior Court Judge for Judicial District 18 (Orange and Chatham Counties), and she was elected to a full term in November of 2022. Previously, Judge Grine was a prosecutor in Durham in the Homicide Unit. She also worked as an educator for over a decade, serving as a faculty member at the North Carolina Central University School of Law and the UNC School of Government, where she specialized in criminal law and procedure. Before joining UNC, Judge Grine worked as an Assistant Public Defender for District 15B. Early in her career, she served as a judicial clerk for Chief Justice Henry Frye of the NC Supreme Court and for Justice (then Judge) Patricia Timmons-Goodson of the NC Court of Appeals. Judge Grine earned a BA with distinction and a JD with honors from UNC Chapel Hill as well as an MA in Spanish from the University of Virginia. In her spare time, she enjoys hiking, playing tennis, and fostering rescue dogs.

Candace Hoffman is a licensed North Carolina lawyer and recovery enthusiast. Candace comes to LAP from the Department of Justice, where she worked in health care, representing the North Carolina Department of Health and Human Services. Her work exposed her to the challenges and complexities of the mental health and substance abuse treatment fields. Before taking this position as LAP Field Coordinator, Candace was a LAP volunteer for six years. Candace lives in Raleigh with her husband, two daughters and two beagles.

Judge R. Greg Horne is a resident Superior Court Judge in the 35th District. He lives in Watauga County. He also serves on the Conference Education Committee and the Sentencing Commission. He previously served ten years on the District Court bench.

Joseph L. Hyde is an expert in the areas of criminal law and procedure. His teaching and research support North Carolina's prosecutors. He also advises on issues related to evidence and appellate procedure. He is the lead contact for *NC PRO*, the School's online resource for prosecutors, and contributes to the North Carolina Criminal Law Blog. Hyde joined the School of Government in 2022. He completed state and federal clerkships for the Hon. James A. Wynn, Jr., on the North Carolina Court of Appeals and the U.S. Court of Appeals for the Fourth Circuit. He then worked for

more than a decade at the North Carolina Department of Justice, Criminal Division, Appellate and Postconviction Section. Most recently, Hyde served as special deputy attorney general, representing the state in criminal appeals and post-conviction litigation. Hyde earned a bachelor's degree from Saint John's College and a J.D. with honors from the UNC School of Law.

Jamie Markham joined the School of Government faculty in 2007. His area of interest is criminal law and procedure, with a focus on the law of sentencing, corrections, and the conditions of confinement. He was named Albert and Gladys Coates Distinguished Term Associate Professor for 2015–2017. Markham earned a bachelor's degree with honors from Harvard College and a law degree with high honors, Order of the Coif, from Duke University, where he was editor-in-chief of the *Duke Law Journal*. He is a member of the North Carolina Bar. Prior to law school, Markham served five years in the United States Air Force as an intelligence officer and foreign area officer. He was also a travel writer for Let's Go Inc., contributing to the Russia and Ukraine chapters of *Let's Go: Eastern Europe*.

Judge Michael O'Foghludha has lived in Durham for over 40 years. He graduated from Duke University with a degree in history and received his law degree from the University of North Carolina at Chapel Hill. He worked as a solo practitioner, a staff attorney with East Central Community Legal Services, an assistant public defender for the 12th Judicial District, and for 23 years with Durham's Pulley, Watson, King, & Lischer, P.A. As managing attorney with this firm, O'Foghludha administered the Adam Lischer Memorial Scholarship, which was established for residents of Durham County attending law schools in North Carolina. In 2011, he was elected superior court judge for the 14th Judicial District.

Ethan Rex, as data manager for the School of Government's Criminal Justice Innovation Lab, spearheads the expansion and maintenance of the Lab's database of state court criminal records as well as manages the Lab's Measuring Justice Dashboard project. He is also responsible for acquiring, cleaning, and understanding various types of data and creating analytical datasets. He joined the Lab in 2020 as project manager and his current role in 2023. Previously, Rex worked in mental health and affordable housing in Oklahoma. He earned a master's degree in public policy from Duke University.

John Rubin is an expert in criminal law and public defense education. He joined the Institute of Government in 1991. He regularly teaches and consults with judges, magistrates, prosecutors, public defenders, and other criminal justice officials. In 2004, Rubin created the Public Defense Education program at the School, supported by contract revenue, grants, registration fees and sales, and fundraising. As director of the program, he oversaw the work of several lawyers and professional employees who develop and deliver a curriculum of annual training programs, a library of reference materials, online educational offerings, and consultation services. Rubin helped establish and continues as a consultant to the North Carolina Office of Indigent Defense Services, the statewide agency responsible for overseeing and enhancing legal representation for indigent defendants and others entitled to counsel under North Carolina law.

Jessica Smith is director of the School's **Criminal Justice Innovation Lab**. The Lab brings together a broad range of stakeholders to learn about criminal justice problems, implement innovative consensus solutions, and measure the impact of their efforts. It seeks to promote a fair and effective criminal justice system, public safety, and economic prosperity through an evidence-

based approach to criminal justice policy. Smith has offered numerous courses for trial and appellate judges and has taught sessions for prosecutors, defenders, law enforcement officers, magistrates, and others. Her many books, chapters, articles, and other publications deal with criminal procedure, substantive criminal law, and evidence. Smith came to the School of Government in 2000 after practicing law at Covington & Burling in Washington, D.C., and clerking for Judge W. Earl Britt on the U.S. District Court for the Eastern District of North Carolina and for Judge J. Dickson Phillips Jr. on the U.S. Court of Appeals for the Fourth Circuit. In 2006, she received the Albert and Gladys Hall Coates Term Professorship for Teaching Excellence; in 2013, she was named by the Chancellor as a William R. Kenan, Jr. Distinguished Professor, one of the University's highest academic honors. Smith earned a B.A., *cum laude,* from the University of Pennsylvania and a J.D., *magna cum laude*, Order of the Coif, from the University of Pennsylvania Law School, where she was managing editor of the *Law Review*.

Jeff Welty is an expert in the area of criminal law and procedure. His research interests include the law of policing, search and seizure, digital evidence, and criminal pleadings. Welty joined the School of Government in 2008. He founded and contributes regularly to the *North Carolina Criminal Law Blog*, an award-winning resource visited by approximately 100,000 users each month. He has written for, appeared on, or been quoted in *The New York Times*, *The Washington Post*, *TIME*, *Newsweek*, National Public Radio, Bloomberg News, *Lawyers' Weekly*, the Raleigh *News and Observer*, and many other media outlets. His books about capital punishment and digital evidence are widely-used legal references. Welty previously served as the director of the North Carolina Judicial College, which provides training and education to the state's judicial officials. Welty completed a federal judicial clerkship and worked in private practice before coming to the School. He has taught police, prosecutors, and judges in the United States, Mexico, Canada, Nigeria, Ghana, and Zambia. From 2020 to 2021, he spent two years on leave from the School at the North Carolina Department of Justice, where he led the Special Prosecutions and Law Enforcement Section. Welty earned a J.D. from Duke University School of Law with highest honors.

Judge Valerie Zachary hails from Yadkin County, where she practiced law for 26 years with her husband, former Representative Lee Zachary. She received her Juris Doctor cum laude from Harvard Law School in 1987, and her Bachelor of Arts with honors from Michigan State University in 1984. Governor Pat McCrory appointed Judge Zachary to the Court of Appeals in 2015. She then won a statewide race to retain her seat in 2016. She is now serving an eight-year term on the Court. In addition to her role on the Court, Judge Zachary has served on numerous commissions and boards, and has taught various continuing legal and judicial education courses. Notably, in the summer of 2023, Judge Zachary commenced her fourth term on the Sentencing Commission. She is also a certified appellate mediator.

Tab: Motions to Suppress

Motions to Suppress

Michael O'Foghludha
Senior Resident 16th District (Durham)

1

N.C.G.S. 15A-971 et seq.

- Violation of the U.S. or N.C. Constitutions
- Substantial violation of statutory rights
  - Extent of deviation from law
  - Willfulness of conduct
  - Importance of deterrence
  - Importance of the interest

  Even considering all these factors, no suppression if officer acted under objectively reasonable good faith belief in lawfulness of actions (but only under statute or 4th amendment, arguably not under NC constitution)

2

Requirements

Be in writing

Be served on the State

State factual grounds, not legal conclusions

Be supported by affidavit (counsel OK)

Summary dismissal if not met, in your discretion

3

Timing

- Misdemeanors, before trial
- Felonies, before trial, unless,
  - No reasonable opportunity
  - You allow, in exercise of discretion
  - No 20 days notice by State of
    - Defendant's statement
    - Search without defendant's presence
    - Warrantless search
    - Providing in Discovery is not notice

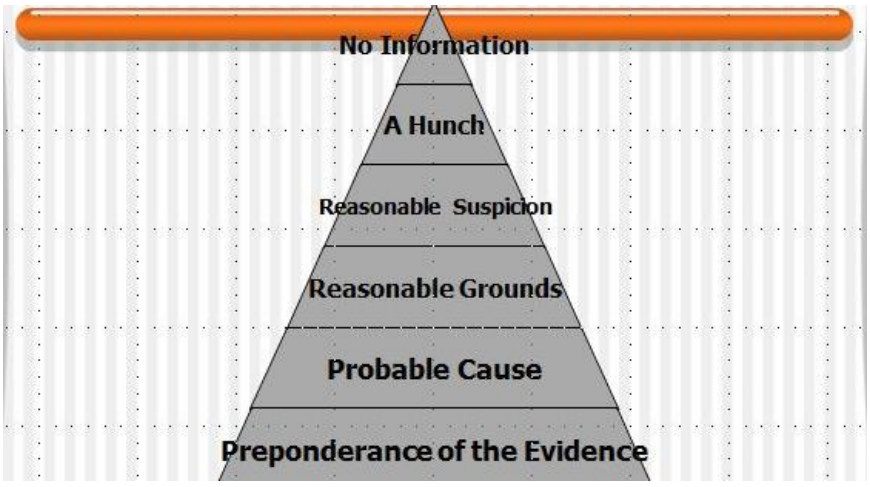
4

Hearing

- No jury panel
- Motion in proper order, B/P on State
- R. Evid. don't apply, except privilege
- Make State go first
- Def. not subject to cross on other facts
- Grant the motion even if conceded
- Treat it like a trial, no defense evidence, state can open and close
- Rule if at all possible, save notes, who prepares?

5

Terry v. Ohio



6

Nervousness

- Everyone gets a little nervous
- State v. Canty 224 NCApp 514 (2012)
- State v. Phifer 226 NCApp 359 (2013)

7

Extended Stops

- Rodriquez v. U.S. 135 S.Ct. 1609 (2015)
- State v. Heien 226 NCApp 280 (2013), aff'd 367 NC 163 (2013)
- State v. Bullock 370 NC 256 (2017)
- State v. Reed 373 NC 498 (2020)

8

Speeding

- Visual estimate ok
- 5 mph over the limit may be “within normal range of driving behavior”
- Below the limit alone- 20-141 (h)- probably not enough, unless other traffic affected, or below minimum posted speed

9

Turn Signal

- 20-154 (c)- shall signal when the operation of another vehicle affected
- State v. Heien 737 S.E.2d 351 (NCSC 2012), modified Heien v. N.C. 135 S.Ct. 530 (2014)
- State v. Eldridge 790 S.E.2d 740 (2016)

10

Stop Light

- Compare Roberson 163 NCApp 129 with Barnard 362 NC 244 (10 seconds v. 30 seconds)
- Don't sit too long, too late at night, near too many bars.

11

Bars/High Crime

- Bars alone, and high crime alone, not enough.
- State v. Sutton 232 NCApp 667 (2014)

12

Weaving

- Weaving “plus”
- 20-146(d)(1)- motorist shall not move from lane of travel unless movement made in safety.
- S v. Fields 195 NCApp 740 (2009)
- S. v. Fields 723 SE2d 777 (2012)

13

Anonymous Tips

- Florida v. JL 529 US 266 (2000)
- Alabama v. White 496 US 325 (1990)
- Navarette v. California 134 SCt 1683 (2014)
- State v. Harwood 221 NCApp 451 (2012)
- State v. Walker (CoA 10/3/17)

14

Search after Stop

- order in, order out
- questions not custodial
- reas. sus.- armed and dangerous. Ariz v. Johnson
- run tags and warrants
- plain sight and smell
- drug dogs ok, if within the mission of the stop (Rodriquez), or if reasonable suspicion justifies extension.

15

MOTIONS TO SUPPRESS

Michael O'Foghludha
Senior Resident Superior Court Judge
16th Judicial District
Advanced Criminal Procedure Seminar
March 4, 2024

PROCEDURE:

Governed entirely by statute. N.C.G.S. 15A-971 et seq. A motion to suppress is the exclusive method of challenging evidence obtained against the defendant in an alleged unlawful manner. The conduct must violate the defendant's rights, not the rights of another. State action is required, not the act of a private party.

Suppression can be granted because of a constitutional violation, or a substantial violation of defendant's statutory rights. The latter is subject **to** a good faith exception. Under the 4th amendment, evidence will not necessarily be suppressed if officers rely in good faith on a warrant issued by a judicial official. Our North Carolina Supreme Court has not recognized a good faith exception the exclusionary rule under the North Carolina constitution. (Compare U.S. v. Leon 468 US 897 (1984) with State v. Carter 322 NC 709 (1988). Practice Tip: Cite both the U.S. and N.C. Constitutions if you are going to suppress the evidence. Section 20 of the North Carolina Constitution is roughly equal to the 4th amendment)

Statutory factors to consider are enumerated In N.C.G.S. 15A-974(2):

-The extent of deviation from lawful conduct;
-the willfulness of the conduct;
-the deterrent effect of suppression;
-the importance of the interest violated;

Even considering all these factors, the evidence shall not be suppressed (under the statute only) if the officer acted under an objectively reasonable, good faith belief that the actions were lawful.

REQUIREMENTS:

- Must be in writing;
- Be served on the State;
- State factual grounds, not conclusions.
- Be supported by affidavit. (can be signed by counsel) Motions made properly at trial (see timing below) need not be supported by an affidavit. S. v. Roper 328 NC 337 (1991)

Motions not meeting these requirements are subject to summary dismissal. S. v. Harris 71 NCApp 141 (1984) (no affidavit) S. v. Phillips 132 NCApp 765 {1999) (conclusions, not facts)

Timing:

Must be made at any time before trial, unless the defendant had no reasonable opportunity to make the motion before trial, or in the trial judge's discretion.

If the State Intends to Introduce evidence of a statement from the defendant, or evidence from a warrantless search, or evidence from a search where the defendant was not present, the State must give at least 20 working days' notice of Its intent to use the evidence at trial. This Is not satisfied by merely producing the evidence In discovery. If the State does so, the defendant must file any applicable motion to suppress within 10 working days. The failure of the State to follow these rules allows the defendant to challenge the proffered evidence at any time. As a practical matter in most cases, the defendant will be able to challenge these three types of evidence though a motion to suppress made at any time. See 15A-975 and 976.

Upon a misdemeanor appeal the defendant must move to suppress prior to trial. 15A-975(c}
This is a common fact pattern. (DWI appeals- motions to suppress based on an improper stop- see below).

HEARING

The hearing is conducted in the absence of the jury or the prospective jury panel. If the motion is in proper form (see above}, the burden is on the State to prove that the challenged evidence was properly obtained. S. v. Barnes 158 NCApp 606 (2003). Therefore, the State should present evidence first. All evidence Is taken under oath.

Both sides have the right to present evidence. If the defendant testifies on the narrow issue of the lawfulness of the search or seizure, the defendant may not be cross examined as to the other Issues in the case. N.C.R. Evidence 104(d}

The Rules of Evidence as to admissibility do not apply, except for privilege. N.C.R. Evidence 104(a), 1101(b).

Even if the State concedes the motion, or says a hearing Is not necessary because the evidence will not be offered, GRANT the motion. This is mandatory. 15A-977(b)(I) and (b)(2).

As noted above, summary denial is also proper If the motion is not properly served, Is not supported by an affidavit, or Is not In proper form. However, a judge in his or her discretion may hold an evidentiary hearing in spite of a deficient motion.

Practice Tips:

Read the motion (and any cases) before you start the evidence

- Have Jeff Welty's summary "Motions to Suppress" open during the hearing from the Superior Court Judge's Bench book (www.sog.unc.edu) (benchbook.sog.unc.edu click on "Criminal", then "Motions to Suppress")
- Bring Arrest, Search, and Investigation in North Carolina (Farb) with you. Open It to the relevant section based on the motion.
- Subscribe to the SOG's same day email service of new criminal appellate decisions and new legislation. Available at www.sog.unc.edu. Read it.
- Treat the hearing like a trial. Ask for briefs. Give each side a closing argument and give them the same order they would have in a trial. (No evidence, right to open and close)
- Take careful notes of all the testimony. Go back over your notes with a highlighter to pick out your findings of fact.

Contents of the Ruling:

The order should contain findings of fact and must contain conclusions of law. Where there is "no material conflict in the evidence", the order need not contain findings of fact. The ruling should be reduced to a written order. Ruling may be reserved until a later time. S v. Wilson 225 NCApp 498 (2013)- written order entered the day of the jury verdict, hearing held at some earlier time- implication in opinion is that the hearing was a long time prior. You must base your FOFs on the evidence under oath, not on matters sworn to in the affidavit supporting the motion to suppress. S. v. Salinas 366 NC 119 (2012).

Practice Tips:

Don't reserve ruling. If you need to make up your mind or read briefs/cases, take a break for as long as necessary, and rule. Advantages: 1) It gives the State a chance for an appeal. 2) If a written order is never produced, maybe the Court of Appeals will deem your order in the transcript to be a sufficient ruling. i.e. there's no material conflict In the evidence, etc. At worst, the CoA will probably just remand for entry of the written findings. See S. v. Morgan 224 NCApp 784 (2013). 3) It's not going to get any better. You know more about it now than you will next week. 4) You don't have to be perfect. As long as your written order is supported by the evidence and consistent with your oral ruling, you are fine. For an example of FOFs not supported by the evidence, see S. v. Weaver 752 SE2d 240 {2013).

The written order:

- If you grant the motion, the defense attorney has every Incentive to get you a written order as soon as possible. The Asst. D.A. probably has more on his/her plate. You have to make a practical decision, based on your experience in your district, as to who Is going to draft the written order.
- If the parties draft the order, have them give you an order in both paper and electronic formats.
- Save your notes from the hearing until the order Is signed.

The ruling on the issue becomes the law of the case. If the case is mistried all pre-trial issues are de novo.

However, what happens when the case comes back from the appellate court on an unrelated issue? In S. v. Lewis 365 NC 488 (2012) the defendant unsuccessfully moved to suppress his identification. That issue was affirmed on appeal, but the case was remanded for a new trial on a different issue. Before his second trial, the defendant moved to suppress based on NEW evidence, and the trial judge denied the motion on the principle that the first ruling was the law of the case as it had been affirmed on appeal. The Supreme Court affirmed the Court of Appeals reversal on this Issue, ruling that the subsequent motion was based on new evidence unavailable to the defense at the first trial.

By contrast, if the issue was considered on appeal, and a new trial ordered on other grounds, and no new evidence is brought forward on the issue, the appellate ruling is the law of the case on all issues ruled on by the appeal. S. v. Ingram 249 NCApp 601 (2016) (unpublished)

DWI cases

The denial of a motion to suppress, or the failure to make a motion to suppress, or even a guilty plea without a like motion in District Court, does not preclude the making of a motion to suppress upon appeal

to the Superior Court. See NCGS 15A-953 and 15A- 979. If a District Court judge desires to grant the defendant's motion to suppress in District Court, the judge must make a "preliminary determination" of the motion, which the State can immediately appeal to the Superior Court. NCGS 20-38.6 and 38.7

SUBSTANTIVE ISSUES

Motions to suppress can be made for any alleged constitutional or statutory reason. Common issues that arise before the Superior Court include:

- Vehicle stops and investigation pursuant to the stop
- Line-ups and identifications
- Search warrants
- Confessions and statements of the defendant

VEHICLE STOPS

Reasonable suspicion of an infraction or a criminal offense under Terry v. Ohio is the standard for the stopping of a motor vehicle. S.v. Styles 362 NC 412 (2008) (Rejecting the argument that probable cause is required for stops based on readily observable traffic violations. S. v. McLendon 130 NCApp 368 (1998) (stating that an officer may stop a vehicle based on a criminal offense or an infraction) .

If reasonable suspicion exists for the stop, it is immaterial that the officer subjectively hopes to gather information related to an unrelated crime. A prolonged extension of the stop, so as to render the stop merely a pretext, is unconstitutional. Whren v. US 517 US 806 (1996)

If reasonable suspicion does not exist at the initiation of the attempted vehicle stop, the fact that the vehicle flees from the officer can provide the necessary reasonable suspicion. California v. Hodari 499 US 621 (1991). Turning around in obvious response to a check point, (even if the check point itself is arguably Invalid), supplies objective reasonable suspicion. S. v. Griffin 366 NC 473 (2013)

A substantial body of law has developed about factors that, STANDING ALONE, do NOT provide a law enforcement with reasonable suspicion. Many of these factors are present in many cases.

SPEEDING

An officer may provide, upon a proper basis, a visual estimate of speed. S. v. Barnhill 166 NCApp 228 (2004) (visual estimate of 40 in a 25- motion to suppress denied). The fact that the visual estimate was made based on a 3 to 5 second time period does not necessarily render the estimate untrustworthy. S. v. Royster 224 NCApp 374 (2012)

Conversely, NOT speeding, or travelling below the limit, standing alone, does not provide reasonable suspicion. See GS 20-141(h) - No vehicle shall travel at such a slow speed such that the vehicle impedes the normal and reasonable movement of traffic. Therefore, if other traffic is affected, or if a minimum speed is violated (less that 45 on the interstate), reasonable suspicion for a stop may be present. See S. v. Canty 224 NCApp 514 (2012) (59 in a 65 did not provide reasonable suspicion). The slower the speed in a high-speed area, like an interstate highway, the greater may be the indicia of suspicion. Numerous cases hold that violations of minimum speed requirements on highways provide reasonable suspicion.

EXTENDED STOPS/NERVOUSNESS

Even if the initial stop is justified, prolonging the stop may render the stop unconstitutional. The nervousness of the occupants alone is not enough to prolong the stop. The Supreme Court has recognized in several cases that any citizen might be nervous during a traffic stop, as has the North Carolina Supreme Court. (e.g., S. v. McClendon 350 NC 360 (1999), stating in dicta that many people

become nervous with law enforcement, even if innocent of all wrongdoing.)

A representative case on nervousness is S. v. Phifer 226 NCApp 359 (2013), where the defendant was seen walking in the middle of the street. The officer called the defendant over and warned him not to impede traffic. The defendant appeared nervous and never stopped moving. The officer's stop and frisk was held to be unconstitutional.

The fact that the defendant slowed immediately from 65 to 59, would not look towards the officer when the officer's car when the officer drove alongside, and appeared to be very nervous, did not provide reasonable suspicion. S. v. Canty 224 NCApp 514 (2012)

The United States Supreme Court case governing extensions of stops is Rodriquez v. United States, 135 S.Ct. 1609 (2015) . A traffic stop may not be extended beyond the time necessary to complete the mission of the stop, which is to address the traffic violation that warranted the stop and attend to related safety concerns. The stop may be extended only for unrelated investigative activities only if the officer has reasonable suspicion of criminal activity to support the continued detention. In Rodriquez the Court ruled that a dog sniff that prolongs the time required to complete the mission of initial traffic stop violates the 4th amendment. After issuing a warning ticket, the officer asked the driver for permission to have a police dog walk around the car. The driver refused permission, but a second officer arrived a few minutes later with the dog, who alerted to the presence of a large amount of drugs. The Court ruled that an officer can certainly conduct unrelated checks during the stop, but may not do so in a way that prolongs the stop beyond the reasonable suspicion that justified the initial stop of the driver and vehicle.

Note that previous North Carolina cases which held that the prolonging of the stop may be de minimus probably do not survive Rodriquez. An example of such a case would be S. v. Sellars 730 SE2d 208 (CoA 2012) (holding that an almost 5-minute delay to conduct a sniff by a drug dog did not violate 4th amendment).

A representative North Carolina case which probably passes constitutional muster under Rodriquez is S. v. Heien 226 NCApp 280 (2013), affd. 367 NC 163 (2013) where the stop occurred at 7.55. Discussion ensued about a broken taillight and other issues, driver's licenses and outstanding warrants were checked, and consent to search (asked for, in part, because one occupant would never come out from under a blanket) was requested at 8.08. The officers were polite and non-confrontational, and most of the questioning concerned the reason for the initial stop. Held: no unnecessary prolonging of the stop, valid search. The distinction is that in Rodriquez the reason for the stop had been completed, (a warning ticket had been issued, the officer asked to extend the stop for the police dog to arrive, and the driver refused consent), whereas in Heien the officers asked permission to search during the time frame when they were still investigating pursuant to the initial stop.

Significant cases analyzing stops under Rodriquez include S v. Bullock 370 NC 256, 805 SE2d 671 (2017) (driver's evasive actions and contradictory answers while sitting in patrol car while office checked databases justified the prolonging of the initial stop to conduct a dog sniff) and S. v. Reed, 373 NC 498 (2020) (asking the driver to set In the patrol vehicle while databases checked did not extend the stop, but once the officer had decided that everything was proper about the defendant's rental of the car being driven, and once the officer had issued a warning ticket for speeding, any further detention of the driver was unjustified. The Court contrasted the circumstances of Heien with those present in the case under consideration). The Supreme Court again considered Rodriquez in S. v. Johnson 378 NC 236 (2021). In that case the defendant was stopped for a fictitious tag, but while checking the data bases the officer discovered that the defendant had a significant criminal history that included violence and weapons offenses, justifying a Terry frisk for officer safety, which revealed contraband. The Court held that reasonable suspicion existed that defendant was armed and dangerous, and the stop was not

unnecessarily extended.

NO TURN SIGNAL

Failing to signal before turning maynot, in itself, provide reasonable suspicion. 20-154(c) provides that a driver shall give a signal when the operation of another vehicle may be affected. Therefore, a driver in a right hand lane need not give a signal if the only legal movement that can be made from that lane in a right hand turn. S. v. Ivey 360 NC 562 (2006).

In S. v. Heien 737 SE2d 351 (2012) the Supreme Court ruled that a mistaken but objectively reasonable and honest belief in the Illegality of the defendant's actions could supply the requisite reasonable suspicion. In S. v. Wiles, (CoA 3/17/2020) the officer stopped the defendant's car believing objectively, but ultimately mistakenly, that the driver was not wearing a seatbelt, and the Court held the stop justified by reasonable suspicion.

By contrast, the CoA reversed the trial court's denial of the defendant's motion to suppress when a Watauga Co. officer stopped a car with Tennessee tags for not having an exterior mirror on the driver's side. By our statute's plain language (NCGS 20-126(b)), this requirement only applies to cars registered in North Carolina. The Court ruled that the law is plain and unambiguous, and suppression was required as the officer did not have a reasonable and objective reason for the stop. S. v. Eldridge 790 SE2d 740 (2016)

SITTING AT A STOP LIGHT

The failure to proceed from a stoplight after it changes from red to green does not, by itself, provide reasonable suspicion. S v. Roberson 163 NCApp 129 (2004) (an 8 to 10 second delay in proceeding does not provide reasonable suspicion. Interestingly, this happened at 4.30 a.m. near several bars. Compare with S.v Barnard 362 NC 244 (2008) (a 30 second delay at 12.15 a.m. near several bars in a high crime area provided reasonable suspicion).

LATE HOUR/BARS/HIGH CRIME

The presence of a driver in a high crime area at an unusual hour does not in itself provide reasonable suspicion. Brown v. Texas 433 US 47 (1979). In S. v. Murray 192 NCApp 684 (2008), the court found no reasonable suspicion to stop a vehicle driving in a commercial area with a high incidence of property crimes at 3.41a.m. Evasive action or other indicia of suspicious activity may provide the necessary reasonable suspicion.

An interesting "high crime area" case is S v. Sutton 232 NCApp 667 (2014) where the Court of Appeals affirmed the denial of a motion to suppress. The officer noted a man walking in a high crime housing project in Kinston, where the officer had previously heard shots, and saw the man clutch his hand to his waist or his side, as if he was concealing an item. The Court contrasted other cases where the searches had been held to be unconstitutional. The Court gave great deference to the trial court's findings of fact.

In S. v. Jackson 368 NC 75, a stop and frisk of the defendant was supported by reasonable suspicion when two men walked away quickly from the officer at a mini-mart, which was known as a high crime area where hand to hand drug sales often occurred. The officer lost sight of the men and left the area, but when he later returned, the men repeated the earlier behavior.

In S. v. Crandell 486 SE2d 789 (CoA 2016), the same result was reached when the search was conducted in a partially burned and abandoned building notorious for drug dealing, when the defendant provided no reason to be on the premises.

WEAVING/WEAVING "PLUS"

GS 20-146(d)(1) states that a motorist shall drive as nearly as practicable entirely within his/her lane of travel and not move from that lane without ascertaining that such movement can be made in safety.

Moving out of one's lane of travel does not always constitute reasonable suspicion. S v. Derbyshire 745 SE2d 866 (2013)- travelling once outside of the travel lane at 10.05 p.m. on a Wednesday night was not erratic and dangerous or constant and continuous and thus did not provide reasonable suspicion. In S v. Kochuk 366 NC 549 (2013) the Supreme Court, reversing the Court of Appeals, considered the totality of the circumstances to determine that reasonable suspicion supported the stop of the defendant's vehicle after the car crossed the right dotted line once while in the middle lane and later drove twice on the fog line at 1.10 a.m.

Crossing the center line is a violation of Chapter 20 and provides reasonable suspicion.

"Bad weaving" within one's lane can give rise to reasonable suspicion. In S. v. Fields 723 SE2d 777 (2012) the defendant's weaving caused evasive action by other drivers, and was described by the office as "like a ball bouncing in a small room".

On a number of occasions, the appellate courts have determined that an officer has the reasonable suspicion necessary to justify an investigatory stop after observing an individual's car weaving in the presence of certain other factors. This has been referred to by legal scholars as the "weaving plus" doctrine. See e.g. Jeff Welty "Weaving and Reasonable Suspicion"- Criminal Law Blog (June 19, 2012), http://nccriminallaw.sog.unc.edu/?p=3677. The case often cited for this is S. v. Fields 195 NCApp 740 (2009), which gives a good overview of this area of the law.

ANONYMOUS TIPS

An anonymous tip must 1) contain sufficient reliable evidence of illegal activity, and 2) sufficiently particularize the defendant or his vehicle .See Florida v. JL 529 US 266 (2000), The Court rejected the argument that the tip was reliable because the description of the suspects visual attributes were accurate, stating that the tip must be reliable in its assertion of illegality, not just in its tendency to identify a particular person, The Court reserved the issue of whether a report of a person carrying a bomb in an urban area must bear the same indicia of reliability. The Court contrasted Alabama v, White 496 US 325 (1990), where an anonymous caller stated that the defendant would be leaving a specified apartment at a specified time in a Plymouth with a broken taillight and delivering an ounce of cocaine to a specific hotel. These predictions were proven correct by the officer's observations, and the Court held that the caller's ability to predict future events, combined with the officer's corroboration of the details, were sufficient to justify the stopping of the defendant's vehicle en route to the hotel. However, a tip that the future defendant would be selling marijuana at a certain location later in the day in a white vehicle was deemed Insufficient by our CoA in S. v. Harwood 221NCApp 451 (2012), when the officer did not observe any illegal activity when following the vehicle on that date. The Court of Appeals discussed White and contrasted the wealth of details supplied in White with the scarce details provided by the caller in the case before them.

The prong of reliability may be satisfied when the caller Identifies themselves or places their anonymity at risk. In S. v. Maready, 362 NC 614, a driver who allowed the police to see her vehicle license plate, notwithstanding the fact that she did not identify herself, provided sufficient evidence for

the court to uphold the subsequent stopping of the defendant. However, in S. v, Coleman 743 SE2d 62 (CoA 2013), a caller, who identified herself, stated that a driver had alcohol in a cup in a particular car in a parking lot. The officer stopped the car on the street and arrested the driver for DWI. Held: no reasonable suspicion, in part because the parking lot was a public vehicular area (where by statute the possession of an open container in a vehicle is not illegal) and the officer observed no bad driving by the defendant. The Court distinguished the Supreme Court decision in Helen by noting that the statutes about operable brake lights are confusing, while the plain reading of the open container law only applies the law to public streets or highways,

In Navarette v. California, 134 SCt 1683 (2014) the Supreme Court's majority opinion gave weight to the fact that the caller could be easily identified through the 911 call system, and the description of the vehicle and the vehicle location was corroborated by the officer.

The importance of a particular description of the vehicle of defendant is illustrated by S, v. Walker (CoA 10/3/2017). In that case, a 911call was placed by a driver who stated that another driver was travelling at about 100 miles per hour and had run the caller off the road, While driving to investigate, the officer was flagged down by the caller, who described the location of the car in question. However, the trial court found as a fact that the car was not particularly identified. Although the defendant's car was stopped about 1/10 of a mile away, the trial court suppressed the stop, and the Court of Appeals affirmed. The Court distinguished Navarette, where the 911 called described both the car and the location in sufficient detail.

VEHICLE SEARCHES AFTER A STOP

Once a vehicle is stopped, the officer may either order the occupants out of the car or order the occupants to remain in the car. May the officer search the individuals also? The answer is no unless there is independent reasonable suspicion for a search of the occupants, or unless the officer has reasonable suspicion that the individual is armed and dangerous. This suspicion may be supplied by belligerence or non-compliance with reasonable officer requests.

A drug dog alert on the driver's side door does not justify a pat down search of a passenger secured outside the car. S. v. Smith 221 NCApp 253 (2012). Similarly, a valid search of the driver and the car does not justify a passenger search without independent reasonable suspicion. S. v. Malunda 230 NCApp 355 (2013)

If a search of the occupants is justified, the search extends to areas of the car within reach of the occupants. Michigan v. Long 463 US 1032 (1983)

Furthermore, a search of the vehicle Is justified if objects in plain sight provide probable cause for the search.

Many prior cases hold that the odor of marijuana provides justification for warrantless searches of the passenger area of the car. However, in 2015 the General Assembly passed the Industrial Hemp Act. Legal CBD and smokable hemp products, and illegal marijuana products, are all made from the cannabis sativa species, and they are indistinguishable from one other by sight and smell. There is currently no field test which may distinguish CBD or hemp products from marijuana. It is an open question as to whether the smell of “marijuana”, standing alone, continues to justify these searches, as the odor may in fact be that of a legal product. In S. v. Parker, 277 NCApp 531 (2021), the Court held that other circumstantial evidence provided reasonable suspicion that the

odor was in fact that of marijuana. This evidence could include the presence of digital scales, wrappers, or cash in plain sight, or the failure of the occupants to claim legal possession. The issue arose again this spring in S. v. Sprigs (CoA Jan. 16, 2024) where the Court again stated that they need not determine whether the odor or visual inspection of "marijuana" standing alone continues to provide probable cause to search, as other circumstantial evidence justified the search. There is a case from the Court of Appeals holding that the odor of marijuana provides reasonable suspicion to stop a vehicle. S. v. Jacobs (CoA 9/19/23)

A search incident to arrest is subject to the limitations of Arizona v. Gant, 129 S.Ct. 1710 (2009), where the Court ruled that officers may search a vehicle incident to an arrest only if the arrestee is unsecured and within reaching distance of the passenger compartment or It is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. In this case, the driver was stopped for driving while license revoked.

Following Gant, our Court of Appeals ruled in S v. Martinez 795 SE2d 386 (2016) that a search of the defendant's vehicle, while the driver was secured in the officer's patrol vehicle, after a stop for suspected DWI, was proper. The facts were somewhat unusual, In that the driver denied driving, threw his keys under the car, and was very uncooperative. Martinez did not state that every DWI arrest would justify a search of the defendant's vehicle for evidence of Impaired driving (such as empty beer cans, etc.), but the Court reasoned that previous cases involving stops for suspected narcotics and weapons violations and subsequent vehicle searches had passed constitutional muster, and a search for evidence of impaired driving was akin to those situations. A search for narcotics while the driver was in the officer's vehicle under arrest for marijuana possession was upheld in S. v. Watkins 725 SE2d 500 (2012), while searches were deemed unconstitutional in S. v. Carter 200 NCApp 47 (2009) (offense of arrest was DMV address change violation) and S. v. Johnson 204 NCApp 259 (2010) (like Gant, the offense of arrest was DWLR).

The distinction seems to be that if there is an ongoing criminal violation (weapons, drugs, guns) the search will likely be upheld, but if the arrest is for a status offense (revoked license, outstanding OFA for a speeding ticket) there is no reasonable likelihood that a vehicle search will reveal evidence of the offense.

SEIZURE?

Sometimes the threshold issue is whether a seizure of the person or vehicle has actually occurred. In S. v. Williams 201NCApp 566 (2009) an officer walked up to an individual and engaged the future defendant in conversation. Cocaine was subsequently discovered on the defendant's person. Following a line of USSC cases, the CoA ruled that the officer's encounter did not constitute a seizure. The test was whether, under the totality of the circumstances, a reasonable person would feel free to leave the encounter with the officer. The Court identified relevant factors, including the presence or absence of 1) a number of officers 2) the display of a weapon by the officer(s) 3) physical touching by the officer(s) 4) retention of identification of the defendant 5) any language or tone implying necessary compliance 6) the blocking of a means of entrance or exit 7) the use of a flashing blue/red light.

In S. v. Wilson (CoA 12/6/16, affirmed per curium NCSC 12/22/17), the officer flagged down the defendant's vehicle to ask the driver questions about the occupant of a nearby house. Unfortunately for the defendant, the officer immediately smelled a strong odor of alcohol and arrested the defendant for DWI. The Court noted that the single officer did not display his weapon, did not block the roadway,

activate his blue lights, or otherwise coerce the defendant into stopping his vehicle, and ruled that no seizure of the defendant occurred until after the officer had personally observed evidence of impaired driving.

A similar result was reached in S. v. Veal 234 NCApp 570 (2014), where the court ruled that no seizure occurred when the officer approached the defendant's car on foot, no blue lights were activated, no gun was brandished, and no show of physical force was used by the officer in questioning the defendant.

In S. v. Knudson 229 NCApp 271 (2013), the trial court did not err in finding that a seizure of the defendant occurred when the officers blocked the defendant's means to leave the scene with a car in front and a bicycle behind, even though no force was used to restrain the defendant.

COMMUNITY CARETAKING

A vehicle stop or search not otherwise supported by probable cause or reasonable suspicion may be upheld under the community caretaking exception. In S. v. Smathers, 753 SE2d 380 (CoA 2014), an officer saw the defendant's car hit a deer and stopped the defendant to see if she was injured. When the officer smelled the strong odor of alcohol, the driver was arrested for DWI. The stop was upheld under this exception to the 4th amendment. The test is whether there is an objective reasonable basis for the officer to perform a search for the care and safety of the community.

Similarly, officers may conduct protective sweeps to ensure the safety of the persons on the premises when they receive information of a crime in progress, or other reliable information indicating that persons may be in immediate danger, and exigent circumstances justify such a sweep. The USSC case on exigent circumstances is Kentucky v. King 563 US 452 (2011), and S. v. Marrero 789 SE2d 560 (CoA 2016) provides a good summary of North Carolina precedent on this issue.

INTERROGATIONS

A defendant's statement must be voluntary, and a custodial confession must be accompanied by appropriate warnings under Miranda v. Arizona.

Factors relevant to the issue of whether a statement is voluntary include:

- Mental or physical coercion
- Intelligence and education, or lack thereof
- Promises of leniency
- Whether the statement was actually the product of the officers (for example, pressure from relatives urging a confession

An involuntary statement may not be used for impeachment.

Miranda motions often focus on the issue of custody. A person is in custody when he is placed under arrest or his freedom is curtailed to an equivalent degree. The fact that a person is not free to immediately leave is not dispositive (i.e. a driver is not in custody just because he is detained during a routine traffic stop). Questions during a routine stop are not custodial interrogation. The fact that the defendant is an inmate does not mean he is in custody for the purposes of questioning. Furthermore, an incriminating statement must be in response to

questioning. Therefore, a volunteered statement is not the result of interrogation. Similarly, statements made in response to routing booking questions, even after the defendant is unquestionably in custody, are not the result of interrogation.

Offenses committed after December 1, 2011, require that all custodial interrogations conducted at a law enforcement or detention facility of adults or juveniles of Class A through C offenses, or rape, sexual offenses, or deadly assaults be video and audio recorded. NCGS l5A-211. A failure to compy with this section shall be considered by the Court in considering a motion to suppress any statement.

Statements made in violation of Miranda may be used for impeachment.

IDENTIFICATIONS

Line-ups and shows up are governed by 15A-284.52 et seq. Eyewitness identifications may also violate the Constitution. The test is whether the line up or show up is so impermissibly suggestive so as to give rise to a very substantial likelihood of a misidentification. The Court should undertake a two-step inquiry, and consider:

1) Whether the totality of the circumstances reveal a pre-trial procedure unnecessarily suggestive, and
2) Whether this procedure created a substantial likelihood of irreparable misidentification.

Representative cases are S v. Hannah, 312 NC 286 (1984), and S v. Wilson 225 NCApp 498 (2013)

The Supreme Court in S. V. Malone 373 NC 134 134 (2019) articulated five factors to be considered by the trial court in determining whether a show-up is impermissibly suggestive. These are:

1) The opportunity of the witness to view the accused at the time of the crime
2) The witness' degree of attention at that time
3) The accuracy of the witness' prior description of the accused
4) The witness' level of certainty
5) The elapsed time between the time of the confrontation and the crime

Tab: Double Jeopardy

DOUBLE JEOPARDY!

Joseph L. Hyde, Assistant Professor

UNC SCHOOL OF GOVERNMENT

1

Roadmap

I. Sources

II. Same offense

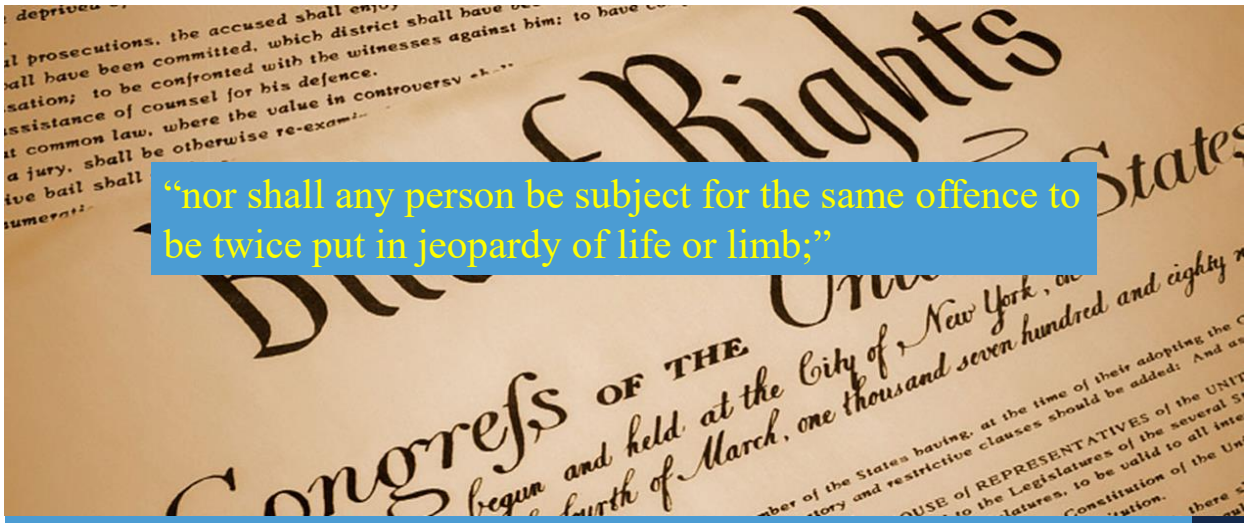
III. Prior acquittal

IV. Prior conviction

V. Multiple punishments

2

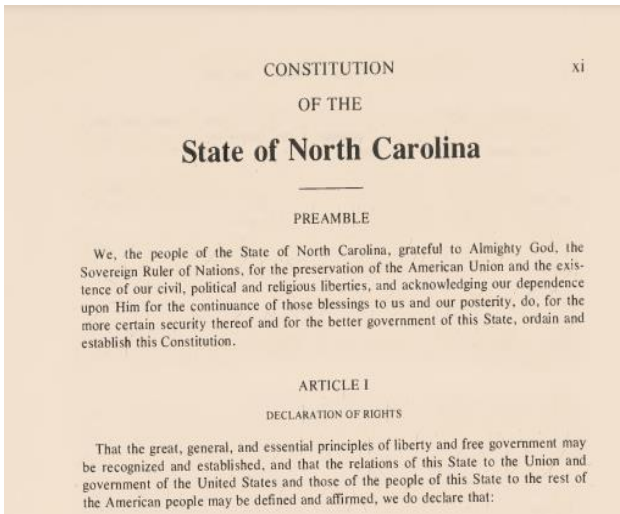
The Fifth Amendment to the United States Constitution



UNC SCHOOL OF GOVERNMENT 3

3

What Provision of the North Carolina Constitution?



CONSTITUTION xi

OF THE

State of North Carolina

PREAMBLE

We, the people of the State of North Carolina, grateful to Almighty God, the Sovereign Ruler of Nations, for the preservation of the American Union and the existence of our civil, political and religious liberties, and acknowledging our dependence upon Him for the continuance of those blessings to us and our posterity, do, for the more certain security thereof and for the better government of this State, ordain and establish this Constitution.

ARTICLE I

DECLARATION OF RIGHTS

That the great, general, and essential principles of liberty and free government may be recognized and established, and that the relations of this State to the Union and government of the United States and those of the people of this State to the rest of the American people may be defined and affirmed, we do declare that:

It is a fundamental and sacred principle of the common law, deeply imbedded in our criminal jurisprudence, that no person can be twice put in jeopardy of life or limb for the same offense. . . .

While the principle is not stated in express terms in the North Carolina Constitution, it has been regarded as an integral part of the 'law of the land' [clause, Art. I, § 19].

UNC SCHOOL OF GOVERNMENT 4

4

Proceedings to Which Double Jeopardy is Applicable:

Subsequent criminal prosecution may be barred by prior:

- criminal prosecution, or
- civil sanction deemed criminal
  - juvenile adjudication

Subsequent criminal prosecution is NOT barred by prior:

- Probation revocation proceeding;
- Thirty-day pretrial driving license revocation;
- One-year commercial driver's license disqualification;
- Assessment of drug tax by N.C. Dept of Revenue;
- ABC Commission administrative action.

Attachment of Jeopardy

- For jury trials, jeopardy attaches when jury is empaneled and sworn.
- For bench trial, jeopardy attaches when court begins to hear evidence.
- For guilty plea, jeopardy attaches upon court's acceptance of the guilty plea.*

Termination of Jeopardy

- Jeopardy is terminated by an acquittal.
- Jeopardy may be terminated by a conviction.*
- Jeopardy is "continuing" when: (1) defendant appeals for trial de novo, or (2) trial ends without a verdict.

Double Jeopardy Provisions Protect Against:

- Second prosecution for the same offense after acquittal;
- Second prosecution for the same offense after conviction;
- Multiple punishments for the same offense.

What constitutes the same offense for double jeopardy?

What constitutes an offense?

- Includes all crimes;
- Criminal contempt after plenary hearing; and
- Infractions.

When are offenses the same?

- For a plea of former jeopardy to be good, it must be grounded on the 'same offense' both in law and in fact.

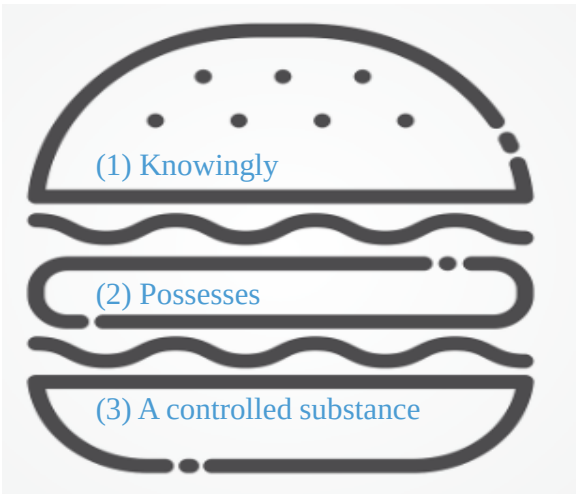
The Same Offense *in Law*

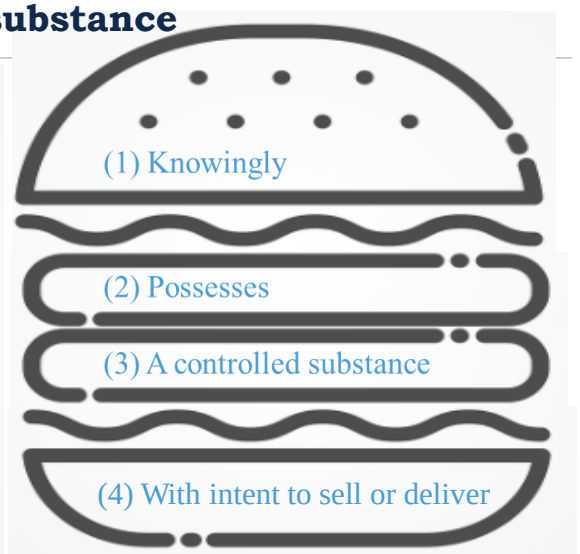
The Blockburger test:

> The test to be applied is whether each provision requires proof of an additional fact which the other does not.

9

The Same Offense *in Law:* possession of a controlled substance





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The Same Offense *in Fact*

The 'same evidence' test asks two questions:

(1) Whether the facts alleged in the second indictment would have sustained a conviction under the first indictment; and

(2) Whether the same evidence would support a conviction in each case.

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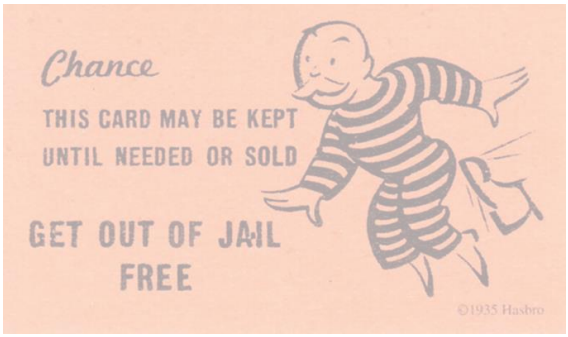
The Same Offense *in Fact:* discharging a firearm into occupied property

- Indictment alleges that defendant discharged a firearm, a handgun, into a vehicle owned by John Doe, while it was occupied by John Doe.
- Evidence shows that defendant's first shot sent bullet through the front windshield of the vehicle.

- Indictment alleges that defendant discharged a firearm, a handgun, into a vehicle owned by John Doe, while it was occupied by John Doe.
- Evidence shows that defendant's second shot sent bullet into the passenger side door of the vehicle.

12

A Prior Acquittal



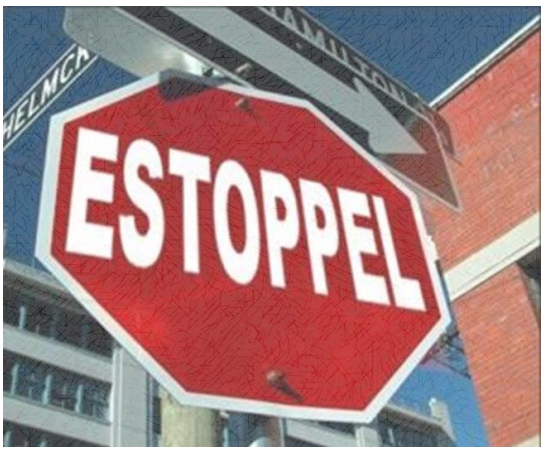
Prior Acquittal Includes:

- A verdict of not guilty;
- Dismissal for insufficient evidence;
- Collateral estoppel.

Collateral Estoppel

Issue preclusion bars successive litigation of an issue of fact or law previously determined by a valid and final judgment.

- May bar State from relitigating issue previously decided in defendant's favor.
- Does not preclude the admission of evidence at a subsequent trial.



Midtrial Dismissal or Mistrial

If a charge is dismissed after jeopardy attaches, retrial is generally barred. But . . .

- Defective pleading
- Fatal variance
- Other dismissal upon defendant's motion not based on grounds of factual guilt or innocence.

When a mistrial is declared, whether double jeopardy prevents retrial depends upon:

- Which party sought a declaration of mistrial; and
- Whether there was "manifest necessity" to declare a mistrial.

15

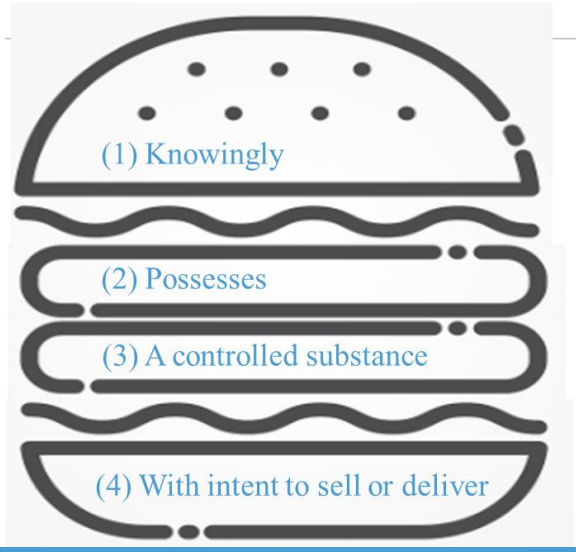
A Prior Conviction

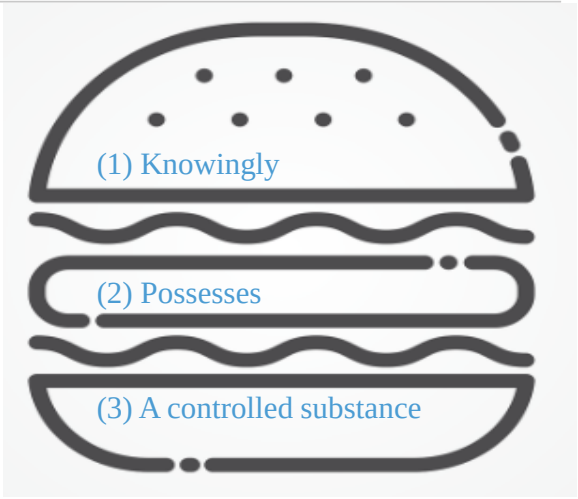
Prior conviction includes:

- Plea of guilty or no contest;
- Verdict of guilty at trial;
- PJC with conditions.

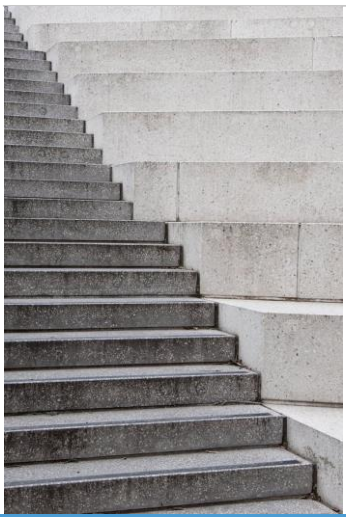
16

When is a Conviction an Implicit Acquittal?





Appeal by Defendant Generally Waives Protection



Defendant waives protection against double jeopardy when a verdict or judgment is set aside at his own instance on motion in the lower court or upon appeal.

- EXCEPT when conviction is overturned for insufficiency of the evidence.
- Appeal from conviction for lesser-included does not waive protection from retrial on greater offense.

Single Trial v. Multiple Trials

With respect to multiple sentences imposed in a single trial, . . .

- the Double Jeopardy clause does no more than prevent the court from prescribing greater punishments than the legislature intended.
- Even if the Blockburger test is satisfied, the defendant may be punished for both crimes if it is found that the legislature so intended.

Determining Legislative Intent

- The traditional means of determining the intent of the legislature include the examination of the subject, language, and history of the statutes.
- Multiple punishments are permissible for:
  - Breaking or entering and larceny pursuant to breaking or entering;
  - Trafficking in cocaine by possession and felony possession of cocaine;
  - Second-degree rape and statutory rape.

Arrest of Judgment

- Motion in arrest of judgment is proper when it is apparent that no judgment against the defendant could lawfully be entered.
- Judgment may also be arrested to avoid double jeopardy problem arising out of multiple punishment for the same offense.

Separate Sovereigns

Federal and state governments are separate sovereigns, and each may prosecute a defendant for the same offense.

However, . . .

- G.S. 90-97 (drug offenses).
- G.S. 15A-134 (borderline cases).

Joinder & Severance

A defendant who has been tried for one offense may move to dismiss a joinable offense.

The motion to dismiss must be granted unless:

- Motion for joinder was previously denied;
- The court finds the right has been waived; or
- The court finds the ends of justice would be defeated if the motion were granted.

G.S. 15A-926(c)(2)

Recapitulation

I. Sources

II. Same offense

III. Prior acquittal

IV. Prior conviction

V. Multiple punishments

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DOUBLE JEOPARDY AND RELATED ISSUES

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I. Introduction. The Double Jeopardy Clause of the Fifth Amendment protects against:

- A second prosecution for the "same offense" after an acquittal;
- A second prosecution for the "same offense" after a conviction (by trial or plea); and
- Multiple punishments for the "same offense."

Section 19, Article I, of the North Carolina Constitution also has been interpreted to protect against double jeopardy. State v. Rambert, 341 N.C. 173, 175 (1995). The North Carolina protection confers no greater protections than the federal protection. State v. Brunson, 327 N.C. 244, 249 (1990).

II. The "Same Offense." As noted in Section I above, double jeopardy protects against a second prosecution for the "same offense" after an acquittal or conviction and against multiple punishments for the "same offense." This section explores the meaning of the term "same offense."

A. What Constitutes An "Offense" for Purposes of Double Jeopardy.

1. Crimes. The term "offense" applies to the prosecution of criminal offenses. United States v. Dixon, 509 U.S. 688 (1993).

2. Criminal Contempt. In *United States v. Dixon*, 509 U.S. 688 (1993), the United States Supreme Court held that criminal contempt imposed after a plenary hearing constitutes an "offense" under double jeopardy. S*ee also* State v. Dye, 139 N.C. App. 148, 153 (2000) (prosecution for domestic criminal trespass barred after plenary criminal contempt finding); State v. Gilley, 135 N.C. App. 519, 528-29 (1999) (prosecution for assault on female barred after plenary criminal contempt finding).

However, the *Dixon* Court did not decide whether summary criminal contempt is included within double jeopardy. North Carolina cases have not directly decided this issue. For example, *State v. Yancy*, 4 N.C. 133 (1814), held that a summary contempt finding of assault did not bar a later prosecution of assault, but the holding did not appear to decide that summary contempt is not an "offense" under double jeopardy. Almost all of the cases in other jurisdictions to consider the issue have ruled that summary criminal contempt is not an "offense" under double jeopardy. United States v. Rollerson, 449 F.2d 1000, 1004-05 (D.C. Cir. 1971) (summary contempt finding for throwing water pitcher at prosecutor did not bar later trial for assault on the prosecutor); Ellis v. State, 634 N.E.2d 771, 774 (Ind. Ct. App. 1994) (summary contempt for escaping from courtroom did not bar later prosecution for escape). For a discussion of contempt in general, see Contempt in this Guide under Judicial Administration & Related Matters.

3. Infractions. In *State v. Hamrick,* 110 N.C. App. 60, 66 (1993), the court held that an infraction is an "offense" under double jeopardy.

B. Test for Determining Whether Offenses Are The "Same." To determine whether offenses are the "same" for purposes of double jeopardy one must look at the elements of the offenses. If each offense contains an element that is not contained in the other, the offenses are not the same for purposes of double jeopardy. United States v. Dixon, 509 U.S. 688, 696 (1993); *see also* State v. Fernandez, 346 N.C. 1, 19 (1997); State v. Tirado, 358 N.C. 551, 579 (2004); State v. Garris, 191 N.C. App. 276, 286 (2008). This test is referred to as the *Blockburger* test, because it comes from the Supreme Court's ruling in *Blockburger v. United States*, 284 U.S. 299 (1932).

1. Examples of Different Offenses. To illustrate application of the *Blockburger* test, suppose that Offense 1 contains elements A, B, and C and that Offense 2 contains elements B, C, and D. In this scenario, Offense 1 contains an element not in Offense 2 (element A) and Offense 2 contains an element not in Offense 1 (element D). Thus the offenses are not the same.

For a case example, consider *State v. Tirado*, 358 N.C. 551, 579 (2004). In that case, the court held that double jeopardy did not bar convictions of both attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury based on the same assault on the victim. The court noted that the elements of use of a deadly weapon and serious injury in the felonious assault are not in attempted first-degree murder, and the element of premeditation and deliberation in attempted first-degree murder is not in felonious assault. Thus, each offense contains at least one element not included in the other. *See generally* JESSICA SMITH, NORTH CAROLINA CRIMES (7th ed. 2012) (Chapter 7 (Assaults) discusses cases involving double jeopardy and multiple convictions of assault and related offenses).

Similarly, in *State v. Etheridge*, 319 N.C. 34, 50-51 (1987), the court held that double jeopardy did not prohibit multiple convictions of: (1) first-degree statutory rape, indecent liberties, and incest based on same act with the same child, and (2) crime against nature, indecent liberties, and second-degree sexual offense based on same act with the same child. The court reasoned that each of these offenses have at least one element that is not included in the other offenses.

2. Examples of Offenses That Are the Same. For another illustration of the *Blockburger* tests, suppose that Offense 1 contains elements A, B, and C and that Offense 2 contains elements A, B, C, and D. Although offense 2 contains an element that is not in offense 1, the reverse is not true for offense 1; every element of offense 1 is included in offense 2. Thus, the offenses are the same under the *Blockburger* test. *See* State v. Partin, 48 N.C. App. 274, 282 (1980) (punishments for convictions of both assault with a deadly weapon and assault with a firearm on a law enforcement officer violated double jeopardy because they are the same offense under double jeopardy).

a. Greater and Lesser-Included Offenses. Under the *Blockburger* test, a greater and lesser-included offense always are the same for purposes of double jeopardy; with the lesser-included offense, by definition, every element of the lesser-included offense will always be part of the greater offense. Thus, a prosecution for the lesser offense will bar a later prosecution for the greater offense—and vice-versa. Brown v. Ohio, 432 U.S. 161, 169 (1977)

(conviction of temporary taking of motor vehicle barred later prosecution of larceny of that motor vehicle; "whatever the sequence may be, [double jeopardy] forbids successive prosecution and cumulative punishment for a greater and lesser included offense"); Green v. United States, 355 U.S. 184, 190 (1957) (defendant was tried for first-degree murder and convicted of second-degree murder, and appellate court granted new trial; defendant may only be tried for second-degree murder at new trial); Payne v. Virginia, 468 U.S. 1062 (1984) (per curiam) (conviction of greater offense, murder committed during commission of robbery with a deadly weapon, bars later prosecution of lesser offense, robbery); State v. Broome, 269 N.C. 661, 666 (1967) (defendant was convicted of DUI, first offense, at trial for DUI, third offense; retrial after appellate reversal of conviction was limited to DUI, first offense). This principle would likely bar a later prosecution of habitual DWI after a prosecution of the underlying DWI, and a later prosecution of habitual misdemeanor assault after a prosecution of the underlying misdemeanor. *See* State v. Haith, 158 N.C. App. 745, *4 (2003) (unpublished) (DWI is lesser-included offense of habitual DWI and defendant may not be convicted and punished for both). *See also* Ball v. United States, 163 U.S. 662, 670 (1896) (acquittal of an offense is an acquittal of all lesser offenses).

b. Continuing Offenses. One twist on this issue arises with respect to offenses that are continuing in nature. For an offense such as stalking for example, the relevant conduct occurs over a period of time. At least one North Carolina case has held that a second prosecution for stalking will be barred when the time periods of the offenses overlap and thus the same acts could have resulted in a conviction of the same offense. *See* State v. Fox, ___ N.C. App. ___, 721 S.E.2d 673, 678 (2011) (double jeopardy barred second prosecution of felony stalking because the time periods of the course of conduct alleged in both stalking indictments overlapped, and thus the same acts could have resulted in a conviction under either indictment).

III. Punishment. As noted in Section I above, double jeopardy protects against multiple punishments for the same offense. For example, if a defendant is convicted of DWI and later prosecuted for habitual DWI, the defendant cannot be convicted or sentenced for the habitual DWI in addition to the sentence for the DWI. State v. Haith, 158 N.C. App. 745, *4 (2003) (unpublished) (DWI is lesser-included offense of habitual DWI and defendant may not be convicted and punished for both).

A. Civil Sanctions As Punishment. In some circumstances a civil sanction or penalty is deemed to be punishment for purposes of double jeopardy. In *Hudson v. United States*, 522 U.S. 93, 99-100 (1997), the United States Supreme Court set out the analysis to be used when determining whether a civil sanction or penalty is deemed to be a punishment. Basically, the Court held that if the civil sanction or punishment is so punitive in nature, it constitutes punishment for purposes of double jeopardy. The Court adopted a two-part test: First, did the legislature expressly or impliedly indicate that the sanction was criminal or civil? Second, assuming the answer to the first question is civil, is the sanction so

punitive either in purpose or effect to transform the sanction into a criminal punishment?

To answer the second question, the Court stated that it would apply the seven factors set out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963):

- Whether the sanction involves an affirmative disability or restraint
- Whether the sanction has historically been considered as a punishment
- Whether the sanction is imposed only with a finding of scienter
- Whether the sanction's operation will promote the traditional aims of punishment, retribution, and deterrence
- Whether the behavior to which the sanction applies is already a crime
- Whether an alternative purpose to which the sanction may rationally be connected is assignable to it
- Whether the sanction appears excessive in relation to the alternative purpose assigned.

These seven factors must be considered with the particular civil statute at issue, not the actual civil sanction imposed in the case, and "only the clearest proof" will suffice to override legislative intent and transform into a criminal punishment what had been denominated a civil sanction. Hudson v. United States, 522 U.S. 93, 100 (1997) (citation omitted); *see also* Seling v. Young, 531 U.S. 250, 263 (2001) (when law is found to be civil, it cannot be considered punitive "as applied" to a single individual in violation of the double jeopardy and ex post facto clauses; the court must consider the law on its face). The *Hudson* Court held that civil monetary penalties and occupational debarment imposed against bankers for violating banking laws did not bar later criminal charges based on the same violations.

The following civil sanctions or penalties have been held to not constitute punishments for purposes of double jeopardy:

- thirty day pretrial driving license revocation under G.S. 20-16.5, State v. Evans, 145 N.C. App. 324, 334 (2001);
- one-year commercial driver's license disqualification under G.S. 20-17.4(a)(7), State v. McKenzie, ___ N.C. ___, ___ S.E.2d ___ (Oct. 4, 2013), reversing court of appeals opinion for reasons stated in dissenting opinion, ___ N.C. App. ___, 736 S.E.2d 591 (2013);
- satellite-based monitoring, State v. Anderson, 198 N.C. App. 201, 204 (2009);
- civil no contact order for convicted sex offender under G.S. 15A-1340.50, State v. Hunt, ___ N.C. App. ___ 727 S.E.2d 584, 593 (2012);
- in rem forfeiture of property, United States v. Ursery, 518 U.S. 267, 292 (1996);
- civil commitment of sex offenders, Kansas v. Hendricks, 521 U.S. 346, 369 (1997);
- payment of drug tax, State v. Adams, 132 N.C. App. 819, 820 (1999); and
- Alcohol Beverage Commission administrative action, State v. Wilson, 127 N.C. App. 129, 133 (1997).

IV. Covered Prosecutions. As noted in Section I above, double jeopardy protects against a second prosecution for the same offense after an acquittal or conviction. In this context, a prosecution means when the State seeks a conviction of a criminal offense or infraction or a finding of contempt after a plenary hearing. United States v. Dixon, 509 U.S. 688 (1993). However, not all proceedings in the criminal justice system are prosecutions for purposes of double jeopardy. For example, a hearing on revocation of probation, parole, or post-release revocation is not a prosecution. Thus, a revocation based on a violation of a criminal offense does not bar a later prosecution of that offense. State v. Sparks, 362 N.C. 181, 189 (2008); In re O'Neal, 160 N.C. App. 409, 413 (2003).

In order for a prior prosecution to bar a second one, the prior prosecution must have both begun and ended. Both of these events have special meaning in the context of a double jeopardy analysis and are discussed below.

A. When A Prosecution Begins. Jeopardy is said to attach when a prosecution begins. In district court, jeopardy attaches when the court begins to hear evidence, which occurs when the first witness is sworn. In superior court, jeopardy attaches when the jury is sworn and impaneled. State v. Brunson, 327 N.C. 244, 245 (1990); Serfass v. United States, 420 U.S. 377, 388 (1975); Crist v. Bretz, 437 U.S. 28, 37, n.15 (1978); United States v. Osteen, 254 F.3d 521, 526 (4th Cir. 2001); G.S. 7B-2414.

Double jeopardy does not attach to a guilty plea until it is accepted by a judge. State v. Wallace, 345 N.C. 462, 467 (1997) (State's offer of second-degree murder plea that was rejected by judge did not bar later trial on first-degree murder).

Double jeopardy does not attach when the State takes a voluntary dismissal before jeopardy had attached. State v. Brunson, 327 N.C. 244, 245 (1990) (jeopardy did not attach in district court when the State dismissed charges before it began to present evidence).

B. When A Prosecution Ends. A prosecution can end with an acquittal or conviction, and in some instances, a dismissal or a mistrial. The sections below explore the relevant rules.

1. Acquittal or Functional Equivalent (Implied Acquittal). An acquittal ends a prosecution. For purposes of double jeopardy, an acquittal includes not only a "not guilty" verdict, but also a trial court's dismissal of a charge for insufficient evidence or an appellate court's reversal of a conviction for insufficient evidence. Greene v. Massey, 437 U.S. 19, 24 (1978); Burks v. United States, 437 U.S. 1, 18 (1978); Hudson v. Louisiana, 450 U.S. 40, 44 (1981). However, a determination that a guilty verdict was against the weight of the evidence does not bar another trial. Tibbs v. Florida, 457 U.S. 31, 46 (1982). Under a de novo system, a higher court trial without a determination whether there was sufficient evidence to support the defendant's conviction at the lower court trial does not violate double jeopardy. Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 310 (1984).

2. Conviction. A conviction for double jeopardy purposes occurs when a defendant enters a plea of guilty or no contest that is accepted by a judge, State v. Wallace, 345 N.C. 462, 467 (1997), or when a judge in district court or a jury in superior court enters a verdict of guilty at a trial. Double jeopardy does not attach to a defendant's acknowledgement of guilt in a deferred prosecution agreement when a guilty plea was not

entered and accepted. State v. Ross, 173 N.C. App. 569, 574 (2005), *aff'd*, 360 N.C. 355 (2006) (per curiam). A prayer for judgment continued (PJC) with conditions amounting to punishment is a conviction, but otherwise it is not a conviction unless the State prays judgment and a judge enters a judgment. State v. Maye, 104 N.C. App. 437, 440 (1991) (when a defendant was convicted and a judgment entered for one drug offense, but judgments were not entered for two other drug offenses because PJCs were entered, the court held that it was unable to address the defendant's double jeopardy argument that his "convictions" and "sentencing" for three possession offenses violated double jeopardy). For a discussion of PJCs in general, see Prayer for Judgment Continued in this Guide under Criminal Law.

3. Mistrial. A mistrial is a judicial termination of a trial after jeopardy has attached and before a verdict has been rendered. When a mistrial is declared, whether a second trial is permitted under double jeopardy depends on who moved for a mistrial, whether the defendant consented to it, and the validity of the trial court's order.

If a mistrial is granted based on the defendant's motion or with his or her consent, double jeopardy will generally not bar a second trial unless the defendant's motion was prompted by prosecutorial misconduct that was intended to provoke a motion for mistrial. Oregon v. Kennedy, 456 U.S. 667, 679 (1982); State v. Walker, 332 N.C. 520, 539 (1992); State v. White, 322 N.C. 506, 511 (1988) (*Kennedy* ruling adopted under state constitution); State v. White, 85 N.C. App. 81, 87 (1987). And the same principle likely applies to judicial misconduct. United States v. Dinitz, 424 U.S. 600, 611 (1976) (dicta).

When a trial court declares a mistrial on its own motion or the State's motion and over the defendant's objection, there must be a showing of "manifest necessity." Arizona v. Washington, 434 U.S. 497, 506 (1978); State v. Sanders, 347 N.C. 587, 599 (1998). Federal double jeopardy case law may not require trial court findings to support "manifest necessity" when there is an adequate trial record. Arizona v. Washington, 434 U.S. 497, 517 (1978). However, G.S. 15A-1064 requires a trial judge before granting a mistrial to make findings of fact concerning the grounds for the mistrial, and it is error to fail to do so. For cases deciding whether a second trial will be barred based on this error, see State v. Odom, 316 N.C. 306, 311 (1986) (findings of fact under G.S. 15A-1064 are mandatory but defendant failed to preserve error for review on appeal by failing to object to declaration of mistrial); State v. Lachat, 317 N.C. 73, 85-87 (1986) (where record was unclear as to whether manifest necessity for mistrial existed, failure to make findings of fact barred a second trial despite defendant's lack of objection; *Odom* rule requiring objection should not be applied in capital cases); State v. Pakulski, 319 N.C. 562, 570-71 (1987) (failure to find facts did not bar a second trial where manifest necessity for mistrial clearly appeared on the record); State v. Sanders, 122 N.C. App. 691, 696 (1996) (trial court erred by failing to find facts but defendant did not object and thus failed to preserve issue for review); State v. White, 85 N.C. App. 81, 85 (1987) (where grounds for mistrial clearly appeared on record, trial court's failure to find facts was harmless error), *aff'd*, 322 N.C. 506 (1988).

a. Mistrial Because of Jury Deadlock on Lesser Offense. Suppose that a trial judge submits to the jury the charged offense and lesser-included offenses. Suppose further that a mistrial is declared, but the jury indicates that it was deadlocked on one of the lesser-included offenses. In such a case, double jeopardy does not bar reprosecution of the charged offense, even if the jury reported that it was unanimous against guilt of greater offense. There must be a final verdict before there can be an implied acquittal. Blueford v. Arkansas, ___ U.S. ___,132 S. Ct. 2044, 2052 (2012); State v. Booker, 306 N.C. 302, 304-05 (1982) (judge submitted first-degree murder and second-degree murder; jury indicated in a note that it was deadlocked on second-degree murder and judge ordered mistrial; court held that this was not an implied acquittal of first-degree murder, and double jeopardy did not bar reprosecution of first-degree murder); State v. Hatcher, 117 N.C. App. 78, 85 (1994) (mistrial on charged offense does not bar submission of lesser offense at retrial even though lesser offenses were not submitted at first trial); State v. Williams, 110 N.C. App. 306, 310 (1993) (holding similar to *Booker*); State v. Herndon, 177 N.C. App. 353, 364 (2006) (jury's note about its agreement on issue in first trial ending in hung jury did not under collateral estoppel or double jeopardy bar relitigation of issue in second trial).

b. Defendant's Right to Assert Double Jeopardy Violation Based on Erroneous Declaration of a Mistrial. A defendant's failure in a non-capital trial to object to a declaration of a mistrial generally forfeits the right to assert a double jeopardy violation at a later trial or on appellate review, State v. Odom, 316 N.C. 306, 311 (1986), but the failure to object in a capital trial generally does not result in forfeiture. State v. Lachat, 317 N.C. 73, 85 (1986).

4. Dismissals After Jeopardy Has Attached. Section IV.A. above discusses when jeopardy attaches. Whether a dismissal after that point constitutes a jeopardy bar is discussed in the subsections that follow.

As background to this discussion, G.S. 15A-1445(a) provides that the State may appeal a dismissal of a charge only if further prosecution would not be prohibited by the Double Jeopardy Clause. Generally, if a charge is dismissed after jeopardy attaches, the State is barred from retrying the defendant. United States v. Martin Linen Supply Co., 430 U.S. 564, 575-76 (1977); Evans v. Michigan, ___ U.S. ___,133 S. Ct. 1069, 1081 (2013) (if judge enters directed verdict of acquittal for insufficient evidence after trial begins and before jury reaches verdict, even if acquittal is based on mistake of law, erroneous acquittal bars further prosecution under double jeopardy). But sometimes there are exceptions to the general rule, as noted below.

a. Midtrial Dismissal—Generally. The Double Jeopardy Clause does not prohibit reprosecution of a charge that was dismissed midtrial pursuant to a defendant's motion if the dismissal was not based on grounds of factual guilt or innocence. United States v. Scott, 437 U.S. 82, 98-99 (1978) (retrial permitted when defendant successfully moved at close of evidence for dismissal based on defendant being prejudiced by pre-indictment delay); State v.

Priddy, 115 N.C. App. 547, 551 (1994) (State had right to appeal and right to retry defendant when defendant at close of evidence successfully moved to dismiss habitual impaired driving charge on ground that superior court did not have jurisdiction over charge); State v. Shedd, 117 N.C. App. 122, 123 (1994) (State's appeal allowed because dismissal of murder charge for discovery violations was unrelated to factual guilt or innocence).

However, if a trial court during a trial dismisses a charge *sua sponte*, double jeopardy bars a retrial unless manifest necessity supported the dismissal. In *State v. Vestal*, 131 N.C. App. 756, 760 (1998), after the jury had been impaneled and sworn, the trial court on its own motion dismissed a criminal charge because the police department had violated a court order requiring the destruction of drugs that the police later improperly used in an undercover operation. The court of appeals dismissed the State's appeal of the trial court's dismissal because double jeopardy prohibited a reprosecution. The trial court's dismissal deprived the defendant of his constitutional right to have the trial completed by the jury. Note that if there had been manifest necessity for the trial court's dismissal, then reprosecution would have been permitted. However, it is almost certain in this case that manifest necessity did not support the trial court's dismissal, so the ruling of the court of appeals was correct even though the court did not address the manifest necessity issue.

b. **Midtrial Dismissal for Fatal Variance.** There is no double jeopardy bar to a second trial with a correctly-alleged pleading after the first charge was dismissed on the defendant's motion at trial or on appeal because there was a fatal variance between the charge's allegations and the evidence. State v. Mason, 174 N.C. App. 206, 208 (2005); State v. Wall, 96 N.C. App. 45, 50 (1989); State v. Johnson, 9 N.C. App. 253, 255 (1970); State v. Miller, 271 N.C. 646, 654 (1967); State v. Stinson, 263 N.C. 283, 292 (1965).

c. **Dismissal for Defective Criminal Pleading.** There is no double jeopardy bar to a second trial with a correctly-alleged pleading after the first charge was dismissed on the defendant's motion at trial or on appeal because an indictment or other criminal pleading was fatally defective. State v. Goforth, 65 N.C. App. 302, 306 (1983); State v. Whitley, 264 N.C. 742, 744 (1965); State v. Coleman, 253 N.C. 799, 801 (1961); State v. Barnes, 253 N.C. 711, 718 (1961). There also is no double jeopardy bar even if the State requested the mistrial, assuming there was no prosecutor manipulation—for example, if the State made the mistrial motion only because its case was going badly. Illinois v. Somerville, 410 U.S. 458, 471 (1973) (mistrial granted on prosecutor's motion based on fatally defective indictment and over defendant's objection did not bar second trial; manifest necessity supported mistrial).

d. **Dismissal By Trial Court for Insufficient Evidence After Jury Returned Guilty Verdict.** The State may appeal a trial court's post-verdict dismissal for insufficient evidence of a charge for which the jury had returned a guilty verdict, because double

jeopardy does not bar an appellate court from reinstating the jury's guilty verdict if it rules there was sufficient evidence to support the verdict. United States v. Wilson, 420 U.S. 332, 352-53 (1975); State v. Scott, 146 N.C. App. 283, 286 (2001), *rev'd on other grounds*, 356 N.C. 591 (2002); State v. Allen, 144 N.C. App. 386, 388-89 (2001).

V. Covered Sentencing Hearings. The Double Jeopardy Clause does not apply to sentencing hearings, except that

(1) a defendant who has been sentenced to life imprisonment in a capital sentencing hearing and has been granted a new trial or sentencing hearing may not be sentenced to death in a later proceeding; and
(2) a defendant for any offense is entitled to credit on a second sentence after retrial for any time served for the original sentence.

Bullington v. Missouri, 451 U.S. 430, 446 (1981) (double jeopardy bars death penalty at resentencing hearing after defendant received life imprisonment at prior sentencing hearing); North Carolina v. Pearce, 395 U.S. 711, 718-19 (1969). *See also* Monge v. California, 524 U.S. 721, 734 (1998) (double jeopardy does not apply to noncapital sentencing hearing); State v. Jones, 314 N.C. 644, 648-49 (1985) (double jeopardy does not apply to finding of aggravating and mitigating factors under Fair Sentencing Act; sentencing judge properly found aggravating factor that was not found at prior sentencing hearing).

For an analysis of due process and G.S. 15A-1335 issues involved with a longer sentence after appeal or collateral attack, see Jessica Smith, *Limitations on a Judge's Authority to Impose a More Severe Sentence After a Defendant's Successful Appeal or Collateral Attack*, Administration of Justice Bulletin 2003/03 (UNC School of Government, July 2003), http://www.sog.unc.edu/sites/www.sog.unc.edu/files/aoj200303.pdf.

VI. Exceptions to the Double Jeopardy Bars. As noted in Section I above, double jeopardy protects against a second prosecution for the same offense after an acquittal or conviction and against multiple punishments for the same offense. There are, however, several important exceptions to those rules.

A. When Multiple Punishments Are Permitted for "Same Offense" At a Single Prosecution. As noted in Section I above, double jeopardy protects against multiple prosecutions for the same offense. However, multiple punishments for two offenses may be permitted at a *single* prosecution, even if they are the "same offense" under the *Blockburger* test, if the legislature clearly has indicated that it intended to permit convictions and punishments for both offenses. Double jeopardy plays only a limited role in deciding whether cumulative punishments may be imposed at a single prosecution; that role being only to prohibit the sentencing court from imposing greater punishments than the legislature intended. Missouri v. Hunter, 459 U.S. 359, 368-69 (1983); State v. Gardner, 315 N.C. 444, 463 (1986) (convictions and punishments in single trial for both felony breaking or entering and felony larceny pursuant to breaking or entering is not prohibited by double jeopardy provisions of either United States or North Carolina constitutions); State v. Pipkins, 337 N.C. 431, 434 (1994) (convictions and punishments for trafficking cocaine by possession and felonious possession of cocaine is not prohibited).

In *Gardner*, cited above, the court stated that the traditional method of determining legislative intent includes examination of the subject, language, and history of the pertinent statutory provisions involving the two (or more) offenses. The court noted that the defendant's conduct violated two separate and distinct social norms, the breaking into or entering the property of another then stealing and carrying away of another's property. For this and other reasons (statutes located in separate articles of Chapter 14, legislature acquiescence to court opinions permitting separate punishment, etc.), it held that the legislature intended that both offenses can be separately punished at a single trial.

B. Separate Sovereignties. Federal and state governments are separate sovereignties and each may prosecute a defendant for the same offense. State v. Myers, 82 N.C. App. 299, 299-300 (1986) (state armed robbery prosecution not barred by prior federal armed robbery prosecution for same act); Abbate v. United States, 359 U.S. 187, 195-96 (1959); Bartkus v. Illinois, 359 U.S. 121, 138-39 (1959). States are also separate sovereignties that may prosecute a defendant for the same offense. Heath v. Alabama, 474 U.S. 82, 93 (1985).

1. Statutory Limitations on Prosecution By Separate Sovereignties. There are two statutory bars that limit prosecutions that may otherwise be permitted by separate sovereignties under double jeopardy.

a. Drug Charges. G.S. 90-97 provides that if a violation of Article 5 of Chapter 90 of the General Statutes (various drug offenses) is a violation of federal law or another state's law, a conviction or acquittal under federal or other state's law for the same act is a bar to prosecution in North Carolina state courts. *State v. Brunson*, 165 N.C. App. 667 (2004), provides a useful guide to interpreting G.S. 90-97. In *Brunson,* an undercover officer made three separate purchases of cocaine from the defendant over a one month period. At least one other person was involved with the defendant. The defendant was charged in federal court with three counts of unlawful distribution of cocaine for the three transactions. He pled guilty to one count in federal court. The State then brought charges based on the same acts. The defendant was convicted of nine counts of trafficking cocaine and three counts of trafficking conspiracy. The court ruled that G.S. 90-97 barred the state prosecution of the nine counts of trafficking cocaine. The court rejected the State's argument that an elemental analysis of federal and state offenses should be used to determine whether the state prosecution is barred. The court instead focused on the underlying actions for which the defendant was prosecuted at the federal and state level. The court also ruled, however, that G.S. 90-97 did not bar the state prosecution of the trafficking conspiracy charges because the defendant was not charged with conspiracy in federal court.

b. Offenses That Straddle Jurisdictions. Under G.S. 15A-134, if an offense occurs partly in North Carolina and partly outside North Carolina, a person charged with the offense may be tried in North Carolina only if he or she has not been placed in jeopardy for the identical offense in the other state.

C. Greater and Lesser Offenses. As noted in Section II.B.2.a. above, greater and lesser offenses are considered to be the "same offense" for purposes of double jeopardy. However, there are several circumstances when a prosecution for a lesser offense does not bar a prosecution for the greater offense.

1. Later Events Support More Serious Charge. If a defendant is convicted of felonious assault and then the victim dies, the defendant may be prosecuted for murder. Diaz v. United States, 223 U.S. 442, 448-49 (1912); State v. Meadows, 272 N.C. 327, 332-33 (1968).

2. Defendant's Guilty Plea to Offense Over State's Objection. A defendant's guilty plea to a lesser offense over the State's objection does not bar the State from prosecuting a greater offense that was pending when the defendant entered the guilty plea. Ohio v. Johnson, 467 U.S. 493, 502 (1984); *see also* State v. Hamrick, 110 N.C. App. 60, 66-67 (1993).

3. Defendant Violates Plea Bargain. A defendant who pleads guilty to a lesser offense as part of a plea bargain and then violates its terms (for example, by refusing to testify for the State at the trial of an accomplice) may be prosecuted for the original charge. Ricketts v. Adamson, 483 U.S. 1, 11-12 (1987).

D. When Defendant's Actions Regarding Joinder or Severance Remove The Bar. If a defendant successfully moves to sever offenses or to oppose joinder and then pleads guilty to one of the offenses, the State is not barred under double jeopardy from prosecuting the remaining offenses. Jeffers v. United States, 432 U.S. 137, 152-54 (1977).

VII. Related Issues

A. Legislative Intent As A Bar for Offenses That Are Not The "Same." Double jeopardy only bars multiple prosecutions and punishments for the "same offense." However, even if offenses are not the "same offense," legislative intent expressed in statutory provisions may bar multiple punishments. For example, several assault statutes begin with or contain the language, "[u]nless . . . conduct is covered under some other provision of law providing greater punishment," that may bar multiple punishments. *See* State v. Williams, 201 N.C. App. 161, 173-74 (2009) (even though assault by strangulation (Class H felony) and assault inflicting serious bodily injury (Class F felony) require proof of different elements so as to be distinct crimes under double jeopardy, the statutory language "unless . . . conduct is covered" reflects a legislative intent that a defendant only be sentenced for the offense requiring greater punishment). There are some North Carolina appellate court cases that may cause confusion on this issue. In *State v. Coria*, 131 N.C. App. 449, 456-57 (1998), the court held that the defendant was properly convicted and punished for assault with a deadly weapon on a law enforcement officer under G.S. 14-34.2 (Class F felony) and assault with a deadly weapon with intent to kill under G.S. 14-32(c) (Class E felony) because each offense had an element not in the other, and therefore there was no double jeopardy violation to punish for both offenses. However, the court did not mention that G.S. 14-34.2 contains the "unless . . . conduct is covered" language. For a more extensive discussion of this issue and other cases, see pages JESSICA SMITH, NORTH CAROLINA CRIMES 116-17 (7th ed. 2012).

B. Joinder. G.S. 15A-926, which authorizes transactionally-based offenses to be joined for trial against a defendant, provides a defendant with a ground for dismissal under certain circumstances of an offense that was not joined for trial.

G.S. 15A-926(c)(2) provides that "[a] defendant who has been tried for one offense may thereafter move to dismiss a charge of a joinable offense." The motion to dismiss must be made before the second trial, and must be granted unless:

- a motion for joinder of these offenses had been previously denied;
- the court finds that the right of joinder has been waived, State v. Jones, 50 N.C. App. 263, 265-66 (1981) (defendant waived right to dismissal of joinable offenses tried separately when defendant failed to make motion to join all pending joinable offenses); or
- the court finds that because the prosecutor did not have sufficient evidence to try the offense at the time of the first trial, or because of some other reason, the ends of justice would be defeated if the motion were granted, State v. Warren, 313 N.C. 254, 263 (1985) (no error in State's bringing burglary and larceny charges after trial for related murder when there was insufficient evidence at time of murder trial to charge burglary and larceny offenses).

G.S. 15A-926(c)(3) provides that the right to joinder under G.S. 15A-926(c) is inapplicable when the defendant has pled guilty or no contest to the previous charge.

C. Collateral Estoppel.

1. Collateral Estoppel As a Component of Double Jeopardy. Collateral estoppel (also known as issue preclusion) "bars successive litigation of an issue of fact or law that is actually litigated and determined by a valid and final judgment, and [the issue] is essential to the judgment." Bobby v. Bies, 556 U.S. 825, 834 (2009) (internal quotation omitted). Collateral estoppel is a component of double jeopardy that may effectively bar the State from a later prosecution or relitigation of an issue previously found favorably to the defendant. *Compare* Ashe v. Swenson, 397 U.S. 436, 446-47 (1970) (when defendant was acquitted of the robbery of one of six poker players, and identity of the defendant was the single issue in dispute, later prosecution for the robbery of a different poker player was barred by collateral estoppel component of double jeopardy), *with* Bobby v. Bies, 556 U.S. 825, 835-36 (2009) (*Ashe* ruling was inapplicable to post-conviction hearing deciding whether defendant was mentally retarded and thus ineligible for death penalty, because statements concerning Bies's mental capacity by state appellate courts on direct appeal of conviction and death sentence were not necessary to judgments affirming his death sentence).

a. North Carolina Cases Applying Collateral Estoppel. North Carolina cases have applied collateral estoppel and held that:

- a not guilty verdict in a habitual or violent habitual felon hearing bars the State from trying the defendant in a later habitual or violent hearing using the same convictions

litigated in the prior hearing, State v. Safrit, 145 N.C. App. 541, 554 (2001);

- a not guilty verdict of an offense in district court bars the State from using the conduct underlying that offense in a later trial in superior court for involuntary manslaughter, State v. McKenzie, 292 N.C. 170, 175 (1977) (acquittal of DUI in district court would bar the use of that offense to prove involuntary manslaughter, although defendant failed to raise issue at superior court trial); and
- the State is barred in a DWI trial from relitigating the issue of whether defendant willfully refused to submit to a breath test following an adverse judicial determination at a civil hearing, in which Attorney General represented the State, of the same issue in an appeal of administrative revocation of defendant's driver's license, State v. Summers, 351 N.C. 620, 626 (2000).

b. North Carolina Cases Not Applying Collateral Estoppel. Declining to apply collateral estoppel, North Carolina cases have held that:

- an acquittal of possession of firearm by felon does not collaterally estop the State from proving the defendant's possession of a firearm at a later armed robbery trial when the jury that acquits the defendant could have found that the defendant's non-possession of the firearm had occurred three hours after the robbery, State v. Alston, 323 N.C. 614, 616-17 (1988);
- although a mitigating circumstance is found at first capital sentencing hearing, collateral estoppel does not bar relitigation of the circumstance at later capital sentencing hearing, State v. Adams, 347 N.C. 48, 59-60 (1997) (relying on Poland v. Arizona, 476 U.S. 147 (1986));
- an acquittal of assault on a government officer in district court does not bar under collateral estoppel the admission of evidence of the assault in superior court trial de novo of obstructing public officer when there are multiple explanations for the acquittal so that the district court did not necessarily decide the issue adversely to the State that was also at issue in the superior court trial, State v. Bell, 164 N.C. App. 83, 92 (2004);
- the State was not collaterally estopped from prosecuting several counts of obtaining property by false pretenses after a trial judge had dismissed other counts of false pretenses for insufficient evidence at a prior trial; it was not absolutely necessary to the defendant's convictions in the second trial that the second jury find against the defendant on an issue on which the first jury—or, in this case, the judge—found in his favor, State v. Spargo, 187 N.C. App. 115, 122 (2007); and

- an acquittal of felonious larceny does not collaterally estop the State at a later trial from proving felonious breaking or entering with the intent to commit larceny, State v. Edwards, 310 N.C. 142, 146 (1984).

c. State Statute Codifying Collateral Estoppel for Defendant. G.S. 15A-954(a)(7) provides that a court, on the defendant's motion, must dismiss charges in a criminal pleading if it determines that "[a]n issue of fact or law essential to a successful prosecution ha[d] been previously adjudicated in favor of the defendant in a prior action between the parties."

d. Defendant's Burden. "When raising a claim of collateral estoppel, the defendant bears the burden of showing that the issue he [or she] seeks to foreclose was *necessarily* resolved in [the defendant's] favor at the prior proceeding." State v. Warren, 313 N.C. 254, 264 (1985); State v. McKenzie, 292 N.C. 170, 175 (1977).

2. State's Offensive Use of Collateral Estoppel. The State's use of collateral estoppel (commonly known as offensive collateral estoppel) and the related principle of res judicata has been recognized under certain circumstances in North Carolina cases. (For the distinction between collateral estoppel and res judicata, see State v. Parsons, 92 N.C. App. 175, 177 (1988).) The source of these legal concepts—when advocated by the State—is the common law, not the Double Jeopardy Clause, because the clause only protects a defendant's rights.

North Carolina case law has recognized the State's use of collateral estoppel in limited circumstances. In *State v. Cornelius*, ___ N.C. App. ___, 723 S.E.2d 783 (2012), for example, the defendant was charged with felony-murder and an underlying felony of burglary. At the first trial the jury found the defendant guilty of burglary but could not reach a verdict on felony-murder. The trial court entered a PJC on the burglary and declared a mistrial as to felony-murder. At the retrial, the trial judge instructed the jury with respect to felony murder that "because it has previously been determined beyond a reasonable doubt in a prior criminal proceeding that Mr. Cornelius committed first degree burglary . . . . you should consider that this element [of felony-murder (that defendant committed the felony of first degree burglary)] has been proven to you beyond a reasonable doubt." ___ N.C. App. at ___, 723 S.E.2d at 787. The court held that the trial court did not err by allowing offensive collateral estoppel to establish the underlying felony for the defendant's felony-murder conviction. Citing *State v. Dial*, 122 N.C. App. 298 (1996) (jury's special verdict finding North Carolina had jurisdiction to try criminal charge, accepted by judge before declaring mistrial at murder trial, was res judicata and barred defendant from relitigating that issue at retrial), the court ruled that the trial court's instruction was proper. ___ N.C. App. at ___, 723 S.E.2d at 789.

In another case, *State v. Lewis*, 311 N.C. 727, 734 (1984), the court held that a conviction of nonsupport of minor children collaterally estopped the defendant from relitigating paternity in a later child enforcement agency's civil action for indemnification of support payments made for minor children. And in a third case, *State v. Ellis*, 262 N.C. 446,

449 (1964), the court held that the determination of paternity may not be relitigated by a defendant in a later prosecution for nonsupport of illegitimate child.

The United States Supreme Court has not directly ruled on the constitutionality of offensive collateral estoppel, although it has expressed doubt about it in dicta. United States v. Dixon, 509 U.S. 688, 710 n.15 (1993) ("[A] conviction in the first prosecution would not excuse the Government from proving the same facts a second time."). See also the discussion of United States Supreme Court case law in *State v. Cornelius*, ___ N.C. App. ___, 723 S.E.2d 783, 788 (2012). It is unclear whether the Court would uphold the use of offensive collateral estoppel in light of a defendant's Sixth Amendment rights to a jury trial and to confront witnesses.

VIII. Procedural Issues

A. At Trial. G.S. 15A-954(a)(5) provides that a trial court on the defendant's motion must dismiss the charges in a criminal pleading if it determines that the defendant has previously been placed in jeopardy for the same offense. G.S. 15A-954(c) provides that the motion to dismiss may be made at any time at trial, but the motion is typically made before the beginning of the second trial.

B. Collateral Attack. A defendant must properly assert a double jeopardy issue at the second trial to raise the issue on appeal or collateral attack. State v. McKenzie, 292 N.C. 170, 176-77 (1977).

C. Effect of Guilty Plea. A guilty (or no contest) plea waives a double jeopardy issue. State v. Hopkins, 279 N.C. 473, 476 (1971). However, as a result of two United States Supreme Court decisions—Menna v. New York, 423 U.S. 61 (1975) (per curiam) and United States v. Boce, 488 U.S. 563, 574-76 (1989)—a guilty plea waives a double jeopardy issue on appeal or collateral attack *except* if the double jeopardy issue can be resolved by examining the face of the criminal pleadings themselves. Thus, the *Hopkins* ruling would appear to have been modified by *Menna* and *Boce*. See State v. Corbett, 191 N.C. App. 1, 5 (court recognized that *Menna* and *Hopkins* appear to be in conflict, but it was bound to follow *Hopkins*), *aff'd per curiam*, 362 N.C. 672 (2008). On the other hand, if other evidence must be considered, a guilty plea waives a double jeopardy issue on appeal or collateral attack. United States v. Brown, 155 F.3d 431, 435 (4th Cir. 1998) (judge erred under *Boce* in holding evidentiary hearing to determine if defendant's second drug conviction—based on a guilty plea—was barred by double jeopardy, because issue must be resolved solely by examining record of prior proceedings).

D. No Pretrial Right to Appeal Denial of Double Jeopardy Motion. A defendant has no right to a pretrial appeal to the appellate division of a judge's denial of a defendant's motion to dismiss a criminal charge on double jeopardy grounds. A defendant may only raise this issue after a conviction. State v. Shoff, 342 N.C. 638 (1996) (per curiam).

Tab: Capacity Issues

Capacity and Commitment

Issues, Concerns, Challenges

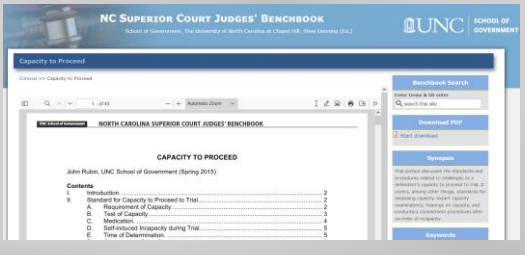
John Rubin
UNC School of Government
March 2024

1

Jackson v. Indiana, 406 U.S. 715 (1972)

"[A] person charged . . . with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant."

2



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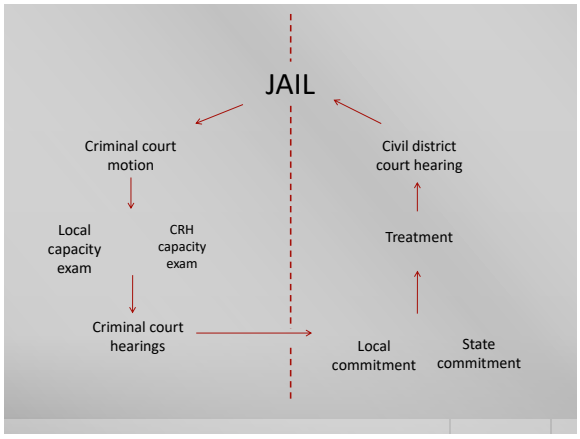


4

Requirement of Capacity

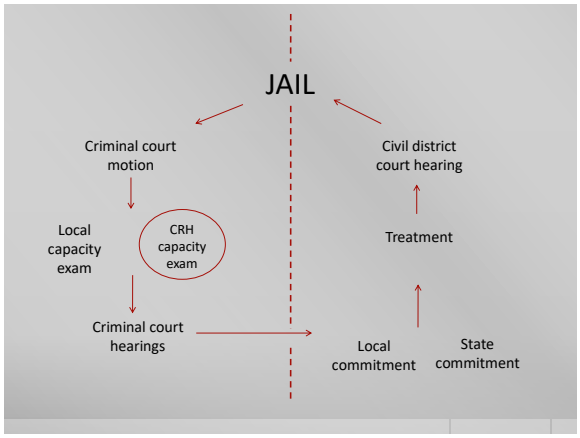
- Due process and North Carolina law prohibit trial and punishment of a person who is incapable of proceeding

5

Question # 1

- If defense counsel fails to raise the question of capacity, is the prohibition waived?
  - Yes
  - No
  - Yes and no

6



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Question # 2

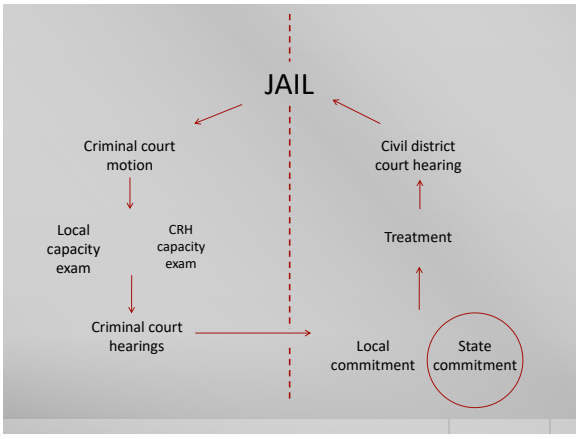
- In felony cases, you can have the defendant evaluated by:
  1. Local examiner
  2. State examiner after local exam
  3. State examiner
  4. All of the above

8

Question # 3

- Must the defendant be in custody while awaiting a capacity evaluation?
  1. Yes
  2. No

9



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Question # 4

- After a finding of incapacity, which option is NOT part of our statutes?
  - Find the defendant is not subject to commitment
  - Find the defendant is subject to commitment and order a local commitment examination
  - Find the defendant is subject to commitment and, because charged with a violent crime, order a state commitment examination
  - Order capacity restoration

11

G.S. 15A-1008

- When a defendant lacks capacity to proceed, the court shall dismiss the charge if
  1. it appears the defendant will not gain capacity
  2. the defendant has been confined for the maximum term for the most serious offense
  3. five years have elapsed in a misdemeanor case and ten years have elapsed in a felony case after a finding of incapacity

12

Question # 5

- After a finding of incapacity, which option is NOT part of our statutes?
  - Find the defendant is not subject to commitment
  - Find the defendant is subject to commitment and order a local commitment examination
  - Find the defendant is subject to commitment and, because charged with a violent crime, order a state commitment examination
  - Order capacity restoration

13

Definition of Violent Offense

- "[A] violent crime, including a crime involving assault with a deadly weapon." G.S. 15A-1003(a).
  - Whether a crime is "violent" depends on elements. *In re Murdock*, 222 N.C. App. 45 (2012).
  - Whether a crime "involves" assault with a deadly weapon depends on facts. *Id.*

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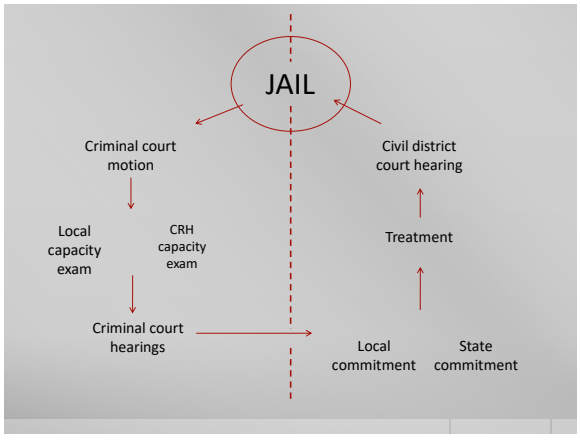


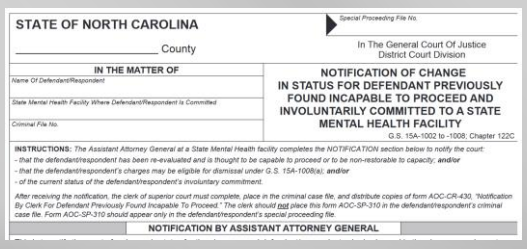
15

Additional 2013 Changes

- Capacity exam must be conducted before termination of commitment
- If exam reports that defendant has gained capacity, notice must be given to clerk, who must give notice to DA, defense attorney, and sheriff
- DA must calendar supplemental hearing within 30 days after report of capacity
- Trial must be calendared for earliest practicable time, with continuances beyond 60 days for extraordinary circumstances only

16

AOC-SP-310



STATE OF NORTH CAROLINA

_____ County

Special Proceeding File No.

In The General Court Of Justice
District Court Division

IN THE MATTER OF

Name Of Defendant/Respondent

State Mental Health Facility Where Defendant/Respondent Is Committed

Criminal File No.

NOTIFICATION OF CHANGE IN STATUS FOR DEFENDANT PREVIOUSLY FOUND INCAPABLE TO PROCEED AND INVOLUNTARILY COMMITTED TO A STATE MENTAL HEALTH FACILITY

G.S. 15A-1002 to -1008; Chapter 122C

INSTRUCTIONS: *The Assistant Attorney General at a State Mental Health facility completes the NOTIFICATION section below to notify the court:*
*- that the defendant/respondent has been re-evaluated and is thought to be capable to proceed or to be non-restorable to capacity; **and/or***
*- that the defendant/respondent's charges may be eligible for dismissal under G.S. 15A-1008(a); **and/or***
- of the current status of the defendant/respondent's involuntary commitment.

After receiving the notification, the clerk of superior court must complete, place in the criminal case file, and distribute copies of form AOC-CR-430, "Notification By Clerk For Defendant Previously Found Incapable To Proceed." The clerk should not place this form AOC-SP-310 in the defendant/respondent's criminal case file. Form AOC-SP-310 should appear only in the defendant/respondent's special proceeding file.

NOTIFICATION BY ASSISTANT ATTORNEY GENERAL

17

Recap of Alternatives

- State capacity exam
  - Local examiner
  - Pretrial release with conditions
- State commitment
  - Local commitment
  - Pretrial release with conditions
- Criminal hearing after state commitment
  - Track, schedule, and hear cases
- Capacity restoration without state commitment
  - Pilot programs
  - Potential legislation

18

Tab: Self-Represented Defendant

NORTH CAROLINA Judicial COLLEGE

Self-Represented Criminal Defendants

Allen Baddour
Resident Superior Court Judge
District 18
February 2024: Advanced Criminal Procedure

UNC SCHOOL OF GOVERNMENT www.sog.unc.edu

1

Self-Represented?

Yes, *Self-Represented* Litigants…
Self-Represented* Criminal Defendants instead of *pro se

2

6th Amendment: Right to Counsel

… and right to self-representation

3

UNC SCHOOL OF GOVERNMENT

- Knowing, voluntary, intelligent waiver
  AND
- Possesses capacity to proceed representing himself

- Knowing, voluntary, intelligent waiver
  AND
- Possesses capacity to proceed representing himself

A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

(1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel

(2) Understands and appreciates the consequences of this decision; and

(3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

NCGS§ 15A-1242

UNC SCHOOL OF GOVERNMENT

An indigent person who has been informed of his right to be represented by counsel at any in-court proceeding, may, in writing, waive the right to in-court representation by counsel

NCGS§ 7A-457

UNC SCHOOL OF GOVERNMENT

7

See

Superior Court Judges Bench Book Questions

UNC SCHOOL OF GOVERNMENT

8

STATE OF NORTH CAROLINA

_____ County

File No.

In The General Court Of Justice
☐ District ☐ Superior Court Division

STATE VERSUS

Name Of Defendant

DOB | Age | Highest Level Of Education Completed

TRANSCRIPT OF PLEA

G.S. 15A-1022, 15A-1022.1

NOTE: *Use this section* ***ONLY*** *when the Court is rejecting the plea arrangement.*
☐ The plea arrangement set forth within this transcript is hereby rejected and the clerk shall place this form in the case file. *(Applies to plea arrangements disclosed on or after December 1, 2009.)*

Date | Name Of Presiding Judge (type or print) | Signature Of Presiding Judge

The undersigned judge, having addressed the defendant personally in open court, finds that the defendant (1) was duly sworn or affirmed, (2) entered a plea of ☐ guilty ☐ guilty pursuant to *Alford* decision ☐ no contest, and (3) offered the following answers to the questions set out below:

	Answers
1. Are you able to hear and understand me?	(1) _____
2. Do you understand that you have the right to remain silent and that any statement you make may be used against you?	(2) _____
3. At what grade level can you read and write?	(3) _____
4. (a) Are you now using or consuming alcohol, drugs, narcotics, medicines, pills, or any other substances?	(4a) _____
(b) When was the last time you used or consumed any such substance?	(4b) _____
(c) How long have you been using or consuming this medication or substance?	(4c) _____
(d) Do you believe your mind is clear, and do you understand what you are doing in this hearing?	(4d) _____
5. Have the charges been explained to you by your lawyer, and do you understand the nature of the charges, and do you understand every element of each charge?	(5) _____

UNC SCHOOL OF GOVERNMENT

9

UNC SCHOOL OF GOVERNMENT

- Knowing, voluntary, intelligent waiver
  AND
- Possesses capacity to proceed representing himself

In Indiana v. Edwards, 554 U.S. 164 (2008), the U.S. Supreme Court held that a state may limit a defendant's right to self-representation by insisting on representation by counsel at trial when the defendant is competent to stand trial but lacks the mental capacity to conduct the defense unless represented.

Best practices:

Standby Counsel

Best practices:

Standby Counsel

But… No hybrid

Best practices:

Non-compliant
or
Non-responsive

Best practices:

Forfeiture

Best practices:

Sovereign Citizens

Best practices:

Trial practices

Best practices:

Consider:

- Frame subject matter of hearing
- Explain process
- Articulate decision from bench if able
- Provide written order
- Set expectations for next steps

UNC SCHOOL OF GOVERNMENT

Best practices:

Ensure procedural fairness

Be fair
***Appear* fair**

Tab: Discovery Issues

Criminal Discovery

Alyson Adams Grine
Resident Superior Court Judge, Judicial District 18
Advanced Criminal Procedure 2024

1

References

- **Benchbook: Discovery in Criminal Cases**
  - https://benchbook.sog.unc.edu/sites/default/files/pdf/Discovery.pdf
- **Benchbook: *Pennsylvania v. Ritchie*: Defendant's Right to Third Party Confidential Records**
  - https://benchbook.sog.unc.edu/criminal/defs-right-3rd-party-confidential-records
- **Defender Manual, Vol. I, Ch. 4**
  - https://defendermanuals.sog.unc.edu/sites/default/files/pdf/Ch%204%20Discovery%20Apr%202021.pdf
- **Materials from Past Conferences: Discovery Issues in Criminal Cases, Bryan Collins**
  - https://www.sog.unc.edu/resource-series/2018-advanced-criminal-procedure-superior-court-judges

2

Roadmap

1. **Discovery Devices**
   a. Statute
   b. Constitution
   c. Other
2. **Sanctions**
3. **Reversal**
4. **Special Topics**

3

Discovery Devices

4

The year is circa 2004. Two distinguished policy makers meet in the hallway of the NC General Assembly…*

*Believe it or not, this conversation is drawn from the Official Commentary to Article 48.

5

Statutory Discovery

- 2004: mandatory **OPEN FILE DISCOVERY** for Ds
  - Defense right to complete files of investigation and prosecution of case
  - Article 48: G.S. 15A-901-910
- Applies to cases in original jurisdiction of Superior Court

True or False: There is a right to discovery for misdemeanor appeals

6

Statutory Discovery: What D Gets

- **Defendant's Discovery Rights** (15A-903)
  - **All files** involved in investigation or prosecution (open to defense exam)
    - Onus on officers to timely provide complete files to DA
    - Includes private entities like a private lab
    - DA's "Due diligence" to investigate/obtain discoverable info
  - **Expert witnesses List** (with report, data, CV…)
  - **Witnesses List**

7

Statutory Discovery: How D Obtains

- **Written request** to DA
  - Required before making motion to compel
    - Unless 1) both parties agree in writing to comply voluntarily, or 2) good cause shown
  - Timing of Request: 10 working days after…
    - GS 15A-902(f)
- **Motion:**
  - D may file motion to compel if no/ unsatisfactory response to request, or after 7 work days
  - Trial Court may also hear:
    - On stipulation of parties
    - On finding of good cause
  - Relief: order party to produce it, or to respond in writing for each item, or do in camera review

G.S. 15A-902

8

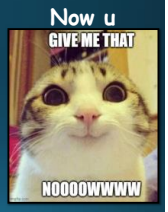
Statutory Discovery: What State Gets

- **State's Discovery Rights:** more limited (15A-905, 906)
  - **Evidence D intends to offer** at trial
    - Documents, files, tangible objects (open to exam)
  - **Testifying Experts** (with accompanying documentation)
  - **Witness List**
  - **Defenses**

9

Statutory Discovery: How State Obtains

- **Reciprocal Discovery** (GS 15A-902)
  - State only gets if D requests discovery, parties have written agreement to exchange, or court orders relief
  - **Timely request** required
    - 10 working days after State provides discovery in response to D request
    - **Motion**
      - If D does not voluntarily comply with request



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Statutory Discovery

- **Both Parties**
  - Continuing duty to disclose (15A-907)
  - Work Product Protected (15A-904, 906)
    - Mental processes, eg, voir dire questions, witness questions, opening and closing, legal research
  - Protective Orders (15A-908(a))
    - May apply ex parte for order to protect info from disclosure for good cause, like risk of harm
      - If Court grants, must seal materials submitted in record

11

Additional Statutes

- **Law Enforcement Recordings: GS 132-1.4A**
  - BWC, Dash-cam
  - Petition SCJ to obtain in civil action (AOC-CV-270)


STATE OF NORTH CAROLINA

PETITION FOR RELEASE OF CUSTODIAL LAW ENFORCEMENT AGENCY RECORDING

12

Additional Statutes

- **Prior Bad Acts: Rule 404(b)**
- **Biological Evidence:** GS 15A-267-268
  - Gives D access to DNA, crime scene evidence…
  - D may move to have State conduct test or seek funds to test
  - Mandates testing if D requests and certain conditions met
- **Nontestimonial ID Orders:** GS 15A-271-282
  - Eg, State may seek saliva sample of suspect
  - D may request test on self
- **Bill of Particulars:** GS 15A-925
- **Deals, Concessions, Immunity Agreements:** GS 15A-1054
- **Depositions** (preserve testimony of infirm…): GS 8-74

13

Defendant's Constitutional Right to Discovery

- **US Constitution**
  - Due Process
  - Sixth Amendment rights to effective assistance of counsel, compulsory process, confrontation, and to present a defense
- **NC Constitution**
  - Article I, Sec 19 (law of land)
  - Article I, Sec 23 (right to counsel, confrontation)

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D's Constitutional Right to Discovery

- ***Brady* Material**, 363 US 83 (1963)
  - State has Due Process duty to disclose evidence:
    - Favorable to defense
      - Tends to negate guilt, mitigate an offense or sentence, or impeach States witness or evidence

    AND
    - "Material to guilt or punishment"
      - A reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different (less than PPE)
  - Applies to guilt/innocence stage and sentencing
  - DA must provide in time for D to make effective use of it at trial
  - New trial required if error found

15

D's Constitutional Right to Discovery

- ***Giglio v. United States***, 405 US 150 (1972)
  - State must disclose evidence affecting witness credibility
    - Includes law enforcement officers
- ***Pennsylvania v. Ritchie***, 480 US 39 (1987)
  - D has right to obtain records containing favorable, material evidence even if confidential
  - Ex. DSS Records, Mental Health Records of PW
    - Conduct in camera review

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Other Discovery Devices

- **Subpoena Duces Tecum**
  - To obtain records not in State custody/control
  - D need not make any showing to obtain, but Court may quash or limit on objection
- **Public Records Request**
  - Eg, for Standard Operating Procedures of Law Enforcement Agency
- **Bill of Particulars**
  - To flesh out indictment
- **Pretrial Hearings**
  - Eg, bond or suppression hearings

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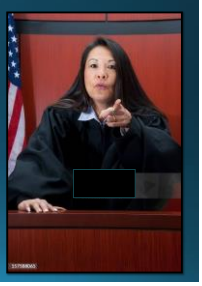
Other Discovery Devices

- **Court's Inherent Authority**
  - In the interests of justice



18

Sanctions (GS 15A-910)

19

Sanctions

1. Order compliance with request
2. Continuance or recess
3. Prohibit use of undisclosed evidence
   - Beware: unconstitutional if infringes on weighty interest of accused
4. Mistrial
5. Dismiss charge (with or without prejudice)
6. Other appropriate order

Make specific findings! GS 15A-910(d)

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Sanctions

- **Choice of Sanction**-trial court's discretion
- **Considerations**: 1) materiality, and 2) totality of circumstances surrounding failure to comply, ie:
  - Bad faith
  - Unfair surprise
  - Prejudice to trial preparation or presentation of evidence
  - Constitutional violation (may require stronger measure)
- Would a lesser sanction work?
  - Less likely to be found an abuse of discretion
- Remember: D has DPC right to present a defense
  - *State v. Cooper*, 229 N.C. App. 442 (2013) (sanction of precluding defense witness was abuse of discretion requiring new trial)

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Reversal

22

Reversal

SANCTIONS:

- Preclusion of affirmative defense as sanction. 235 NC 365.
  - D has right to put on defense, and trial court did not detail reasons
- Dismissing charge as a sanction. 225 NCA 599; 222 NCA 707.
  - Extreme sanction, and trial court did not make findings about prejudice warranting
  - 836 SE2d 658: trial court erred by finding destruction of BWC warranted dismissal without determining whether it was done in bad faith.
- Excluding defense expert testimony as a sanction, and failure to conduct in camera review of materials. 229 NCA 442.
- Ordering suppression as sanction for State's failure to document and disclose communications. 225 NCA 599.
  - 15A-903 requires production of existing documents, it doesn't require State to create documentation.

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Reversal

- Failure to disclose DSS records to D where they contained impeachment information or other favorable, material information. 212 NCA 661; 197 NCA 619; 165 NCA 854.
- *Brady*
  - Preventing D from crossing witness about bias, like witness' deal for sentence commutation, or pending criminal charges. 346 NC 162.
- Failing to preclude expert witness not on State's list from testifying. 178 NCA 351.
- Denying D's request for continuance when State disclosed expert 5 days before trial andproduced report 3 days before trial. 362 NC 285.

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Special Topics

North Carolina Criminal Law
A UNC School of Government Blog

- Identity of Confidential Informants
- Discovery of Officers' Text Messages
- New Ethics Opinion on Incarcerated Defendants' Right to Review Discovery
- Discovery and Separate Sovereigns
- Discovery in Child Pornography Cass
- Expert Discovery

25

Tab:
Counsel Issues

NORTH CAROLINA Judicial COLLEGE

Right to Counsel Issues

Phil Dixon
UNC School of Gov't.

UNC SCHOOL OF GOVERNMENT

1

Ineffective Assistance Claims

- ❑ *Strickland* attorney error claims
- ❑ *Harbison* Claims
- ❑ Denial of counsel claims
- ❑ Conflict of interest claims

UNC SCHOOL OF GOVERNMENT

2

Question # 1

- Defendant is on trial for PWISD cocaine, Sale of cocaine, PDP, and Habitual Felon. During closing argument, defense counsel says:

"D. could get four months on the paraphernalia. I agree you can find him guilty of that one; it's open and shut. But there was no proof of sale or intent to distribute, and you should find him not guilty of those."

DA: Objection! I want to be heard at the bench.

Answer # 1

St. v. King, 218 N.C. App. 384 (2012)

- Though clearly a strategic decision, such a statement concedes defendant's guilt to the charge of possession of drug paraphernalia

Harbison Claims

Alleges that counsel admitted the defendant's guilt to the jury, without the defendant's consent, in violation of the defendant's right to effective assistance. *State v. Harbison*, 315 N.C. 175 (1985)

Harbison Claims

- NC courts have held that when counsel admits defendant's guilt to the jury without defendant's consent, it is **per se IAC**. *State v. Harbison*, 315 N.C. 175 (1985)
- The only inquiries are whether there was an unauthorized admission of guilt or whether defense counsel exceeded the scope of the defendant's consent

Harbison Claims

Best practices at trial

- Ask—before opening & closing statements--whether counsel plans to admit guilt to any offense or a lesser-included
- If yes, determine, on the record, whether defendant consents to the strategy

Harbison Claims

Best practices at trial

- Defense counsel can't proceed unless defendant gives explicit consent on the record
- If counsel unexpectedly admits guilt, excuse jury & determine whether defendant consents to the admission; if not may → **mistrial**

Question # 2

- Defendant is on trial for 2d degree Rape, 2d degree Sex Offense, Assault by Strangulation, and AOF. During closing argument, defense counsel argues:
  - "You heard (the D.) admit things got physical. He admitted he did wrong. God knows he did…Put aside your feelings about the violence that occurred. You can't convict him of the rape and sexual assault and strangulation based on the evidence. Find him not guilty those."

DA: Objection! I want to be heard at the bench.

Answer # 2

St. v. McAllister, 375 N.C. 455 (2020)

Implied Admission of Guilt = *Harbison* Error

Question # 3

- Defendant is on trial for first-degree statutory sex offense, crime against nature, and indecent liberties. During closing argument, defense counsel states:

> "The minor was 15 and was in high school. The defendant didn't know that. The minor lied. The defendant told the officer the truth about what happened. He gave the minor oral. The defendant didn't lie to the police. He told police what happened between them. I ask you to find him not guilty."

DA: Objection! I want to be heard at the bench.

Answer # 3

St. v. Cholon, 284 N.C. App. 152 (2022)

Implied admission of guilt = *Harbison* error

Harbison Claims

What is not (necessarily) a *Harbison* Error:

- Admission to one element of an offense
- Admission of guilt to another crime that is not a lesser-included offense
- Admitting guilt in a capital case after informing the client of that strategy and the client will not respond (?)

Question # 4

- During jury selection, defense counsel approaches and explains that he and the defendant are unable to agree about accepting a certain juror. The defendant is asking to personally address the court about the issue.

What should you do?

Absolute Impasse

Answer # 4

- When defense counsel & a fully informed criminal defendant reach an **absolute impasse** as to tactical decisions, the client's wishes must control. *State v. Ali,* 329 N.C. 394, 404 (1991) (noting principal-agent nature of the attorney-client relationship)

Absolute Impasse

What's an Absolute Impasse? Defendant and counsel must be locked in controversy regarding a matter of trial strategy.

- ✓ Jury selection
- ✓ Whether to testify or present evidence
- ✓ Examination of witnesses
- ✓ Defenses
- ✓ Whether to move for mistrial
- ✓ Jury instructions
- ✓ Whether to plead guilty
- ✓ Whether to appeal

Absolute Impasse

Your Duties. If brought to your attention that such an impasse exists, you must require defense counsel to abide by defendant's wishes

Defense Counsel's Duties. Make a record of the circumstances, advice to the defendant, the reasons for the advice, the defendant's decision, and the conclusion reached. The better practice is to do this on the record in open court

Absolute Impasse

19

Question # 5

- Two of the defendant's prior attorneys were allowed to withdraw due to breakdown of the relationship. The defendant then waives all counsel and is appt'd. standby counsel. After expressing problems researching the law and investigating his case from jail several times, D. states on the day of trial his desire to have full representation. Standby counsel needs a continuance to do.

What should you do?

20

Answer # 5

St. v. Harvin, 382 N.C. 566 (2022)

[T]he defendant's behavior in requesting the removal of two counsel, seeking to proceed pro se, and then deciding that he needed the help of counsel to vindicate his rights at trial—while remaining polite, cooperative, and constructively engaged in the proceedings—was not "the type or level of obstructive and dilatory behavior which [would] allow the trial court . . . to conclude that [the] defendant had forfeited the right to counsel

21

Waiver vs. Forfeiture

Waiver of Counsel	Forfeiture of Counsel
Knowing, intelligent, and voluntary relinquishment of the right to counsel	Involuntary relinquishment relinquishment of the right to counsel due to egregious misconduct

22

Forfeiture of Counsel

Involuntary relinquishment relinquishment of right to counsel

=

Serious obstruction of the proceeding or assaulting their attorney

23

Forfeiture of Counsel

- Use advance warnings when possible
- Document the reasons for withdrawal of prior counsel or D.'s inability to retain counsel
- Tread cautiously!

24

Forfeiture of Counsel

- Must be a clear record of D.'s misconduct
- Make findings of fact and legal conclusions
- Age of case and # of attys. is NOT dispositive

Question # 6

- D.'s motion to remove his first atty. was allowed. Her second atty. withdrew. The third atty. withdrew shortly after that. A fourth atty. was appointed and withdrew 1.5 months later. Six months later, the fifth attorney withdrew. There were multiple waivers of counsel signed and D. also attempted to hire her own atty., without success. She asks for a sixth appt.'d. atty.

What should you do?

Answer # 6

***State v. Atwell*, 383 N.C. 437 (2022)**

Defendant's behavior did not rise to the level of egregious misconduct which could justify the trial court's determination that she had involuntarily surrendered her right to counsel. Defendant never engaged in aggressive, profane, or threatening behavior, show[ed] any contempt for the trial court's authority.

Forfeiture of Counsel

Forfeiture

- Making representation physically dangerous for atty by assault, threats, harassment
- Profane or threating behavior that disrupts the proceedings
- Repeated refusal to answer whether he wants an attorney
- Refusing to participate in the case
- Hiring/firing multiple attys. or refusing to retain one after multiple opportunities*

No Forfeiture

- Having attorneys withdraw (even multiple ones)
- Being unable to retain an attorney after good faith effort*
- Being frustrating, dense, or slow
- Challenging the court's jurisdiction, conspiracy theories or other unfounded beliefs
- Speaking out of turn
- Arguing with and questioning the court or counsel

Question # 7

- D. waives appointed counsel and hires a private lawyer. The week of trial, D. wishes to fire that lawyer and hire different private counsel. The trial court allows the withdrawal but warns D. that the trial will proceed that week. D. ultimately cannot hire the second private lawyer. D. asks for new counsel to be appointed. The trial court declines to do so and requires D. to proceed pro se.

Problem?

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Answer # 7

***State v. Blakeney*, 245 N.C. App. 452 (2016)**

Waiver of Appointed Counsel ≠ Waiver of all Counsel

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Waiver of Counsel

Knowing, voluntary relinquishment relinquishment of right to counsel

=

15A-1242 Colloquy

1)Advised of right to counsel

2)Understands and appreciates consequences of decision

3)Understands nature of charges and possible punishments

(a "thorough inquiry")

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Waiver of Counsel Colloquy – G.S. 15A-1242

Are you able to hear and understand me?

Are you under the influence of any substances?

Age, education, literacy?

Any handicaps or disabilities?

Do you understand you have the right to a lawyer, including at the State's expense?

Understand the court will not give you advice on defenses, jury instructions, objections, or other legal issues?

Understand the court will treat you as if you were a lawyer?

Understand the nature of charges and the possible punishments?

Do you have any questions?

Do you now waive the right to the assistance of a lawyer and voluntarily and intelligently decide to represent yourself?

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32

"Gray-area" Defendants

***Indiana v. Edwards*, 554 U.S. 164 (2008)**

TC may limit a D's right to self representation by insisting on representation by counsel when D is competent to stand trial but lacks the mental capacity to conduct the defense unless represented

33

"Gray-area" Defendants

***St. v. Cureton* (NCA 2012):**

The constitution does not prohibit self-representation by a "gray-area" defendant

Capable to proceed is judged by the same standard as capable of proceeding pro se

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Question # 8

- Local police charge the D. and he is on trial. Officers from that department testify against D. At the charge conference, D. explains he is concerned that his lawyer isn't acting in his best interests, because his lawyer also represents the police in his capacity as a part-time city attorney. D. admits he's known about this for a year and doesn't wish to question his lawyer about it.

What should you do?

Question # 8

***St. v. Lynch*, 271 N.C. App. 532 (2020)**

If defense counsel advises the police, that is an unwaivable conflict

The trial court erred in failing to further investigate the issue

Conflict of Interest

Standard. The standard for evaluating a conflict of interest claim depends on when the claim was raised

Conflict raised before or during trial. Trial court either must appoint separate counsel or take adequate steps to ascertain that the risk of conflict is too remote to warrant separate counsel

- Defendant night be able to waive the conflict

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Conflict of Interest

Standard. The standard for evaluating a conflict of interest claim depends on when the claim was raised

Conflict raised later. Defendant must show that an actual conflict of interest adversely affected counsel's performance

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Tab: High-Profile Trials

Open Courts and Fair Trials: Control of High-Profile Cases

Shea Denning
March 2024

UNC SCHOOL OF GOVERNMENT

1

2

3

May you close the courtroom?

4

[W]hen the case is a 'sensational' one tensions develop between the right of the accused to trial by an impartial jury and the rights guaranteed others by the First Amendment.

Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976)

5

What Does the First Amendment Protect?

The right of the public (and press) to attend criminal trials is implicit in the guarantees of the First Amendment.

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)

This right of access also applies to preliminary hearings in criminal cases.

Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1 (1986).

6

A Qualified Right

The right of access is a qualified right.

Proceedings may be closed when findings are made that closure is **essential to preserve higher values** and is **narrowly tailored** to serve that interest.

Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1 (1986).

Right to Access v. Right to Fair Trial

If the higher-value interest is the defendant's right to a fair trial, findings in support of closure must show:

1. There is a ***substantial probability*** that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent, and
2. Reasonable alternatives cannot protect the defendant's right.

Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1 (1986).

Sixth Amendment Right to a Public Trial

- Sixth Amendment provides for a public trial for the benefit of the accused.
- This protection extends to suppression hearings.
- Any closure of a suppression hearing or trial (or portion thereof) must meet the following test:
  - Party seeking to close hearing must advance overriding interest
  - Closure must be no broader than necessary to protect interest
  - Trial court must consider reasonable alternatives
  - Trial court must make adequate findings to support closure

Waller v. Georgia, 467 U.S. 39 (1984)

The Upshot?

It is a tough road to closure.

If you close a proceeding over the defendant's objection and in violation of the defendant's Sixth Amendment rights, that is structural error.

Weaver v. Massachusetts, 582 U.S. 286 (2017)

May you seal the exhibits?

Right of Access to Court Records

Common law right of access to court records

Access may be denied when **essential to preserve higher values** and restriction is **narrowly tailored**

Baltimore Sun Co. v. Goetz, 886 F.2d 60 (4th Cir. 1989).

13

Control of the Courtroom

NC CODE OF JUDICIAL CONDUCT, CANON 3 A.(7)

- A judge should exercise discretion with regard to permitting broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during civil or criminal sessions of court or recesses between sessions, pursuant to the provisions of Rule 15 of the General Rules of Practice for the Superior and District Courts.

14

Control of the Courtroom

RULE 15 OF THE GENERAL RULES OF PRACTICE

Allows

- Media coverage of public judicial proceedings

But

- Presiding judge has authority to prohibit or terminate coverage in the courtroom and adjacent corridors

Prohibits

- Audio pickup of bench conferences, counsel-counsel conferences, attorney-client discussions
- Coverage of police informants, minors, undercover agents, relocated witnesses, sex crime victims and families
- Coverage of jurors at any stage. Judge must so inform jurors.

N.C.P.I.--Crim. 100.15
General Criminal Volume
Page 1 of 1

N.C.P.I.—CRIM. 100.15 INSTRUCTIONS RE CAMERAS AND MICROPHONES IN COURTROOM.

NOTE WELL: For additional information regarding cameras and microphones in the courtroom see Chapter 22 of the North Carolina Trial Judges Bench Book as well as Rule 15 of the General Rules of Practice for the Superior and District Courts.

Before I speak to you concerning jury selection, I wish to mention the matter of possible news media coverage of this trial.

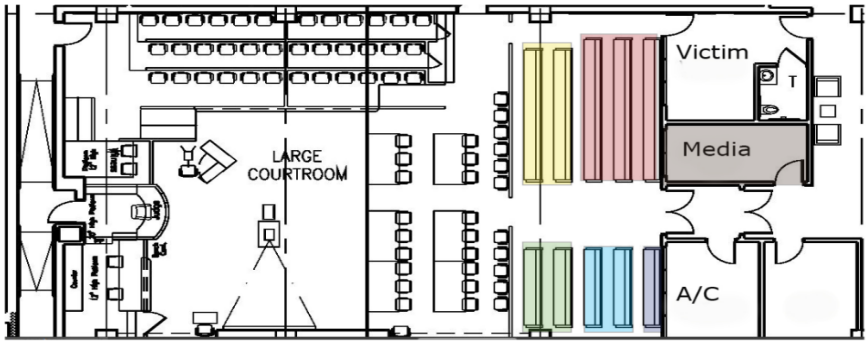
You may have noticed T.V. or camera equipment in the courthouse. Media coverage of jurors is expressly prohibited at any portion of the proceeding, including that portion in which a jury is selected. The cameramen and the photographers are not permitted to take pictures of you.

Therefore, you should not even consider whether this trial, or a portion of it, will be covered by the media by any of the means I have mentioned. It will not affect you personally, or the trial, so I urge you to put that matter out of your mind.

Control of the Courtroom

RULE 15 OF THE GENERAL RULES OF PRACTICE

SAMPLE COURTROOM



Practical Tips for Handling the Media

- **Don't be too quick to ban.** Allowing a camera can prevent reporting errors and reduce confusion.
- **Consider a decorum order.** Give everyone notice of specific requirements.
- **Savvy camera person.** Require that camera operator be familiar with Rule 15 and any applicable local rules.
- **Media room.** Allow a separate media room for video/audio feed. Post media rules in the room and on the door.
- **Key exhibits.** Encourage parties to prepare copies for media.

Preparation is Key. Meet with Your Team.

Clerk, TCA, and Senior Resident

- Expanded jury pool
- Space:
  - Courtroom selection
  - Arranging separate media room
  - Technology check
- Courtroom seating plan
- Designating the court's media liaison – TCA?
- Preparing Clerk's staff for onslaught of information requests

County Sheriff

- More officers in courtroom and in and around courthouse
- Enhanced weapons search
- Security of windows, side and back entrances, perimeter
- Juror safety issues – travel, secured entry and exit
- Witness and custodial defendant safety
- Defendant's entry point if from jail
- Evacuation and active shooter plans
- Traffic and media truck control

Control of the Courtroom

G.S. 15A-1034

(a) The presiding judge may impose reasonable limitations on access to the courtroom when necessary to ensure the orderliness of courtroom proceedings or the safety of persons present

Control of the Courtroom

OTHER TOOLS

- Sequestration of witnesses
  - G.S. 15A-1225; N.C. R. Evid. 615

Control of the Courtroom

OTHER TOOLS

- Removal of a disruptive defendant
  - G.S. 15A-1032

§ 15A-1032. Removal of disruptive defendant.

(a) A trial judge, after warning a defendant whose conduct is disrupting his trial, may order the defendant removed from the trial if he continues conduct which is so disruptive that the trial cannot proceed in an orderly manner. When practicable, the judge's warning and order for removal must be issued out of the presence of the jury.

(b) If the judge orders a defendant removed from the courtroom, he must:

(1) Enter in the record the reasons for his action; and

(2) Instruct the jurors that the removal is not to be considered in weighing evidence or determining the issue of guilt.

A defendant removed from the courtroom must be given the opportunity of learning of the trial proceedings through his counsel at reasonable intervals as directed by the court and must be given opportunity to return to the courtroom during the trial upon assurance of his good behavior. (1977, c. 711, s. 1.)

Control of the Courtroom

OTHER TOOLS

- Removal of a disruptive spectator
  - G.S. 15A-1033: The judge in his discretion may order any person other than a defendant removed from a courtroom when his conduct disrupts the conduct of the trial.

Control of the Proceedings

LIMITING EXTRAJUDICIAL STATEMENTS

Prior restraints on speech

Prior restraints on speech are presumptively unconstitutional.

To be valid, a prior restraint on publication must be based on factual findings that:

1. Publicity is likely to affect jurors and the right to a fair trial;
2. Lesser measures such as a change in venue, continuance, or voir dire have been considered and will not mitigate risk; and
3. The order will actually work to keep prejudicial information from jurors.

And even then, there is nothing that proscribes the press from reporting events that transpire in the courtroom.

§ 7A-276.1. Court orders prohibiting publication or broadcast of reports of open court proceedings or reports of public records banned.

No court shall make or issue any rule or order banning, prohibiting, or restricting the publication or broadcast of any report concerning any of the following: any evidence, testimony, argument, ruling, verdict, decision, judgment, or other matter occurring in open court in any hearing, trial, or other proceeding, civil or criminal; and no court shall issue any rule or order sealing, prohibiting, restricting the publication or broadcast of the contents of any public record as defined by any statute of this State, which is required to be open to public inspection under any valid statute, regulation, or rule of common law. If any rule or order is made or issued by any court in violation of the provisions of this statute, it shall be null and void and of no effect, and no person shall be punished for contempt for the violation of any such void rule or order. (1977, c. 711, s. 3.)

§ 5A-11. Criminal contempt.

(a) Except as provided in subsection (b), each of the following is criminal contempt:

. . .

(5) Willful publication of a report of the proceedings in a court that is grossly inaccurate and presents a clear and present danger of imminent and serious threat to the administration of justice, made with knowledge that it was false or with reckless disregard of whether it was false. No person, however, may be held in contempt for publishing a truthful report of proceedings in a court.

(b) No person may be held in contempt under this section on the basis of the content of any broadcast, publication, or other communication unless it presents a clear and present danger of an imminent and serious threat to the administration of criminal justice.

(c) This section is subject to the provisions of G.S. 7A-276.1, Court orders prohibiting publication or broadcast of reports of open court proceedings or reports of public records banned. (1977, c. 711, s. 3; 1994, Ex. Sess., c. 19, s. 1; 2011-307, s. 6.)

May the Court restrain the speech of *trial participants*?

Restraining speech by trial participants

- First Amendment does not prohibit discipline of a lawyer for remarks that create a substantial likelihood of material prejudice to the trial
  - *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991)

Rules of Professional Conduct

Rule 3.6: A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a **substantial likelihood of materially prejudicing an adjudicative proceeding** in the matter.

. . .

[A] lawyer may make a statement that a reasonable lawyer would believe is **required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client.** A statement made pursuant to this paragraph shall be limited to such information as is reasonably necessary to mitigate the recent adverse publicity.

Rules of Professional Conduct

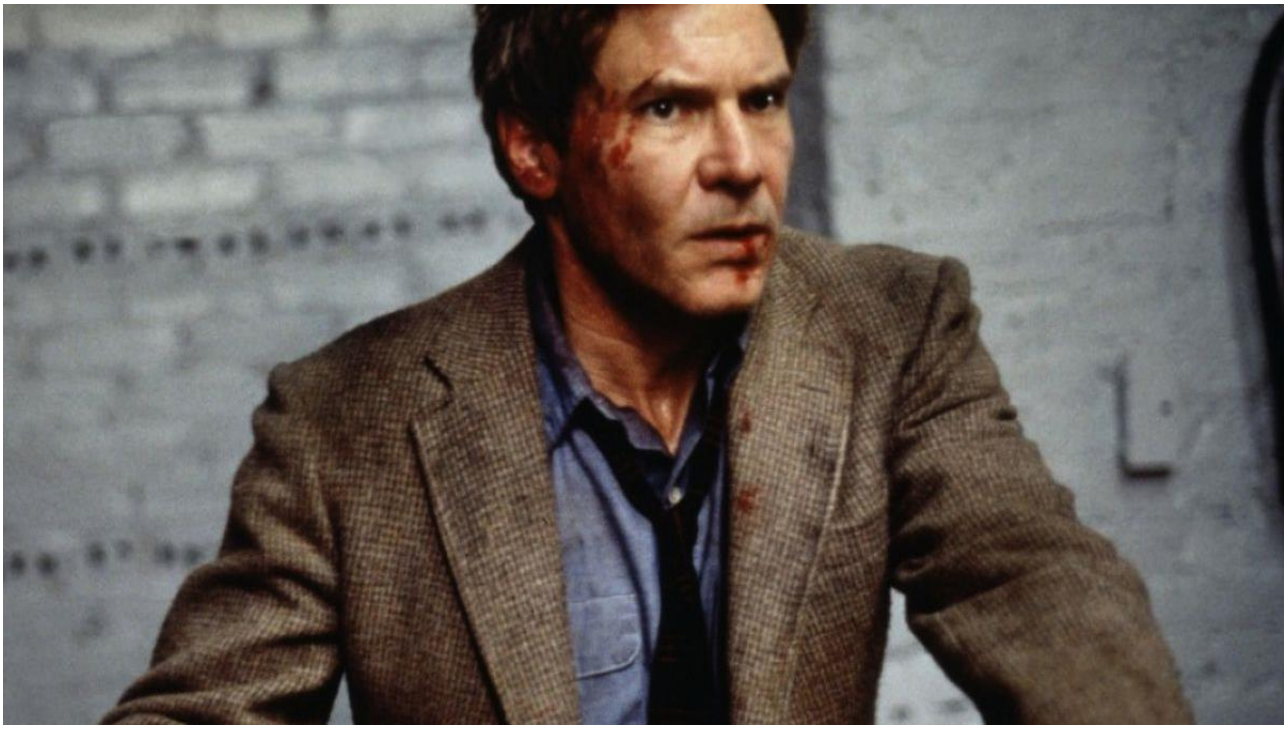
Rule 3.8(f): The prosecutor in a criminal case shall . . . except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, **refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused** and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Restricting Speech by Trial Participants

- North Carolina courts have reviewed orders prohibiting extrajudicial statements by the parties under the same standard as that applied to orders restricting the media.
  - *Beaufort County Bd. of Educ. v. Beaufort County Bd. of Comm'rs*, 184 N.C. App. 110 (2007)

Takeaways

1. First and Sixth Amendment right to open courts and public trials
   - Right is not absolute. May give way to overriding interest if restriction is narrowly tailored.
   - Before a criminal trial (or any portion of it) may be closed, party seeking closure must advance overriding interest, court must consider reasonable alternatives, and court must make adequate findings. Closure must be no broader than necessary.
2. Common law right of access to court records
   - Access may be denied if essential to preserve higher values and restriction is narrowly tailored.
3. Court may exercise control of courtroom by excluding certain individuals from trial and imposing reasonable limitations on access.
4. Prior restraints on speech are presumptively unconstitutional.
   - Rules of Professional Conduct limit statements by attorneys.



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Thank you.

Comments? Questions?

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Tab: Pretrial Accountability & Release

The North Carolina Court Appearance Project

While most people attend their court hearings, missed court appearances use additional law enforcement resources, inconvenience victims and witnesses, and can result in an arrest, time in jail, and/or a suspended license for the person charged. The reasons for missed appearances are often simple and solvable, like lack of transportation or inability to get time off from work. The North Carolina Court Appearance Project was designed to support stakeholders' efforts to identify and implement policies to address these barriers and improve responses to non-appearances, while ensuring public safety and improving efficiency.

Phase I: Policy Development

In August 2021, diverse stakeholder teams from New Hanover, Orange, and Robeson Counties explored policy solutions to promote court appearances and identify better responses to non-appearances. Using local court and jail data, teams reflected on court procedures and identified key areas for change. The solutions they developed are summarized in the table below and explained in greater detail in the Phase 1 Project Report.

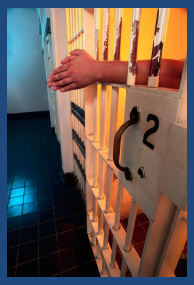
	**Help people understand and remember the need to appear**	Text message reminders; palm cards to accompany citations; forms that are easier to read and understand
	**Address barriers to appearance**	Transportation assistance; virtual appearance options
	**Make court more user-friendly**	Hearings scheduled in smaller time blocks; walk-in hours; services for high-need groups; shorter disposition times
	**Build community trust**	More diverse court personnel; regular community engagement
	**Reduce collateral harms**	Fewer unnecessary orders for arrest; license restoration services; updating state laws

Phase II: Implementation, Engagement & a New Court Appearance Toolbox

In Phase II, the county teams worked to implement priority policy initiatives and share their work with other stakeholders. Also, the Lab's research team collected examples of policy initiatives implemented elsewhere in North Carolina and across the nation. From this work, we produced the Court Appearance Toolbox, including off-the-shelf tools that can be adapted to any jurisdiction. Using the Toolbox, stakeholders can learn about the impact of missed court appearances, understand how to use data to pinpoint problems and opportunities, and find tools that work for them.

The project was funded by The Pew Charitable Trusts. For more information, contact Ethan Rex, Lab Data Manager.

Tab: Habitual Offenses



HABITUAL FELON AND RELATED OFFENSES

Jeff Welty
School of Government

1

Overview

- Habitual felon
  - Four strikes and you're "out"
  - Almost any felony is a strike
  - Increases penalty for current crime
    - Four classes higher (up to Class C)
- Violent habitual felon
  - Three strikes and you're "out"
  - Only defined "violent" felonies are strikes
  - Mandatory sentence of life without parole

2

Overview

- Habitual breaking and entering
  - Two strikes and you're "out"
  - Only listed offenses are strikes
  - Increases penalty for current crime
    - Class E
- Armed habitual felon
  - Two strikes and you're "out"
  - Firearm-related felonies are strikes
  - Increases penalty for current crime
    - Class C, minimum 120 months active
  - Effective for current crimes committed on or after Oct. 1, 2013

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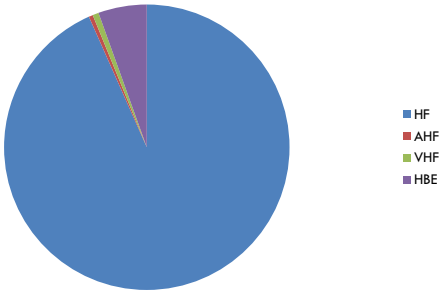
2022 HF, AHF, VHF, and HBE Charges



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Not Part of This Class

- Habitual MDM assault, G.S. 14-33.2
- Habitual MDM larceny, G.S. 14-72(b)(6)
- Habitual DWI, G.S. 20-138.5

5

Habitual Felon

6

Previous Felonies: What Counts?

- NC felonies
- Federal felonies
- Felonies in other states that are "substantially similar to" NC felonies
- Offenses in other jurisdictions that are not felonies if
  - Other jurisdiction does not classify offenses as felonies
  - "Substantially similar to" NC felonies
  - Punishable by >1 year in prison

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Previous Felonies: What Counts?

- Felonies used to support a prior habitual felon conviction
  - But not an acquittal
- Felonies necessary to the current felony
  - Example: Current felony is felon in possession of a firearm. A prior drug felony can support both the felon in possession and the habitual felon.
  - Example: Current felony is HDWI. A prior conviction of HDWI may support both the current HDWI and HF.

8

Previous Felonies: What Counts?

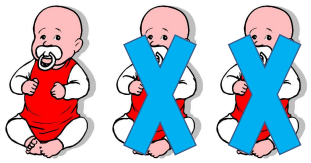
- Some very old convictions
  - All convictions incurred before 7/6/67
  - North Carolina convictions based on no contest pleas before 12/1/75
- Pardoned convictions
- Certain federal alcohol offenses
- Habitual misdemeanor assault
  - Conviction "shall not be used as a prior conviction for any other habitual offense statute"

Doesn't

9

Previous Felonies: Other Rules

- No more than one of the previous felonies may have been "committed before [the defendant] attain[ed] the age of 18 years"
  - G.S. 14-7.1



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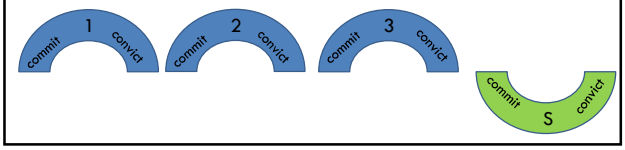
Previous Felonies: Other Rules

- **Previous felonies must not overlap.**
  - Each must have been "committed after the conviction of" the previous felony
    - G.S. 14-7.1
  - May substantive felony overlap the third previous felony?



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Current Felonies

- **Any felony.** "[A]ny felony under the laws of North Carolina" can serve as the current felony.
  - G.S. 14-7.6
- **Recidivist offenses.** Even recidivist offenses like HDWI and HMA count as current felonies.
- **Class 1 misdemeanor drug possession.** A defendant with a prior drug conviction may be "punished as a Class I felon," G.S. 90-95(e)(3), and so may serve as a current felony. State v. Howell, 370 N.C. 647 (2018).

12

Charging: Generally

- **Discretion.** "The district attorney, in his or her discretion, may charge . . ."
- **Must be charged by indictment.** Or information?
- **Cannot stand alone.** Must attach to a substantive felony.
- **Separate indictment.** Typically charged in a separate indictment from the substantive felony.

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Charging: Attachment Rules

- **Timing.** Habitual felon indictment may be returned before, along with, or after the indictment for the current felony.
- **Attachment.**
  - Automatically attaches to all pending felonies
  - Automatically attaches to all subsequently charged felonies
    - Except felonies that the defendant hadn't committed at the time the habitual indictment was returned
    - Only until all pending felonies are "adjudicated," by conviction, plea, dismissal, or acquittal, even if sentencing has not yet occurred; subsequent charges require a new habitual felon indictment

14

Charging: Formal Requirements

- **Requirements.**
  - [Name of previous felony]
  - Date previous felony committed
  - Name of state or other sovereign
  - Date of conviction
  - Court of conviction
  - [Case number]

- **Extra convictions.**
  - May allege more than three previous felonies
  - Insurance in case one is later invalidated
  - Can't use any of them for prior record level

15

Charging: Amendments, Etc.

- **Amendment.** May correct many errors.
  - Date of a previous felony
  - County in which a previous felony took place
  - Incorrect digit in case number of previous felony
- **Changing previous felonies.**
  - Substituting one previous felony for another cannot be done by amendment (must be done by superseding indictment)

16

Charging: Withdrawing Charges

- The State may "withdraw [the] habitual felon indictment as to some or all of the underlying felony charges . . . up until the time that the jury returns a verdict" in the habitual felon stage.
  - State v. Murphy, 193 N.C. App. 236 (2008).

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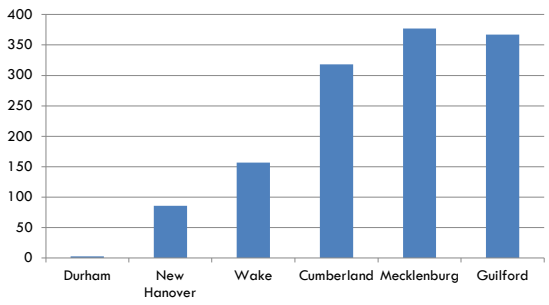
2022 HF Charges by County



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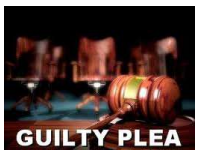
Procedure: OFAs and Bond

- **Bond.**
  - Return of a habitual indictment is relevant to bond
  - Probably improper to set a separate bond for a habitual charge
  - Instead, modify bond on the substantive felony
- **Service/order for arrest.**
  - Probably not proper to issue an OFA upon return of habitual indictment
  - Instead, give notice of indictment per G.S. 15A-630

19

Procedure: Pleas

- **May plead guilty.** The defendant may plead guilty to habitual felon whether he pled guilty to the current felony or was convicted at trial.
- **Full colloquy.** The judge must conduct a full plea colloquy under G.S. 15A-1022.
  - An acknowledgement or stipulation by the defendant is insufficient



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Procedure: Trials

- **Bifurcated.**
  - Jury should not be informed of habitual felon indictment during trial of current felony
  - Same jury
- **Full-fledged trial.** "[T]he proceedings shall be as if the issue of habitual felon were a principal charge."
  - G.S. 14-7.5
- **Timing.** Can't start trial on habitual felon allegation until at least 20 days after habitual felon indictment.

21

Proving Previous Felonies

- **Ways to prove.**
  - Stipulation
  - Original or certified copy of judgment
  - Faxed copy of judgment
    - State v. Wall, 141 N.C. App. 529 (2000)
  - ACIS printout
    - State v. Waycaster, 375 N.C. 232 (2020)
- **Prima facie evidence.** Original or certified copy of judgment, with substantially identical name, is prima facie evidence that the conviction is the defendant's.
  - G.S. 14-7.4; State v. Petty, 100 N.C. App. 465 (1990)

22

Sentencing

- **Sentence the current felony.**
  - Not the habitual felon charge
  - Four classes higher, up to Class C
  - Unless it is already a higher class
- **Consecutive sentencing required.**
  - Sentence must "run consecutively with . . . any sentence being served" at the time of sentencing
  - May run concurrent with, or be consolidated with, other sentences imposed at the same time, including other habitual felon sentences
  - How does this work with probation?

23

Sentencing

- **No double counting.**
  - Previous convictions listed in habitual felon indictment may not be used when calculating prior record level
  - May use convictions consolidated with listed prior convictions
  - May use listed prior convictions for "bonus points"

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Sentencing

- **Habitual felon status can sometimes benefit the defendant**
  - Sentencing a Class C felon as a habitual felon will often result in a lower sentence
  - Sentencing a Class D felon as a habitual felon will sometimes result in a lower sentence
  - Sentencing a drug trafficking defendant as a habitual felon will sometimes result in a lower sentence

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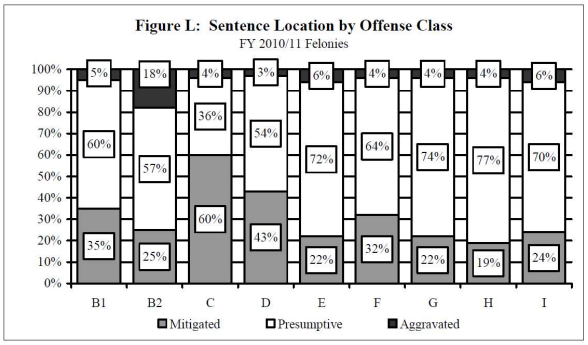

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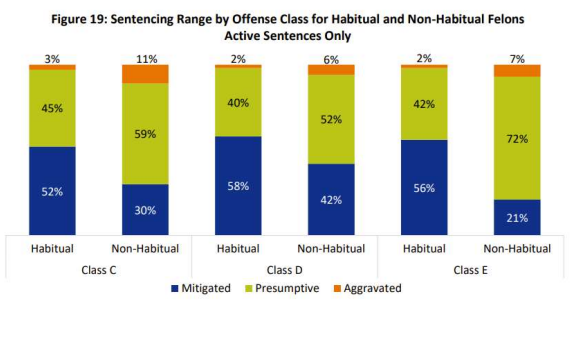

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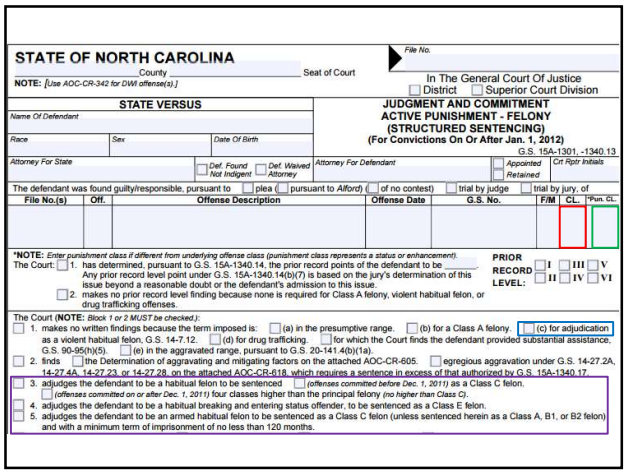

STATE OF NORTH CAROLINA

_____ County _____ Seat of Court

NOTE: *[Use AOC-CR-342 for DWI offense(s).]*

File No.

In The General Court Of Justice
☐ District ☐ Superior Court Division

STATE VERSUS

Name Of Defendant

Race | Sex | Date Of Birth

JUDGMENT AND COMMITMENT
ACTIVE PUNISHMENT - FELONY
(STRUCTURED SENTENCING)
(For Convictions On Or After Jan. 1, 2012)
G.S. 15A-1301, -1340.13

Attorney For State | ☐ Def. Found Not Indigent ☐ Def. Waived Attorney | Attorney For Defendant | ☐ Appointed ☐ Retained | Crt Rptr Initials

The defendant was found guilty/responsible, pursuant to ☐ plea (☐ pursuant to *Alford*) (☐ of no contest) ☐ trial by judge ☐ trial by jury, of

File No.(s)	Off.	Offense Description	Offense Date	G.S. No.	F/M	CL.	Pun. CL.

*NOTE: *Enter punishment class if different from underlying offense class (punishment class represents a status or enhancement).*
The Court: ☐ 1. has determined, pursuant to G.S. 15A-1340.14, the prior record points of the defendant to be _____. Any prior record level point under G.S. 15A-1340.14(b)(7) is based on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue.
☐ 2. makes no prior record level finding because none is required for Class A felony, violent habitual felon, or drug trafficking offenses.

PRIOR RECORD LEVEL: ☐ I ☐ II ☐ III ☐ IV ☐ V ☐ VI

The Court (**NOTE:** *Block 1 or 2 MUST be checked.*):
☐ 1. makes no written findings because the term imposed is: ☐ (a) in the presumptive range. ☐ (b) for a Class A felony. ☐ (c) for adjudication as a violent habitual felon, G.S. 14-7.12. ☐ (d) for drug trafficking. ☐ for which the Court finds the defendant provided substantial assistance, G.S. 90-95(h)(5). ☐ (e) in the aggravated range, pursuant to G.S. 20-141.4(b)(1a).
☐ 2. finds ☐ the Determination of aggravating and mitigating factors on the attached AOC-CR-605. ☐ egregious aggravation under G.S. 14-27.2A, 14-27.4A, 14-27.23, or 14-27.28, on the attached AOC-CR-618, which requires a sentence in excess of that authorized by G.S. 15A-1340.17.
☐ 3. adjudges the defendant to be a habitual felon to be sentenced ☐ *(offenses committed before Dec. 1, 2011)* as a Class C felon. ☐ *(offenses committed on or after Dec. 1, 2011)* four classes higher than the principal felony *(no higher than Class C)*.
☐ 4. adjudges the defendant to be a habitual breaking and entering status offender, to be sentenced as a Class E felon.
☐ 5. adjudges the defendant to be an armed habitual felon to be sentenced as a Class C felon (unless sentenced herein as a Class A, B1, or B2 felon) and with a minimum term of imprisonment of no less than 120 months.

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Habitual Felon MARs

- **Retroactivity.**
  - 2011 JRA changes are prospective only
  - 8th Amendment doesn't require retroactivity
  - G.S. 15A-1415(b)(7) doesn't require retroactivity
- **Challenges to previous felonies.**
  - When a previous felony goes bad

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Violent Habitual Felon

30

Violent Habitual Felon

- **Not common.**
  - No more than 35 charges statewide in any recent year
  - No more than 8 convictions statewide in any recent year
- **Qualifying substantive and previous felonies.**
  - "All Class A through E felonies" or substantially similar crimes from other jurisdictions
    - G.S. 14-7.7
  - Underinclusive and overinclusive

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Violent Habitual Felon

- Same requirement of non-overlap
- Only need two previous felonies
- Can both be <18
- Procedure is similar to habitual felon
- LWOP

32

Violent Habitual Felon

- The State may charge both HF and VHF
  - Example
    - D charged with Class E felony child abuse (serious bodily injury)
    - State fears that jury may return Class F felony child abuse (serious physical injury)
    - D has two previous Class E assault convictions and a PWISD cocaine conviction
  - Bifurcate? Trifurcate?

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Habitual Breaking and Entering

34

Habitual Breaking/Entering

- Qualifying previous and current felonies

1st Degree Burglary	Class D
2nd Degree Burglary	Class G
Breaking Out Burglary	Class D
Felony Breaking or Entering	Class H
B/E with Intent to Terrorize	Class H
Breaking or Entering Church, Etc.	Class G
Similar Repealed Offenses	n/a
Similar Out-of-State Offenses	n/a

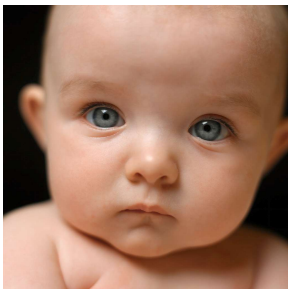
35

Habitual Breaking/Entering

- **Age.** Previous felony can be <18, current felony must be ≥ 18.
- **Procedure.** Mirrors habitual felon.
- **Punishment.**
  - Class E, so probation is possible at PRL I and II
  - Consecutive sentencing required, as with habitual felon
- **Relationship to habitual felon.**
  - HBE can't itself be a previous felony for HF purposes
  - HBE can't be further enhanced (H to E to C) under HF
  - Unlikely to have HF and HBE charged together

36

Armed Habitual Felon



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Armed Habitual Felon

- **Previous felonies.** Felonies in which:
  - D used or displayed a gun, and
  - The use of the gun was necessary to prove an element or to establish an aggravator or enhancement
- **Substantive felonies.**
  - Felony where jury finds D personally possessed gun and used or displayed it
  - The gun does not need to be necessary to prove an element or to establish an aggravator or enhancement

38

Armed Habitual Felon

- **Same general structure as HF.**
- **Confusing provisions.**
  - Statute sometimes refers to crimes involving "use or display" of gun, sometimes to "use, display, or threatened use or display"
  - Statute sometimes refers to firearms, sometimes to "firearm or deadly weapon"

39

Armed Habitual Felon

- **Requires useless (?) findings.**

(NOTE: *If offender is not also a reportable conviction in No. 9 above, this finding requires no further action by the court.*)
☐ 10. finds that a ☐ motor vehicle ☐ commercial motor vehicle was used in the commission of the offense and that it shall be reported to DMV.
☐ 11. finds this is an offense involving assault, communicating a threat, or an act defined by G.S. 50B-1(a), and the defendant had a personal relationship as defined by G.S. 50B-1(b) with the victim.
☐ 12. *(offenses committed on or after Dec. 1, 2008, only)* finds the above designated offense(s) involved criminal street gang activity. G.S. 14-50.25.
☐ 13. did not grant a conditional discharge under G.S. 90-96(a) because *(check all that apply)* ☐ the defendant refused to consent. ☐ *(offenses committed on or after Dec. 1, 2013, only)* the Court finds, with the agreement of the District Attorney, that the offender is inappropriate for a conditional discharge for factors related to the offense.
☐ 14. finds that the defendant used or displayed a firearm while committing the felony. G.S. 15A-1382.2.

- **AHF, VHF, and HF together.**

40

Questions?

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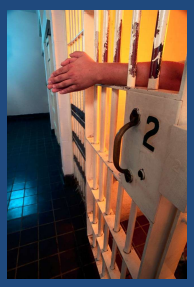

HABITUAL FELON AND RELATED OFFENSES

Jeff Welty
School of Government

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Tab:
Jury Argument

JURY ARGUMENT

R. GREG HORNE
SUPERIOR COURT JUDGE
35TH DISTRICT
R.GREGORY.HORNE@NCCOURTS.ORG

1

N.C.G.S.§15A-1230(a)

During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

2

3

State v. Jones, 355 N.C. 117 (2002).

"Thus, it is incumbent on the trial court to ***monitor vigilantly*** the course of such arguments, to intervene as warranted, to entertain objections, and to impose any remedies pertaining to those objections."

4

So what does that look like? Probably not this:

- State v. Bayman, 336 N.C. 748 (1994).
- "The prosecutor's closing argument was not transcribed, and the trial judge was out of the courtroom when defendant's objection was raised."

5

Practice Pointer #1

Probably best to stay in the courtroom for both opening and closing argument.

6

7

State v. Huey, 370 N.C. 174 (2017).

"(W)e are disturbed that some counsel may be purposefully crafting improper arguments, attempting to get away with as much as opposing counsel and the trial court will allow, rather than adhering to statutory requirements and general standards of professionalism. Our concern stems from the fact that the same closing argument language continues to reappear before this Court despite our repeated warnings that such arguments are improper. . . We, once again, instruct trial judges to be prepared to intervene *ex mero motu* when improper arguments are made."

8

N.C.G.S.§15A-1230(a)

During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

9

N.C. R. Super. & Dist. Cts. Rule 12:

Counsel are at all times to conduct themselves with dignity and propriety. . . . Adverse witnesses and suitors should be treated with fairness and due consideration. Abusive language or offensive personal references are prohibited. . . . Counsel shall not knowingly misinterpret the contents of a paper, the testimony of a witness, the language or argument of opposite counsel or the language of a decision or other authority; nor shall he offer evidence which he knows to be inadmissible.

10

N.C. R. Prof. Cond. Rule 3.4(e):

Fairness to opposing party and counsel - A lawyer shall not:
(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, ask an irrelevant question that is intended to degrade a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

11

St. v. Locklear, 294 N.C. 210 (1978).

"It is the responsibility of the trial judge to maintain a courtroom atmosphere and decorum appropriate to judicial proceedings. He should intervene, on his own motion if necessary, in cases of flagrant and prejudicial misconduct of counsel. If counsel's misconduct is in wilful violation of the court's rulings and instructions, exercise of the contempt powers may be appropriate…All lawyers are officers of the court and subject to its lawful orders as well as to the provisions of the North Carolina State Bar Code of Professional Responsibility."

12

"Within these statutory confines, we have long recognized that prosecutors are given ***wide latitude*** (emphasis added) in the scope of their argument and may argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom."

St. v. Huey, 370 N.C. 174 (2017).

13

Cases Present in Two Ways:

1. Counsel Raises an objection
   - Trial Court rules on the objection and may give a curative instruction
   - Review Standard: Abuse of Discretion

2. No Objection
   - Trial Court Either Intervenes or Does Not
   - Review Standard: Gross Impropriety

14

State v. Parker, 377 N.C. 466 (2021).

- "Arguments of counsel are largely in the control and discretion of the trial court. The appellate courts ordinarily will not review the exercise of that discretion unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury."

15

State v. Parker, 377 N.C. 466 (2021).

"When defendant does not object to comments made by the prosecutor during closing arguments, only an extreme impropriety . . . will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting ex mero motu an argument that defense counsel apparently did not believe was prejudicial when originally spoken."

16

State v. Womble, 343 N.C. 667(1996).

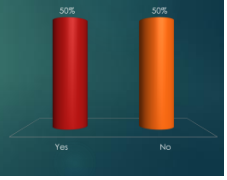
"When determining whether the prosecutor's remarks are grossly improper, the remarks must be viewed in context and in light of the overall factual circumstances to which they refer."

17

Facts in Evidence and Reasonable Inferences.

May a prosecutor argue a factual scenario that was not established by direct evidence during the trial?

A. Yes
B. No



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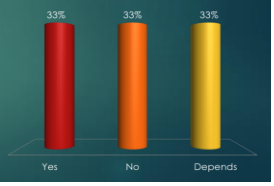
- Yes. "Prosecutors may, in closing arguments, create a scenario of the crime committed as long the record contains sufficient evidence from which the scenario is reasonably inferable." **St. v. Frye, 341 N.C. 470 (1995), *cert. denied*, 517 U.S. 1123 (1996).**
- "Conversely, counsel is prohibited from arguing facts which are not supported by the evidence." St. v. Williams, 317 N.C. 474 (1986).

19

May the prosecutor argue in a statutory sex offense case: "Odds are [Jane] is not his first victim, but she is the one who ultimately told"?

A. Yes
B. No
C. Depends



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No. The argument is improper. "In making this statement, the prosecution argued outside the evidence and implied that defendant may have assaulted other minors in the past."

St. v. Hunt, 2013 N.C. App. LEXIS 13 (2013).

21

But *Hunt* also underscores the importance of the different standards of review and their application.

1) Objection = Abuse of Discretion

2) No Objection = Gross Impropriety

22

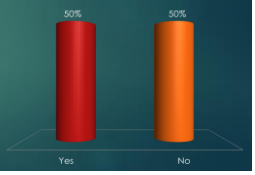
…"(D)efense counsel in the present case did not object to the prosecutor's comment. Although we find that the prosecution's statement was improper, it does not rise to the level of gross impropriety that would allow this Court to find that the trial court abused its discretion in failing to intervene *ex mero motu.* Defendant has failed to establish that the State's argument rendered the conviction fundamentally unfair, and defendant's argument is overruled." *Id. at 17.*

23

Credibility of Witnesses.

May an attorney, based on her analysis of the evidence, argue that a witness is a liar?

A. Yes
B. No



24

No. "In particular, 'we have found ***grossly improper*** (emphasis added) the practice of flatly calling a witness or opposing counsel a liar when there has been no evidence to support the allegation.'"

St. v. Hembre, 368 N.C. 2 (2015).

25

"It is improper for a lawyer to assert his opinion that a witness is lying. 'He can argue to the jury that they should not believe a witness, but he should not call him a liar.'" St. v. Locklear, 294 N.C. 210 (1978).

"Liar" or "lying" should draw the court's immediate attention. But it does not have to be that direct.

26

27

"Not until two years later when he could look at everything, when he can study the evidence, when he can get legal advi[c]e from his attorneys, does he come up with this elaborate tale as to what took place.

Two years later, after he gives all these confessions to the police and says exactly how he killed Heather and Randi Saldana . . . the defense starts. The defendant, along with his two attorneys, come together to try and create some sort of story."

28

"In context, the import of these arguments is clear: The State argued to the jury, not only that defendant had confessed truly and recanted falsely, but that he had lied on the stand in cooperation with defense counsel…Accordingly, we hold that the prosecutor's statements to this effect were grossly improper, and the trial court erred by failing to intervene *ex mero motu*."

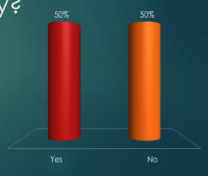
St. v. Hembre, 368 N.C. 2 (2015).

29

Role of the Jury.

May a prosecutor argue that the jury should act as the voice and conscience of the community?

A. Yes
B. No



30

Yes. "Prosecutorial argument encouraging 'the jury to lend an ear to the community rather than a voice' is improper. However, we have repeatedly stated that it is proper to urge the jury to act as the voice and conscience of the community."

St. v. Bishop, 346 N.C. 365 (1997).

31

"-(T)he jury may speak for the community, but the community cannot speak to the jury."

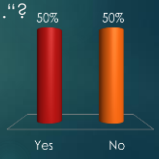
St. v. Barden, 356 N.C. 316 (2002)

32

Defendant's Silence.

May a prosecutor argue as follows: "Now, it is a principle of law that, when applied in these trials, that the State nor the defense cannot show a person's criminal record *unless that person testified from this witness stand . . .*"?

A. Yes
B. No



33

No. "The thrust of the statement at that point is to suggest in unmistakable terms that defendant had failed to testify. Such remark violates the rule that counsel may not comment upon the failure of a defendant in a criminal prosecution to testify. This is forbidden by G.S. 8-54."

St. v. Monk, 286 N.C. 509 (1975).

34

"We have stated that prosecutors may comment on a defendant's failure to produce witnesses (**except** failure to call Defendant's spouse as witness) or exculpatory evidence to contradict or refute evidence presented by the State."

St. v. Barden, 356 N.C. 316 (2002) (see HN58 as to failure to call spouse citing N.C.G.S. 8-57(a)).

35

Monk also sets out the proper trial court response.

"Improper comment on defendant's failure to testify may be cured by an instruction from the court that the argument is improper followed by prompt and explicit instructions to the jury to disregard it." *Id.* at 516.

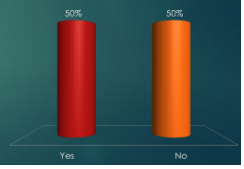
"See State v. Lindsay, 278 N.C. 293 (1971), for an instruction on this point which we approve." *Id.*

36

Placing Jurors in Victim's Position

May a prosecutor ask the jurors to put themselves in the victim's place?

A. Yes
B. No



37

No. "The State is not permitted to make arguments asking the jurors to put themselves in the victims' places." St. v. Roache, 358 N.C. 243 (2004).

However, "this Court has repeatedly found no impropriety when the prosecutor asks the jury to imagine the fear and emotions of a victim." *Id*. at 298.

38

Name Calling and Abusive Arguments

"You got this quitter, this loser, this worthless piece of -- who's mean. . . . He's as mean as they come. He's lower than the dirt on a snake's belly." St. v. Jones, 355 N.C. 117 (2002).

'During closing argument the prosecutor characterized defendant as a "monster," "demon," "devil," "a man without morals" and as having a "monster mind." Such improper characterizations of defendant amounted to no more than name-calling…'. St. v. Mathews, 358 N.C. 102 (2004).

"As for the term 'parasite,' this name-calling by the State was unnecessary and unprofessional, but does not rise to the level of gross impropriety." ("liar" and "con man" not improper under facts). St. v. Twitty, 212 N.C.App. 100 (2011).

39

"As this was a trial for first-degree murder involving a calculated armed robbery and an unprovoked killing, it was not improper for the State to refer to defendant as 'cold-blooded murderer.'"

St. v. Harris, 338 N.C. 211 (1994).

40

"(W)e hold that the prosecutor's repeated degradations of defendant: (1) shifted the focus from the jury's opinion of defendant's character and acts to the prosecutor's opinion, offered as fact in the form of conclusory name-calling, of defendant's character and acts; and (2) were purposely intended to deflect the jury away from its proper role as a fact-finder by appealing to its members' passions and/or prejudices."

St. v. Jones, 355 N.C. 117 (2002).

41

42

State v. Harbison, 315 N.C. 175 (1985)

"(W)e conclude that ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent."

43

St. v. Maready, 205 N.C. App. 1 (2010).

Harbison analysis still applies post-Florida v. Nixon (543 U.S. 363 (1991)).

44

"Defense counsel's statements were not the equivalent of asking the jury to find defendant guilty of any charge, and therefore, *Harbison* does not control." St. v. Strickland, 346 N.C. 443 (1997).

"To establish a *Harbison* claim, the defendant must first show that his trial attorney has made a concession of guilt." St. v. Maniego, 163 N.C. App. 676 (2004).

45

"Admission by defense counsel of an element of a crime charged, while still maintaining the defendant's innocence, does not necessarily amount to a *Harbison* error." St. v. Wilson, 236 N.C. App. 472 (2014).

"Because this purported admission by Defendant's counsel did not refer to either the crime charged or to a lesser-included offense, counsel's statements in this case fall outside of *Harbison*." *Id. at 477.*

46

Tab: Criminal Non-Jury Trials

Criminal Non-Jury Trials

1

North Carolina Constitution
Article I, Section 24

Right of jury trial in criminal cases. No person shall be convicted of any crime but by the unanimous verdict of a jury in open court. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo.

2

North Carolina Constitution
Article I, Section 24

- Limitation codified in NCGS §15A-1201
- North Carolina last state which did not allow waiver of jury trials in criminal cases

3

North Carolina Constitution
Article I, Section 24 (amended 2014)

Right of jury trial in criminal cases.
No person shall be convicted of any crime but by the unanimous verdict of a jury in open court, **except** that a person accused of any criminal offense for which the **State is not seeking a sentence of death in superior court may, in writing or on the record in the court and with the consent of the trial judge, waive jury trial, subject to procedures prescribed by the General Assembly.** The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo. (2013-300, s. 1.)

4

Right to waive jury trial
Article I, Section 24 (amended 2014)

- State not seeking sentence of death
- In writing or on the record
- With the consent of the trial judge
- Subject to procedures prescribed by General Assembly

5

NCGS §15A-1201(a)-(e)

N.C. General Assembly amended statute to set out procedures for waiving a jury trial

- Effective 12/1/14-arraignments on or after this date
- Effective 10/1/15-waivers on or after this date

6

NCGS §15A-1201

effective 12/1/14

Permitted waiver by Defendant if:

- State not seeking sentence of death
- Made knowingly and voluntarily
- In writing or on the record
- With the trial judge's consent

7

NCGS §15A-1201

Effective October 1, 2015

- applicable to defendants waiving their right to trial by jury on or after October 1, 2015
- clarification of law and fact to be decided
- procedure for joined defendants
- method of providing notice of intent to waive, and when
- procedure for judicial consent to waiver
- procedure to revoke waiver
- requirements for resolving motions to suppress

8

Procedures to waive jury trial NCGS 15A-1201

- Notice of intent to waive
- State schedule hearing on waiver
- Judicial consent to jury waiver

9

Step 1

Notice of intent to waive by one of three methods:

- Stipulation
- File written notice of intent to waive with court
- Give notice on the record in open court

10

Stipulation
NCGS § 15A-1201(c)(1)

- may be conditioned on each party's consent to the trial judge
- signed by both the State and the defendant
- served on the counsel for any co-defendants.

11

Filing a written notice with court
NCGS §15A-1201(c)(2)

- Serving that notice:
  -on the State
  -on counsel for any co-defendants
- Within the earliest of 10 working days after:
  (i) arraignment,
  (ii) service of a calendar setting under G.S. 7A-49.4(b), or
  (iii) setting of a definite trial date under G.S. 7A-49.4(c).

12

Waive on the record in open court NCGS §15A-1201(c)(3)

By the earlier of :

(i) the time of arraignment

(ii) calling of the calendar under G.S. 7A-49.4(b) or G.S. 7A-49.4(c).

13

Advance notice of waiver

Rutledge, 267 N.C. App. 91 (2019)

- waiver still proper if:
  - Defendant gives notice on date of trial
  - Consent by State and trial court
  - Defendant invites compliance by failure to request separate arraignment
- even if no proper notice, prejudice required

14

Step 2
State schedule hearing

- matter to be heard in open court
- before the trial judge who will actually preside over the trial

Note: No time frame in which State must set matter for hearing

15

Step 3
Judicial consent to jury waiver

Trial judge **shall**:

- Address defendant personally to determine understanding
- Determine State's position
- Consider arguments by State and defendant

16

Address defendant personally to determine understanding

- determine whether the defendant fully understands decision to waive the right to trial by jury
- appreciates the consequences of the defendant's decision to waive the right to trial by jury.

See Waiver of Jury Trial

See Form 405

17

Personally address defendant

State v. Hamer, 377 N.C. 502 (2021)

- failed to personally address defendant, but no prejudice
- overwhelming evidence of guilt

18

State v. Rollinson
383 N.C. 528 (2022)

Not abuse of discretion to accept waiver when

- Defense counsel responded instead of defendant who wished to waive
- Defendant signed jury trial waiver form under oath

19

Knowing and voluntary

State v. Swink, 252 N.C. App. 218 (2016

- sufficient colloquy
- in writing and in open court
- signed waiver form which stated rights given

20

Determine State's position

Determine whether the State objects to the waiver and, if so, why.

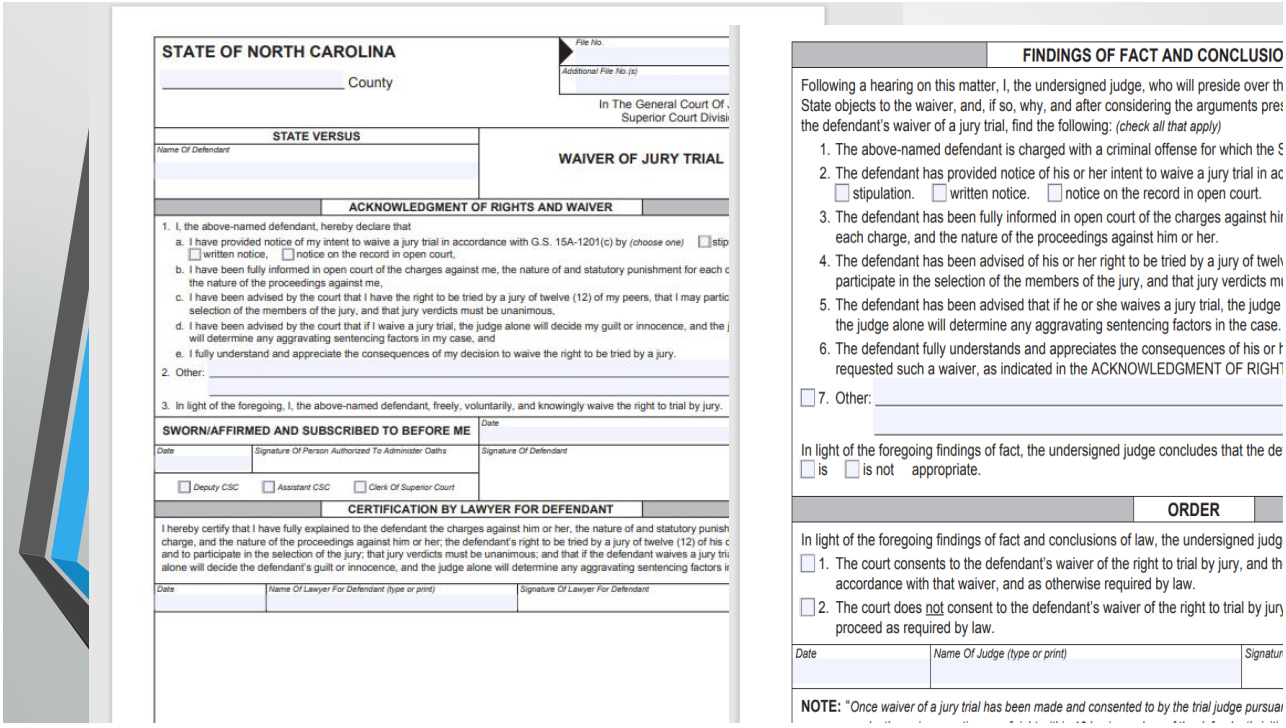
Note: State's consent not required

21

Consider arguments by State and defendant

Consider the arguments presented by both the State and the defendant regarding the defendant's waiver of a jury trial.

22



STATE OF NORTH CAROLINA

_____ County

File No.

Additional File No.(s)

In The General Court Of
Superior Court Divisi

STATE VERSUS

Name Of Defendant

WAIVER OF JURY TRIAL

ACKNOWLEDGMENT OF RIGHTS AND WAIVER

1. I, the above-named defendant, hereby declare that
   a. I have provided notice of my intent to waive a jury trial in accordance with G.S. 15A-1201(c) by *(choose one)* ☐ stip ☐ written notice, ☐ notice on the record in open court,
   b. I have been fully informed in open court of the charges against me, the nature of and statutory punishment for each c the nature of the proceedings against me,
   c. I have been advised by the court that I have the right to be tried by a jury of twelve (12) of my peers, that I may partic selection of the members of the jury, and that jury verdicts must be unanimous,
   d. I have been advised by the court that if I waive a jury trial, the judge alone will decide my guilt or innocence, and the j will determine any aggravating sentencing factors in my case, and
   e. I fully understand and appreciate the consequences of my decision to waive the right to be tried by a jury.
2. Other: _____
3. In light of the foregoing, I, the above-named defendant, freely, voluntarily, and knowingly waive the right to trial by jury.

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME

Date

Date | Signature Of Person Authorized To Administer Oaths | Signature Of Defendant

☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court

CERTIFICATION BY LAWYER FOR DEFENDANT

I hereby certify that I have fully explained to the defendant the charges against him or her, the nature of and statutory punish charge, and the nature of the proceedings against him or her; the defendant's right to be tried by a jury of twelve (12) of his c and to participate in the selection of the jury; that jury verdicts must be unanimous; and that if the defendant waives a jury tri alone will decide the defendant's guilt or innocence, and the judge alone will determine any aggravating sentencing factors i

Date | Name Of Lawyer For Defendant (type or print) | Signature Of Lawyer For Defendant

FINDINGS OF FACT AND CONCLUSIO

Following a hearing on this matter, I, the undersigned judge, who will preside over th State objects to the waiver, and, if so, why, and after considering the arguments pres the defendant's waiver of a jury trial, find the following: *(check all that apply)*

1. The above-named defendant is charged with a criminal offense for which the S
2. The defendant has provided notice of his or her intent to waive a jury trial in ac ☐ stipulation. ☐ written notice. ☐ notice on the record in open court.
3. The defendant has been fully informed in open court of the charges against hi each charge, and the nature of the proceedings against him or her.
4. The defendant has been advised of his or her right to be tried by a jury of twel participate in the selection of the members of the jury, and that jury verdicts m
5. The defendant has been advised that if he or she waives a jury trial, the judge the judge alone will determine any aggravating sentencing factors in the case.
6. The defendant fully understands and appreciates the consequences of his or h requested such a waiver, as indicated in the ACKNOWLEDGMENT OF RIGHT

☐ 7. Other: _____

In light of the foregoing findings of fact, the undersigned judge concludes that the de ☐ is ☐ is not appropriate.

ORDER

In light of the foregoing findings of fact and conclusions of law, the undersigned judg

☐ 1. The court consents to the defendant's waiver of the right to trial by jury, and th accordance with that waiver, and as otherwise required by law.

☐ 2. The court does not consent to the defendant's waiver of the right to trial by jury proceed as required by law.

Date | Name Of Judge (type or print) | Signatur

NOTE: *"Once waiver of a jury trial has been made and consented to by the trial judge pursua*

23

Decision on Waiver

The decision to grant or deny the defendant's request for a bench trial shall be made by the judge who will actually preside over the trial.

24

Scope of Waiver of Jury Trial
NCGS §15A-1201(b)

- Whole matter of law and fact heard by trial judge
- Determination of sentencing factors heard by trial judge
- Judgment given by court

25

Judgment
NCGS 15A-1201(b)

Judgment given by trial judge

- should announce findings made beyond a reasonable doubt
- statute does not provide for FOF or COL

State v. Cheeks, 267 N.C. App. 579 (2019)

26

Revocation of Waiver NCGS §15A-1201(e)

- within 10 business days of initial notice.
- at other times, in discretion of trial judge, if no unreasonable hardship or delay to the State.
- once revocation granted, decision is final and binding.

27

10-day revocation of waiver

State v. Rutledge, 267 N.C. App. 91 (2019)

- 10 days, if waiver in advance of trial
- No cooling off period-cause unnecessary delays

28

Co-defendants

NCGS §15A-1201(b)

If joinder of co-defendants:

shall be a jury trial **UNLESS**

all defendants waive the right to trial by jury

OR

the court, in its discretion, severs the case.

29

Motions to Suppress

NCGS §15A-1201(f)

The court shall make written findings of fact and conclusions of law.

30

State v. Jones
248 N.C. App. 418 (2016)

Motion to Suppress:

Same judge could hear and preside over trial because:

- Defendant chose to waive jury trial and proceed with a bench trial
- Trial court is presumed to disregard inadmissible evidence

31

Additional Considerations

- Habitual felon
- Status of waiver on remand for retrial or mistrial
- Logistics for out-of-county trial judges
- Judge's denial of waiver of jury trial

32

Criminal Non-Jury Trials

by Gale M. Adams

Advanced Criminal Procedure 2024

Article I, Section 24 of the North Carolina Constitution, captioned "Right of jury trial in criminal cases," formerly read,

> No person shall be convicted of any crime but by the unanimous verdict of a jury in open court. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo.

Under this provision, criminal defendants in district court charged with a misdemeanor were not entitled to a jury trial and criminal defendants charged with a felony could not waive the right to a jury trial, unless they were pleading guilty.

In November 2014, the citizens of North Carolina, however, voted to amend Article I, Section 24 of the North Carolina Constitution to allow criminal defendants charged with a felony to waive the right to a jury trial. This amendment was codified in North Carolina General Statute §15A-1201. Although that statute became effective December 1, 2014 and applied to defendants arraigned on or after that date, Section 15A-1201 was again amended and this amendment became effective October 1, 2015 and is applicable to defendants waiving their right to trial by jury on or after this date.

North Carolina General Statute **§15A-1201** provides:

(a) Right to Jury Trial. – In all criminal cases the defendant has the right to be tried by a jury of 12 whose verdict must be unanimous. In the district court the judge is the finder of fact in criminal cases, but the defendant has the right to appeal for trial de novo in superior court as provided in G.S. 15A-1431. In superior court all criminal trials in which the defendant enters a plea of not guilty must be tried before a jury, unless the defendant waives the right to a jury trial, as provided in subsection (b) of this section.

(b) Waiver of Right to Jury Trial. – A defendant accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, knowingly and voluntarily, in writing or on the record in the court and with the consent of the trial judge, waive the right to trial by jury. When a defendant waives the right to trial by jury under this section, the jury is dispensed with as provided by law, and the whole matter of law and fact, to include all factors referred to in G.S. 20-179 and subsections (a1) and (a3) of G.S. 15A-1340.16, shall be heard and judgment given by the court. If a motion for joinder of co-defendants is allowed, there shall be a jury trial unless all defendants waive the right to trial by jury, or the court, in its discretion, severs the case.

(c) A defendant seeking to waive the right to trial by jury under subsection (b) of this section shall give notice of intent to waive a jury trial by any of the following methods:

(1) Stipulation, which may be conditioned on each party's consent to the trial judge, signed by both the State and the defendant and served on the counsel for any co-defendants.
(2) Filing a written notice of intent to waive a jury trial with the court and serving on the State and counsel for any co-defendants within the earliest of (i) 10 working days after arraignment, (ii) 10 working days after service of a calendar setting under G.S. 7A-49.4(b), or (iii) 10 working days after the setting of a definite trial date under G.S. 7A-49.4(c).
(3) Giving notice of intent to waive a jury trial on the record in open court by the earlier of (i) the time of arraignment or (ii) the calling of the calendar under G.S. 7A-49.4(b) or G.S. 7A-49.4(c).

(d) Judicial Consent to Jury Waiver. – Upon notice of waiver by the defense pursuant to subsection (c) of this section, the State shall schedule the matter to be heard in open court to determine whether the judge agrees to hear the case without a jury. The decision to grant or deny the defendant's request for a bench trial shall be made by the judge who will actually preside over the trial. Before consenting to a defendant's waiver of the right to a trial by jury, the trial judge shall do all of the following:

(1) Address the defendant personally and determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury.
(2) Determine whether the State objects to the waiver and, if so, why. Consider the arguments presented by both the State and the defendant regarding the defendant's waiver of a jury trial.

(e) Revocation of Waiver. – Once waiver of a jury trial has been made and consented to by the trial judge pursuant to subsection (d) of this section, the defendant may revoke the waiver one time as of right within 10 business days of the defendant's initial notice pursuant to subsection (c) of this section if the defendant does so in open court with the State present or in writing to both the State and the judge. In all other circumstances, the defendant may only revoke the waiver of trial by jury upon the trial judge finding the revocation would not cause unreasonable hardship or delay to the State. Once a revocation has been granted pursuant to this subsection, the decision is final and binding.

(f) Suppression of Evidence. – In the event that a defendant who has waived the right to trial by jury pursuant to this section makes a motion to suppress evidence under Article 53 of this Chapter, the court shall make written findings of fact and conclusions of law.

A. Pretrial Procedure to Waive Right to Jury Trial

Defendant's Notice of Intent to Waive: A criminal defendant who seeks to waive his right to a jury trial must first give notice of his intent to do so by any one of three methods outlined in G.S. Section 15A-1201(c):

1. **Stipulation** (in writing), which may be conditioned on each party's consent to the trial judge, signed by both the State and the defendant and served on the counsel for any co-defendants.

2. **Filing a written notice of intent to waive a jury trial with the court** and serving on the State and counsel for any co-defendants within the earliest of (i) 10 working days after arraignment, (ii) 10 working days after service of a calendar setting under G.S. 7A-49.4(b), or (iii) 10 working days after the setting of a definite trial date under G.S. 7A-49.4(c).

3. **Giving notice of intent to waive a jury trial on the record in open court** by the earlier of (i) the time of arraignment or (ii) the calling of the calendar under G.S. 7A-49.4(b) or G.S. 7A-49.4(c).

Scheduling Hearing on Waiver: After the defendant notices the intent to waive the right to a trial by jury by one of the aforementioned methods, the State must schedule the matter for hearing in open court.

Note: The statute does not provide a time limit within which the hearing on the waiver must be set.

Hearing on Judicial Acceptance/Consent to Jury Waiver: Under G.S. 15A-1201(d), after the State has scheduled the matter for hearing:

1. The trial judge who will actually preside over the trial must decide whether to grant or deny the defendant's request for a bench trial.

2. Before consenting to a defendant's waiver of the right to a trial by jury, the trial judge shall do all of the following:

   a. Address the defendant personally and determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury. The defendant should be advised as follows to ensure a knowing and voluntary waiver:

      (1) charges against the defendant;
      (2) nature of and statutory punishment for each charge;
      (3) nature of the proceedings against the defendant;
      (4) the right to be tried by a jury of twelve of their peers;
      (5) the right to participate in the selection of the members of the jury;
      (6) the jury verdict must be unanimous;
      (7) the judge alone will decide their guilt or innocence;
      (8) the judge alone will determine any aggravating sentencing factors in their case; and
      (9) if have any questions about waiver or information provided.

(See Attachment A: Waiver of Jury Trial, for more detailed colloquy.)

b. Determine whether the State objects to the waiver and, if so, why.

c. Consider the arguments presented by both the State and the defendant regarding the defendant's waiver of a jury trial.

3. After the defendant is properly advised of his rights, the defendant should execute ACKNOWLEDGEMENT OF RIGHTS AND WAIVER, (Attachment B: See Form 405) documenting that informed of rights and is knowingly and voluntarily waiving right to a jury trial.

4. The judge who will preside over the non-jury trial should make the appropriate findings of fact and conclusions of law and enter an order indicating whether the court consents or does not consent to the defendant's waiver of the right to trial by jury. (Attachment B: See Form 405)

B. Trial Procedure

Scope of Judge's Decisions at Trial: When the defendant waives a trial by jury, the court hears "the whole matter of law and fact" and determines whether the defendant is guilty beyond a reasonable doubt or not guilty. G.S. 15A-1201(b)

1. If the trial judge finds the defendant guilty, the trial judge also sentences the defendant.

2. The trial judge also decides on the existence of aggravating factors, to include all factors referred to in G.S. 20-179 and subsections (a1) and (a3) of G.S. 15A-1340.16.

Co-defendants Joined for Trial: If co-defendants are joined for trial, there shall be a jury trial unless all defendants waive the right to trial by jury, or the court, in its discretion, severs the case. G.S. 15A-1201(b):

C. Revocation of Waiver: Pursuant to G.S. 15A-1201(e), once the defendant requests to waive the right to a jury trial and that request has been consented to by the trial judge:

1. The defendant may revoke the waiver, in open court, **one** time, as of right, **within 10 business days** of initial notice, with the State present.

2. In all other circumstances, the defendant may only revoke the waiver if the trial judge finds that the revocation will not cause unreasonable hardship or delay to the State.

3. Once the revocation has been granted, the decision is final and binding.

D. Motions to Suppress: G.S. 1201(f) provides, when a defendant makes a motion to suppress evidence under Chapter 15A, Article 53, the judge shall make written findings of fact and conclusions of law.

The trial judge who suppressed evidence pursuant to a motion to suppress may also preside over the bench trial, absent a showing of prejudice. *State v. Jones, 248 N.C. App 418, 424, 789 S.E.2d 651, 656 (2016)* (N.C. Court of appeals found that judges are presumed to disregard incompetent evidence and the defendant chose to waive his right to a jury trial with full knowledge that the same judge who granted his pretrial motion to suppress would be presiding over his bench trial).

E. Practical Considerations

1. Announcing Verdict

When announcing the verdict, announce that the finding that the defendant is guilty or not guilty or of the existence of aggravating factors is "beyond a reasonable doubt."

2. Defendant has no absolute right to non-jury trial.

The Supreme Court rejected the appellant's contention that he had an unrestricted right to waive a jury trial. Chief Justice Warren wrote:

> "We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury -- the very thing that the Constitution guarantees him."

Singer v. United States, 380 U.S. 24, 36,13 L.Ed.2d 630, 85 S.Ct. 783 (1965). See also *Patton v. United States*, 281 U.S. 276, 312-13, 74 L. Ed. 854, 50 S. Ct. 253 (1930). *See also United States v. Clausell*, 389 F.2d 34, 35 (2d Cir. 1968). *U.S. v Clapps, 732 F.2d 1148, 1151 (3d Cir. 1984)*

Waiver of Jury Trial

Are you able to hear and understand me?
Are you now under the influence of any alcoholic beverages, drugs, narcotics, or other pills?
How old are you?
Have you completed high school? College? If not, what is the last grade you completed?
Do you know how to read? Write?
Do you suffer from any mental handicap? Physical handicap?
Do you understand that you are charged with _____, and that if you are convicted of this [these] charge[s], you could be imprisoned for a maximum of _____ and that the minimum sentence is _____? [Add fine or restitution if necessary.]
Do you understand that you have the right to be tried by a jury of twelve (12)?
Do you understand that you may participate in the selection of the members of the jury?
Do you understand that jury verdicts must be unanimous?
Do you understand that if you waive a jury trial, the judge alone will decide your guilt or innocence?
Do you understand the judge alone will determine any aggravating factors in your case?
Has your lawyer fully explained to you the consequences of waiving a jury trial?
Do you believe that you fully understand and appreciate the consequences of your decision to waive the right to be tried by a jury?
Do you now knowingly and voluntarily waive your right to a jury trial in this case?
Has anyone promised you anything or threatened you in any way to cause you to waive your right to a jury trial?
With all these things in mind, do you now wish to ask me any questions about what I have just said to you?

Attachment A

STATE OF NORTH CAROLINA

_____ County

File No.

Additional File No.(s)

In The General Court Of Justice
Superior Court Division

STATE VERSUS

Name Of Defendant

WAIVER OF JURY TRIAL

G.S. 15A-1201

ACKNOWLEDGMENT OF RIGHTS AND WAIVER

1. I, the above-named defendant, hereby declare that
   a. I have provided notice of my intent to waive a jury trial in accordance with G.S. 15A-1201(c) by *(choose one)* ☐ stipulation, ☐ written notice, ☐ notice on the record in open court,
   b. I have been fully informed in open court of the charges against me, the nature of and statutory punishment for each charge, and the nature of the proceedings against me,
   c. I have been advised by the court that I have the right to be tried by a jury of twelve (12) of my peers, that I may participate in the selection of the members of the jury, and that jury verdicts must be unanimous,
   d. I have been advised by the court that if I waive a jury trial, the judge alone will decide my guilt or innocence, and the judge alone will determine any aggravating sentencing factors in my case, and
   e. I fully understand and appreciate the consequences of my decision to waive the right to be tried by a jury.
2. Other: _____
   _____.
3. In light of the foregoing, I, the above-named defendant, freely, voluntarily, and knowingly waive the right to trial by jury.

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME

Date

Date | Signature Of Person Authorized To Administer Oaths

☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court

Signature Of Defendant

CERTIFICATION BY LAWYER FOR DEFENDANT

I hereby certify that I have fully explained to the defendant the charges against him or her, the nature of and statutory punishment for each charge, and the nature of the proceedings against him or her; the defendant's right to be tried by a jury of twelve (12) of his or her peers, and to participate in the selection of the jury; that jury verdicts must be unanimous; and that if the defendant waives a jury trial, the judge alone will decide the defendant's guilt or innocence, and the judge alone will determine any aggravating sentencing factors in the case.

Date	Name Of Lawyer For Defendant (type or print)	Signature Of Lawyer For Defendant

(Over)

AOC-CR-405, Rev. 12/15

Attachment B

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Following a hearing on this matter, I, the undersigned judge, who will preside over the defendant's trial, after determining whether the State objects to the waiver, and, if so, why, and after considering the arguments presented by both the State and the defendant regarding the defendant's waiver of a jury trial, find the following: *(check all that apply)*

1. The above-named defendant is charged with a criminal offense for which the State is not seeking a sentence of death.
2. The defendant has provided notice of his or her intent to waive a jury trial in accordance with G.S. 15A-1201(c) by *(choose one)*
   ☐ stipulation. ☐ written notice. ☐ notice on the record in open court.
3. The defendant has been fully informed in open court of the charges against him or her, the nature of and statutory punishment for each charge, and the nature of the proceedings against him or her.
4. The defendant has been advised of his or her right to be tried by a jury of twelve (12) of his or her peers, that he or she may participate in the selection of the members of the jury, and that jury verdicts must be unanimous.
5. The defendant has been advised that if he or she waives a jury trial, the judge alone will decide his or her guilt or innocence, and the judge alone will determine any aggravating sentencing factors in the case.
6. The defendant fully understands and appreciates the consequences of his or her decision to waive the right to trial by jury, and has requested such a waiver, as indicated in the ACKNOWLEDGMENT OF RIGHTS AND WAIVER, above.

☐ 7. Other: _____

_____.

In light of the foregoing findings of fact, the undersigned judge concludes that the defendant's requested waiver of the right to trial by jury ☐ is ☐ is not appropriate.

ORDER

In light of the foregoing findings of fact and conclusions of law, the undersigned judge hereby orders as follows: *(check one)*

☐ 1. The court consents to the defendant's waiver of the right to trial by jury, and the charge(s) against the defendant shall proceed in accordance with that waiver, and as otherwise required by law.

☐ 2. The court does <u>not</u> consent to the defendant's waiver of the right to trial by jury, and the charge(s) against the defendant shall proceed as required by law.

Date	*Name Of Judge (type or print)*	*Signature Of Judge*

NOTE: "*Once waiver of a jury trial has been made and consented to by the trial judge pursuant to subsection (d) of [G.S. 15A-1201], the defendant may revoke the waiver one time as of right within 10 business days of the defendant's initial notice pursuant to subsection (c) of [G.S. 15A-1201] if the defendant does so in open court with the State present or in writing to both the State and the judge. In all other circumstances, the defendant may only revoke the waiver of trial by jury upon the trial judge finding the revocation would not cause unreasonable hardship or delay to the State. Once a revocation has been granted pursuant to this subsection, the decision is final and binding." G.S. 15A-1201(e).*

Tab: Criminal Proc. & Confrontation Rights

UNDERSTANDING CONFRONTATION RIGHTS:

TESTIMONIAL VS. NONTESTIMONIAL STATEMENTS

BRITTANY BROMELL
MARCH 2024

1

THE SIXTH AMENDMENT

"In all criminal proceedings, the accused shall enjoy the right . . .to be confronted with the witnesses against him."

2

CONFRONTATION CLAUSE BASIC RULE

The Confrontation Clause prohibits the admission of testimonial, out of court statements by an unavailable witness at trial unless the defendant had a prior opportunity to cross examine the witness.

3

CONFRONTATION CLAUSE BASIC RULE

The Confrontation Clause prohibits the admission of testimonial, out of court statements by an unavailable witness at trial unless the defendant had a prior opportunity to cross examine the witness.

4

5

WHAT IS A TESTIMONIAL STATEMENT?

- A statement that has the primary purpose of establishing or proving past facts for potential later use in a criminal prosecution
- If the primary purpose is not to establish past facts but rather to allow law enforcement to respond to an ongoing emergency, it is not testimonial
- Objective test based on all the circumstances

6

PRIMARY PURPOSE TEST FACTORS

- What was the purpose of the statement from the perspective of a reasonable person?
- Was there objectively an ongoing emergency?
- Was there an ongoing threat to first responders or the public?
- What was the declarant's medical condition?
- How formal or informal were the circumstances under which the statement was made?

7

Ongoing Emergency	No Ongoing Emergency
• The perpetrator remains at the scene and is not in law enforcement custody • The dispute is a public, not a private one • The perpetrator is at large/location is unknown • A gun or other weapon with a "long reach" is involved • The location is unsecure • The victim is seriously injured • Medical attention is needed or the need for it is not yet determined • The questioning occurs close in time to the event • The victim or others call for assistance	• The perpetrator has fled and is unlikely to return • The dispute is a private, not a public one • The perpetrator's location is known/is in law enforcement custody • A fist or another weapon with a "short reach" is involved • The location is secure • No one is seriously injured • No medical attention is needed • There is a significant lapse of time between the event and the questioning • No call for assistance is made

8

POLICE AGENTS

- The police directed the victim to the interviewer or requested or arranged for the interview
- The interview was forensic
- A law enforcement officer was present during the interview
- A law enforcement officer observed the interview from another room
- A law enforcement officer videotaped the interview
- The interviewer consulted with a prosecution investigator before or during the interview
- The interviewer consulted with a law enforcement officer before or during the interview
- The interviewer asked questions at the behest of a law enforcement officer
- The purpose of the interview was to further a criminal investigation
- The lack of a non-law enforcement purpose to the interview
- The fact that law enforcement was provided with a videotape of the interview after it concluded

9

STATEMENTS TO OTHERS

- Family
- Friends
- Co-Workers
- Medical personnel (pediatricians, emergency room doctors, and sexual assault nurse examiners [SANE nurses])
- Social Workers
- Teachers

10

STATEMENTS TO OTHERS

- No categorical rule that statements made to people other than law enforcement are nontestimonial
- However, "such statements are much less likely to be testimonial than statements to law enforcement officers."

11

LET'S PRACTICE!

12

FORENSIC REPORTS

- Forensic reports are testimonial.
- A forensic report may not be simply read to the jury by a surrogate witness.
- Exception: the use of substitute analyst testimony. R. Evid. 703.

13

Substitute Analyst Testimony and Smith v. Arizona

October 17, 2023 by Phil Dixon

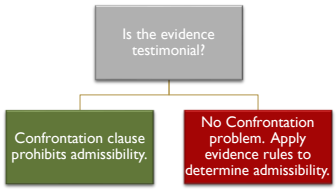
Print

14

OTHER REPORTS & RECORDS

- Machine-generated data → generally nontestimonial
- Medical reports and records → generally nontestimonial
- Business records → generally nontestimonial
  - Police reports → testimonial

15


Is the evidence testimonial?
Confrontation clause prohibits admissibility.
No Confrontation problem. Apply evidence rules to determine admissibility.

16

Tab:
Jury Management

JURY ISSUES

By: Robert C. Ervin

1. The jury sent a note through the bailiff asking to view a set of line-up photographs reviewed by the victim of the alleged crime. Both the Assistant District Attorney and the defense attorney object to allowing the jury to view the line-up photographs. Is it error to allow the jury to view the line-up photographs in the courtroom?

2. The defendant was tried and convicted of robbery. The alleged offense occurred in November, 1982. At trial, the State's case rested on eyewitnesses' identification of the defendant and the defendant relied on a defense of alibi contending that he lived in another state at the time of the robbery. During deliberations, the jury asked to view Exhibit #1, the photographic lineup, and with the consent of the parties the exhibit was delivered to the jury room. While viewing the photographs, a juror peeled back tape placed over a handwritten notation revealing the words "Police Department, Wilson, North Carolina— 12291, 12-07-81". The jurors discussed the notation as evidence contradicting the defendant's alibi defense. The defendant was convicted. Is the defendant entitled to a new trial?

3. During the trial of a robbery case, the State offered evidence of a statement made by the defendant to a detective. This evidence was presented when the detective read the defendant's statement to the jury. The statement itself was not introduced into evidence as an exhibit. The jury, while deliberating, sent out a note asking for "all statements of the defendant and any pictures taken." Should the Court, in the exercise of its discretion, provide the written copy of the statement that the detective read into evidence to the jury in response to their request?

4. The jury sent a note requesting that the testimony of two witnesses be re-read. Both the State and the defense agreed that the testimony should not be re-read. The trial court determined, in the exercise of its discretion, that the testimony should not be re-read to the jury. The trial court sent a written message to the jury, through the bailiff, denying the jury's request. Is this procedure permissible?

5. During jury deliberations, the foreperson of the jury returned to the courtroom and in open court and on the record asked the trial judge for a clarification of the law. The trial court judge answered the question in open court on the record and the foreperson returned to the jury room. Is this procedure error?

6. During jury deliberations, the jury sent a note to the trial judge requesting certain exhibits and transcripts of the testimony of four witnesses. The entire jury was returned to the courtroom. The trial court, with the consent of the parties, allowed the jury to take the exhibits into the jury room. The trial court denied the request for a transcript and indicated that the court reporter had not yet transcribed the testimony and the Court did not have the ability to present the transcript to the jury. The Court advised the jury that it was their responsibility and obligation to rely on their own recollection of the evidence. Is this procedure erroneous?

7. During the trial of a cocaine and methamphetamine trafficking case, the jury, during deliberations, sent the trial court a written question asking, "What was the amount of cocaine in

the cooler?" Is the trial court permitted to answer the jury's question concerning the facts of the case?

8. The jury advised the trial court that it was divided 9 to 3 in the case. The trial court gave additional instructions consistent with the pattern instruction customarily given when a jury reports a deadlock. The Court added at the conclusion of the pattern charge that "the main purpose of that is that it will be expensive again to have to get another jury to try this case over." Are the additional jury instructions permissible?

9. The courtroom clerk reported that when the jurors left the courtroom one juror commented to other jurors that he believed "when you take that Bible in your hand you are supposed to be telling the truth and I don't think that young boy was telling the truth." The Court excused the juror who reportedly made the comment without any further inquiry. Did the Court err by excusing this juror?

10. After jury deliberations began in a murder trial, a juror informed the judge that he could not return the next day because of a scheduled doctor's appointment. The trial court dismissed this juror, replaced him with an alternate juror and instructed the jury to begin its deliberations anew. Did the trial court judge err by removing the juror with the doctor's appointment, substituting an alternate juror and instructing the jurors to begin deliberations anew?

11. The defendant was escorted by police officers through the courtroom several minutes before court began. At the time, the defendant was handcuffed and wearing visible leg restraints. All of the jurors were present in the courtroom when the defendant was escorted through and each juror indicated, when questioned by the Court, that he or she had seen the defendant in handcuffs and leg restraints. Could the trial court properly deny a motion for a mistrial and rely on curative instructions to the jury?

12. During the trial of a murder case, the jury was sequestered at a local hotel. There was a police complaint originating from the hotel of disorderly conduct involving at least three jurors. Police officers observed three jurors in an intoxicated condition moving about in their underwear along the hallways. At least one juror was so intoxicated that he had to be threatened with arrest before he would agree to return to his hotel room. The trial court, after hearing evidence from law enforcement officers involved in the incident, declared a mistrial over the defendant's objection. Did the trial court err by ordering a mistrial?

13. During the course of the trial, a juror fell asleep. This occurred during defense counsel's cross-examination of one of the State's witnesses. Did the trial court err by not declaring a mistrial when it observed the juror sleeping during the trial?

14. During the course of a trial, a voir dire hearing was conducted concerning a statement that the defendant allegedly made to a relative. After the hearing, but prior to the introduction of any of the evidence presented at the voir dire hearing, a local newspaper published details of the evidence in a front-page news story. The defendant moved to inquire whether any jurors had read or heard about the article. Did the trial judge err by denying the defendant's request?

15. The defense lawyer advised the trial court that his secretary had informed him that someone called his office and left a message that one of the jurors had been talking about the case being tried with her mother-in-law. The juror reportedly said that she thought the defendant was guilty

because of the look on his face. The defendant requested an inquiry by the court concerning this information. Did the trial court err by failing to question the juror who had reportedly made these comments?

16. In a murder case, an individual reported to the court that she went to the coffee bar in the basement of the courthouse and observed some of the jurors. This individual heard one of the jurors say to the others that "the boy probably took a knife and cut himself and threw the knife away and is going to plead self-defense". The defense attorney asked the Court to inquire by calling the juror who allegedly spoke these words to be questioned about the incident. The trial court denied the request. Did the trial court err by denying this request?

17. During a first degree murder trial, the Assistant District Attorneys prosecuting the case advised the Court that a juror had contact with one of the assistants that morning when the juror brought an insurance letter to the District Attorney's office relating to a traffic citation the juror received prior to the beginning of the trial. The juror spoke to one of the ADAs, who referred the juror to an office employee, who later read the insurance letter to the ADA in order to determine whether the letter was sufficient. The employee took the juror's ticket and the juror returned to the courtroom. The citation was dismissed in accordance with the standard policies of the District Attorney's office. The defendant challenged the juror's ability to continue serving as a juror. The trial court denied this challenge. Did the trial court err by not replacing this juror with an alternate?

18. The jury began deliberations in a drug case on Wednesday and the Court recessed until Friday because of Veteran's Day. On Friday morning a juror returned to court with a two page typewritten document titled "Circumstantial Evidence" that listed fourteen circumstantial factors pointing toward the defendant's guilt. The juror gave the document to the bailiff and asked him to make copies to distribute to the other jurors. The bailiff gave the document to the trial judge. Defense counsel moved for an inquiry and a mistrial. The trial court denied both motions and returned the document to the juror without making copies. Did the trial court err?

19. The defendant was convicted of sexual battery. After the jury returned its verdict and before the sentencing hearing the next morning, the defendant's trial counsel moved for a mistrial. The defendant's attorney indicated that several jurors told him that jurors had admitted looking up legal terms such as "sexual gratification, reasonable doubt and intent" and the sexual battery statute on the internet during the trial. The trial court did not conduct and further inquiry and denied the defendant's motion for a mistrial. Did the trial court abuse its discretion by failing to act?

20. During the sentencing phase of a capital murder trial, a juror took a Bible into the jury room and read passages from the Old Testament concerning the death penalty to the other jurors and the jurors discussed those passages in their deliberations. The jury then returned a death sentence. On a Motion for Appropriate Relief, the defendant established that this occurred by testimony from jurors. Is the defendant entitled to a new trial?

21. A juror informed the court that she had received telephone calls the previous evening from an alternate juror. When the alternate juror was questioned, he informed the court that one of the bailiffs made comments after a defense expert testified to the effect that, "They can pay somebody enough money to say something was wrong with it" and "some of the people who testified for the defense were paid to say what—were here to say because they were paid." The

alternate juror indicated that about half the jurors were present when a bailiff made these remarks. Three jurors verified hearing these remarks. When the jurors who heard this bailiff's remarks were questioned, each juror indicated he or she was not influenced by the comments and could make a fair and impartial decision after the presentation of all the evidence. Could the trial court properly rely on the affected jurors' assurances that they could be fair and impartial and deny the defendant's motion for a mistrial?

22. A juror indicated in voir dire that he knew one of the State's witnesses and informed defense counsel that he had not worked with the witness in question on any law enforcement related matters. Later, the defendant learned that the juror was an active member of the Board of Directors of the local Crimestoppers organization and may have known the State's witness in that capacity. Does this evidence justify granting a new trial?

23. While jury was deliberating, the trial court judge went on the record and stated that "with permission of the parties, I knocked on the jury room door. They invited me in and I asked the foreperson, 'Are you making any progress?' and the foreperson said 'Little to none." And I said, 'Little to none?' to which the other 11 jurors said, 'None." So I'm at the point where I'm going to ask them to come in and declare a mistrial." The Court conferred with counsel about this situation and was then advised by the courtroom officer that the jury had reached a unanimous verdict. The jury then returned a verdict finding the defendant guilty. Was the court's conduct error?

24. During jury deliberations, a note is sent by the jury to the judge. The note asks, "Do we have any concern for our safety following the verdict? Based on previous witness gang information and large number of people in court during the trial." The note continued by requesting, "Please do not bring this up in court." The judge received the note and did not inform the parties of the existence of the note. Later, the jury returned a verdict finding the defendant guilty of first degree murder. Was the trial judge's approach to handling the note erroneous?

The case law indicates a series of principles or best practices.

1) There is a duty to investigate or inquire into substantial allegations of juror misconduct.

2) The better practice is to inquire of the witnesses to the misconduct, including jurors.

3) The trial court should find facts on the record based on the results of the inquiry.

4) The trial court should give appropriate curative instructions tailored to the misconduct, if any, is established.

5) The trial court should remove tainted jurors to eliminate prejudice, provided jury deliberations have not begun.

6) If the impact of the misconduct cannot be cured by curative instructions and the removal of tainted jurors, then a mistrial is in order.

JURY ISSUES

By Robert C. Ervin

1. The jury sent a note through the bailiff asking to view a set of line-up photographs reviewed by the victim of the alleged crime. Both the Assistant District Attorney and the defense attorney object to allowing the jury to view the line-up photographs. Is it error to allow the jury to view the line-up photographs in the courtroom?

   NO. If a jury after retiring requests to review evidence, the judge, in his or her discretion, after notice to the prosecutor and defendant, may permit the jury to examine in open court any requested materials, which have been admitted into evidence. In order for the trial judge to allow the jury to take the requested evidence into the deliberation room, the judge must have consent from both the State and the defendant. See N.C. General Statute §15A-1233(b). However, if the judge simply lets the jury examine the requested evidence in open court, but does not allow the jury to take it into the jury room, there is no necessity for obtaining the consent of the parties. State v. Lee, 128 N.C. App. 506, 495 S.E.2d 373 (1998) (trial court did not abuse its discretion).

2. The defendant was tried and convicted of robbery. The alleged offense occurred in November, 1982. At trial, the State's case rested on eyewitnesses' identification of the defendant and the defendant relied on a defense of alibi contending that he lived in another state at the time of the robbery. During deliberations, the jury asked to view Exhibit #1, the photographic lineup, and with the consent of the parties the exhibit was delivered to the jury room. While viewing the photographs, a juror peeled back tape placed over a handwritten notation revealing the words "Police Department, Wilson, North Carolina— 12291, 12-07-81". The jurors discussed the notation as evidence contradicting the defendant's alibi defense. The defendant was convicted. Is the defendant entitled to a new trial?

   YES. A fundamental aspect of a criminal defendant's right to confront the witnesses and evidence against him is that a jury's verdict must be based on evidence produced at trial, not on extrinsic evidence which has escaped the rules of evidence, the supervision of the court and other procedural safeguards of a fair trial. In this situation, the Court of Appeals observed that it was undisputed that information about the defendant, which had not been admitted in evidence, came to the attention of the jury and that this evidence directly contradicted the defendant's alibi witnesses. The Court of Appeals held that because this exposure occurred during the jury's deliberations, the defendant had no opportunity to challenge the evidence by cross-examination or to minimize its impact through closing argument or through a curative instruction by the trial judge. Under these circumstances, the jury's exposure to extraneous information clearly abridged the defendant's constitutional right of confrontation. State v. Lyles, 94 N.C. App. 240, 380 S.E.2d 390 (1989).

3. During the trial of a robbery case, the State offered evidence of a statement made by the defendant to a detective. This evidence was presented when the detective read the defendant's statement to the jury. The statement itself was not introduced into evidence as an exhibit. The jury, while deliberating, sent out a note asking for "all statements of the defendant and any pictures taken." Should the Court, in the exercise of its discretion, provide the written copy of the statement that the detective read into evidence to the jury in response to their request?

NO. N. C. Gen. Stat. 15A-1233 grants the trial court discretion to make available to the jury only "testimony or other evidence" and "exhibits and writings which have been received in evidence." Because the report was not admitted into evidence, the trial court necessarily had no discretion to allow it to be reviewed by the jury. State v. Combs, 182 N. C. App. 365, 642 S. E. 2d 491 (2007). N. C. Gen. Stat. 15A-1233 does not give authority to permit the jury to take writings which have not been received in evidence to the jury room under any circumstances. The trial court judge could have ordered the court reporter to produce a transcript of that portion of the detective's testimony instead of providing the written report.

4. The jury sent a note requesting that the testimony of two witnesses be re-read. Both the State and the defense agreed that the testimony should not be re-read. The trial court determined, in the exercise of its discretion, that the testimony should not be re-read to the jury. The trial court sent a written message to the jury, through the bailiff, denying the jury's request. Is this procedure permissible?

NO. N.C. General Statute §15A-1233(a) provides that jurors must be conducted to the courtroom if after retiring for deliberation, they request a review of testimony or other evidence. The trial judge erred by not adhering to the requirements of the statute. State v. Nobles, 350 N. C. 483, 515 S. E. 2d 885 (1999), State v. McLaughlin, 320 N.C. 564, 359 S.E.2d 768 (1987), State v. Colvin, 92 N.C. App. 152, 374 S.E.2d 126 (1988). It is unlikely that such an error is prejudicial.

5. During jury deliberations, the foreperson of the jury returned to the courtroom and in open court and on the record asked the trial judge for a clarification of the law. The trial court judge answered the question in open court on the record and the foreperson returned to the jury room. Is this procedure error?

YES. The danger in this instance is that the question presented and the trial court's response may be inaccurately relayed by the foreperson to the remaining jurors. It is error for the trial court to fail to bring the entire jury to the courtroom to respond to the foreperson's question. State v. Tucker, 91 N.C. App. 511, 372 S.E.2d 328 (1988). It is also error to allow only the foreperson to transmit requests for a transcript. State v. Ashe, 314 N.C. 28, 331 S.E.2d 652 (1985). The entire trial should be viewed and heard simultaneously by all twelve jurors. To allow a jury foreperson, another individual juror, or anyone else to communicate privately with the trial court regarding matters material to the case and then to relay the court's response to the full jury is inconsistent with this policy. The danger presented is that the person, even the jury foreperson, having alone made the request of the Court and heard the Court's response first hand may through misunderstanding, inadvertent editorialization, or an intentional misrepresentation, inaccurately relay the jury's request or the Court's response or both to the defendant's detriment. State v. Ashe, 314 N.C. at 36.

6. During jury deliberations, the jury sent a note to the trial judge requesting certain exhibits and transcripts of the testimony of four witnesses. The entire jury was returned to the courtroom. The trial court, with the consent of the parties, allowed the jury to take the exhibits into the jury room. The trial court denied the request for a transcript and indicated that the court reporter had not yet transcribed the testimony and the Court did not have the ability to present the transcript to the jury. The Court advised the jury that it was their responsibility and obligation to rely on their own recollection of the evidence. Is this procedure erroneous?

YES. It is within the Court's discretion to determine whether, under the facts of a particular case, the transcript should be made available for re-examination and rehearing by the jury. State v. Barrow, 350 N.C. 640, 517 S.E.2d 374 (1999). In the case described in this question, the trial court stated that it did not have the ability to present the transcript to the jury, indicating a failure to exercise discretion. Id. When no reason is assigned by the Court for a ruling, which may be made as a matter of discretion, the presumption on appeal is that the Court made the ruling in the exercise of its discretion. However, where the statements of the trial court show that the trial court did not exercise discretion, the presumption is overcome and the denial is deemed erroneous. State v. Johnson, 346 N.C. 119, 484 S.E.2d 372 (1997). In this instance, the trial court should expressly rule "in the exercise of my discretion" the request is either allowed or denied. When the trial court states for the record that, in its discretion, it is allowing or denying a jury's request to review testimony, it is presumed that the trial court did so in accordance with N.C. General Statute §15A-1233. State v. Perez, 135 N.C. App. 543, 522 S.E.2d 102 (1999).

7. During the trial of a cocaine and methamphetamine trafficking case, the jury, during deliberations, sent the trial court a written question asking, "What was the amount of cocaine in the cooler?" Is the trial court permitted to answer the jury's question concerning the facts of the case?

YES. In State v. Cardenas, 169 N.C. App. 404, 610 S.E.2d 240 (2005), the Court conferred with counsel for the parties and replied that there was no evidence presented that there was any cocaine in the cooler. The Court of Appeals observed that "defendant does not show and we fail to see how the trial court abused its discretion in answering the jury's question." The defendant was acquitted on the cocaine charges and, as a result, the trial court's answer to the question did not prejudice the defendant. In State v. Wampler, 145 N.C. App. 127, 549 S.E.2d 563 (2001), the jury asked the court a question regarding the time frame from when the defendant was at a particular location until the time of the crime. The trial court instructed the members of the jury "to rely on your own recollection" of the evidence. In Wampler, the Court of Appeals found that the trial court acted properly in the use of its discretion in refusing to answer the jury's question. As the Court of Appeals opined, "[i]n the absence of the transcript, the trial court would have had to give evidence, which in effect would be giving its own recollection of the testimony." 145 N.C. App. at 132. In this type of situation, the safer approach is the one followed by the trial court in Wampler.

8. The jury advised the trial court that it was divided 9 to 3 in the case. The trial court gave additional instructions consistent with the pattern instruction customarily given when a jury reports a deadlock. The Court added at the conclusion of the pattern charge that "the main purpose of that is that it will be expensive again to have to get another jury to try this case over." Are the additional jury instructions permissible?

NO. The additional instructions constituted prejudicial error. State v. Buckom, 111 N.C. App. 240, 431 S.E.2d 776 (1993). The North Carolina Supreme Court has observed that the General Assembly, by enacting NC General Statute §15A-1235, intended to provide that a jury may no longer be advised of the potential expense and inconvenience of retrying a case should the jury fail to agree. State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980). A trial court judge should avoid any reference to the potential expense and inconvenience of retrying the case should the jury fail to agree. State v. Hunter, 48 N.C. App. 689, 269 S.E.2d 736 (1980).

9. The courtroom clerk reported that when the jurors left the courtroom one juror commented to other jurors that he believed "when you take that Bible in your hand you are supposed to be telling the truth and I don't think that young boy was telling the truth." The Court excused the juror who reportedly made the comment without any further inquiry. Did the Court err by excusing this juror?

NO. The trial court may remove a sitting juror and seat an alternate juror before final submission of the case to the jury if a juror becomes incapacitated or disqualified, or is discharged for any other reason. See N.C. General Statute §15A-1215(a). The trial judge removed the juror in keeping with its desire that no one should be suspicious of his capacity to render a fair verdict. The trial court acted well within its discretion under N.C. General Statute §15A-1215(a) in doing so. State v. Harrington, 335 N.C. 105, 436 S.E.2d 235 (1993).

10. After jury deliberations began in a murder trial, a juror informed the judge that he could not return the next day because of a scheduled doctor's appointment. The trial court dismissed this juror, replaced him with an alternate juror and instructed the jury to begin its deliberations anew. Did the trial court judge err by removing the juror with the doctor's appointment, substituting an alternate juror and instructing the jurors to begin deliberations anew?

THE STATUTE SAYS NO. THE COURT OF APPEALS SAYS THIS VIOLATES THE CONSTITUTION OF NORTH CAROLINA AND THE ANSWER IS **YES.**

N. C. Gen. Stat. 15A-1215(a) provides that "if at any time prior to a verdict being rendered, a juror dies, becomes incapacitated or disqualified, or is discharged for any other reason, an alternate juror becomes a juror, in the order in which selected, and serves in all respects as those selected on the regular trial panel." The statute further provides that "if an alternate juror replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew." There are similar statutes for jury trials determining felony aggravating factors and DWI aggravating factors. See N. C. Gen. Stat. 15A-1340.16(a1) and N. C. Gen. Stat. 20-179(a1)(3).

In State v. Chambers, decided by the North Carolina Court of Appeals on February 20, 2024, the Court of Appeals opined that in these circumstances, "(b)ased on precedent from our Supreme Court, we conclude that Defendant's right under our state constitution to a properly constituted jury was violated."

"Our North Carolina Constitution provides that "no person shall be convicted of any crime but by the unanimous verdict of a jury in open court." In Chambers, the Court of Appeals further observed that "(o)ur Supreme Court has interpreted this provision to preclude juror substitution during a trial after commencement of jury deliberations."

The Court of Appeals quoted from State v. Bunning, 346 N. C. 253, 256, 485 S. E. 2d 290 (1997) which observed:

> In this case, the jury verdict was reached by more than twelve persons. The juror who was excused participated in the deliberations for half a day. We cannot say what influence she had on the other jurors, but we have to assume she made some contribution to the verdict. The alternate juror did not have the benefit of the discussion by the other jurors which occurred before he was put on the jury. We cannot say he fully participated in reaching a verdict. In this case, eleven jurors fully participated in reaching a verdict, and two jurors

participated partially in reaching a verdict. This is not the twelve jurors required to reach a valid verdict in a criminal case.

This principle is a longstanding one in North Carolina. In Whitehurst v. Davis, 3 N. C. 11 (1800), the Superior Court, acting as the state's Supreme Court, faced an appeal from a trial in which 13 jurors had resolved the case. In a per curiam opinion, the Court observed:

> Our Constitution declares that in all controversies at law respecting property the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable. It may be said, if thirteen concur in a verdict, twelve must necessarily have given their assent. But any innovation amounting in the least degree to a departure from the ancient mode may cause a departure in other instances, and in the end endanger or prevent this excellent institution from its usual course. Therefore, no such innovation should be permitted.

11. The defendant was escorted by police officers through the courtroom several minutes before court began. At the time, the defendant was handcuffed and wearing visible leg restraints. All of the jurors were present in the courtroom when the defendant was escorted through and each juror indicated, when questioned by the Court, that he or she had seen the defendant in handcuffs and leg restraints. Could the trial court properly deny a motion for a mistrial and rely on curative instructions to the jury?

YES. N.C. General Statute §15A-1061 provides that the judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case. The decision whether to grant a motion for mistrial rests within the sound discretion of the trial judge and will not ordinarily be disturbed on appeal absent a showing of abuse of discretion. State v. Johnson, 341 N.C. 104, 459 S.E. 2d 246 (1995). In Johnson, the Supreme Court concluded that the trial court did not abuse its discretion in denying defendant's motion for a mistrial. The trial court gave curative instructions about the incident described in this question and questioned jurors in order to determine if they were still able to give defendant a fair trial. Id. at 114. Upon questioning by the Court, none of the jurors indicated that they had any problem being fair or following the Court's instructions. Id. at 115.

12. During the trial of a murder case, the jury was sequestered at a local hotel. There was a police complaint originating from the hotel of disorderly conduct involving at least three jurors. Police officers observed three jurors in an intoxicated condition moving about in their underwear along the hallways. At least one juror was so intoxicated that he had to be threatened with arrest before he would agree to return to his hotel room. The trial court, after hearing evidence from law enforcement officers involved in the incident, declared a mistrial over the defendant's objection. Did the trial court err by ordering a mistrial?

YES. The Supreme Court observed in State v. Crocker, 239 N.C. 446, 80 S.E. 2d 243 (1954), that "there is no suggestion that any juror at any time when the court was in session was under any disability on account of intoxicants or otherwise. Nor is there any evidence that any of the jurors, when court convened Friday morning, were not 'clothed and in their right minds' and able to proceed with jury service." It appeared that the order of mistrial in Crocker was provoked by

and based on the unfortunate incident in the nighttime causing some disturbance when certain of the jurors drank some intoxicants in their hotel rooms. The record in Crocker also indicated that the bailiff in charge of the jury furnished the intoxicants they drank and was held in contempt of court. In Crocker, there was no evidence concerning the crucial question namely the condition and fitness of the jurors to continue their service when court convened and, consequently there was no factual basis for the trial judge, in the exercise of his discretion, to order a mistrial.

In other cases, trial court judges' decisions to order a mistrial based on an intoxicated juror have been upheld. State v. Tyson, 138 N.C. 627, 50 S.E. 456 (1905) (Court found that after all the evidence had been presented a juror had, without permission, gone home and procured a quantity of liquor and was in a grossly intoxicated condition on Friday night and that on Saturday morning the juror was in a very nervous and besotted condition and unfit for duty and that unavailing efforts were made to render him fit for service.); State v. Jenkins, 116 N.C. 972, 20 S.E. 1021 (1895) (Jurors drank whiskey during deliberations and some were intoxicated during deliberations.). In Jenkins, the Supreme Court opined that "[t]he law requires that jurors, while in the discharge of their duties, shall be temperate and in such a condition of mind as to enable them to discharge those duties honestly, intelligently and free from the influence and dominion of strong drink." 116 N.C. at 974.

13. During the course of the trial, a juror fell asleep. This occurred during defense counsel's cross-examination of one of the State's witnesses. Did the trial court err by not declaring a mistrial when it observed the juror sleeping during the trial?

NO. In State v. Williams, 33 N.C. App. 397, 235 S.E.2d 86 (1972), a juror fell asleep during the defense attorney's cross-examination of one of the State's witnesses. The trial court judge asked the jurors to stand up and told the jury "you can't go to sleep." There was nothing in the record to indicate that the defendant was prejudiced in any way. American Jurisprudence and American Law Reports indicate that both the juror's inattention and the prejudicial effect on the complaining party must be shown. 75B Am Jur 2d Trial, §618; Inattention of Juror from Sleepiness or Other Cause as Grounds for Reversal or New Trial, 59 ALR 5th 1.

14. During the course of a trial, a voir dire hearing was conducted concerning a statement that the defendant allegedly made to a relative. After the hearing, but prior to the introduction of any of the evidence presented at the voir dire hearing, a local newspaper published details of the evidence in a front-page news story. The defendant moved to inquire whether any jurors had read or heard about the article. Did the trial judge err by denying the defendant's request?

NO. When there is a substantial reason to fear that the jury has become aware of improper and prejudicial matters, the trial court must question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial. However, in the situation outlined in the question, other than the fact that the statement was in the paper, there was no basis to think that the jury had become aware of it. Absent a clearer suspicion that the jury was aware of the publication, the trial court did not err in refusing to question the jury about it. State v. Smith, 135 N.C. App. 649, 522 S.E.2d 321 (1999). In fact, as the Court of Appeals observed in Smith, questioning the jury about whether they read the article may have done nothing more than alert them to a statement of which they were previously unaware. Id. at 658. For similar cases see State v. Harden, 344 N.C. 542, 476 S.E.2d 658 (1996); State v. Langford, 319 N.C. 332, 354

S.E.2d 518 (1987). If the evidence indicates that jurors actually were exposed to the publicity, then an inquiry would be required.

15. The defense lawyer advised the trial court that his secretary had informed him that someone called his office and left a message that one of the jurors had been talking about the case being tried with her mother-in-law. The juror reportedly said that she thought the defendant was guilty because of the look on his face. The defendant requested an inquiry by the court concerning this information. Did the trial court err by failing to question the juror who had reportedly made these comments?

NO. The report was an anonymous telephone call made to the attorney's office. Misconduct must be determined by the facts and circumstances of each case. The circumstances must be such as not merely to put suspicion on the verdict, because there was opportunity and a chance for misconduct. When there is merely a matter of suspicion, it is purely a matter in the discretion of the presiding judge. State v. Aldridge, 139 N.C. App. 706, 534 S.E.2d 629 (2000). An examination of the juror involved in the alleged misconduct is not always required, especially where the allegation is nebulous or when the witness did not overhear the juror or third party talk about the case. Id. 139 N.C. App. 715.

16. In a murder case, an individual reported to the court that she went to the coffee bar in the basement of the courthouse and observed some of the jurors. This individual heard one of the jurors say to the others that "the boy probably took a knife and cut himself and threw the knife away and is going to plead self-defense". The defense attorney asked the Court to inquire by calling the juror who allegedly spoke these words to be questioned about the incident. The trial court denied the request. Did the trial court err by denying this request?

YES. The record in the case on which this question is based did not indicate that the individual who observed the incident had any interest in the case. The individual's testimony about the incident was uncontradicted and there was nothing to impeach this individual's credibility. In State v. Drake, 31 N.C. App. 187, 229 S.E.2d 51 (1976), the Court of Appeals observed "it is well-settled law in this State that the determination of the trial court on the question of juror misconduct will be reversed only where an abuse of discretion has occurred." The trial judge is in a better position to investigate any allegations of misconduct, question witnesses and observe their demeanor, and make appropriate findings. 31 N.C. App. at 190. In Drake, the Court of Appeals ordered a new trial and observed that the trial court denied the defendant's timely motion based on the uncontradicted testimony of a disinterested witness to call the juror who allegedly formed and expressed an opinion on the crucial issue of self-defense and the Court denied the motion for mistrial without determining the truth about the alleged misconduct. 31 N.C. App. at 192.

17. During a first degree murder trial, the Assistant District Attorneys prosecuting the case advised the Court that a juror had contact with one of the assistants that morning when the juror brought an insurance letter to the District Attorney's office relating to a traffic citation the juror received prior to the beginning of the trial. The juror spoke to one of the ADAs, who referred the juror to an office employee, who later read the insurance letter to the ADA in order to determine whether the letter was sufficient. The employee took the juror's ticket and the juror returned to the courtroom. The citation was dismissed in accordance with the standard policies of the District Attorney's office. The defendant challenged the juror's ability to continue serving as a juror. The

trial court denied this challenge. Did the trial court err by not replacing this juror with an alternate?

NO. The trial court may replace a juror with an alternate juror should the original one become disqualified or be discharged for some reason. N.C. General Statute §15A-1215(a); State v. Richardson, 341 N.C. 658, 462 S.E.2d 492 (1995). When a juror has contact with someone who may have an interest in the case, the judge has the duty to determine whether such contact resulted in substantial and irreparable prejudice to the defendant. State v. Richardson, 341 N.C. at 673. In Richardson, the trial court conducted an inquiry of the juror and the employee in the District Attorney's office. The juror indicated that the contact with the ADA would not influence her verdict and that she could be a fair and impartial juror. The Court of Appeals commented that the trial court had the opportunity to see and hear the juror on voir dire and, having observed the juror's demeanor and made findings as to her credibility, to determine whether the juror can be fair and impartial. For this reason, among others, it is within the trial court's discretion based on its observation and sound judgment to determine whether a juror can be fair and impartial. 341 N.C. at 673. In this instance, there was no abuse of discretion in deciding not to replace the juror.

18. The jury began deliberations in a drug case on Wednesday and the Court recessed until Friday because of Veteran's Day. On Friday morning a juror returned to court with a two page typewritten document titled "Circumstantial Evidence" that listed fourteen circumstantial factors pointing toward the defendant's guilt. The juror gave the document to the bailiff and asked him to make copies to distribute to the other jurors. The bailiff gave the document to the trial judge. Defense counsel moved for an inquiry and a mistrial. The trial court denied both motions and returned the document to the juror without making copies. Did the trial court err?

NO. The trial court did not find that the juror had violated any order of the court. There was no implication that he continued deliberating with other jurors during the Court's recess or that he made any inquiry or investigation of his own concerning the case. On these facts, the Court of Appeals concluded in State v. Harris, 145 N.C. App. 570, 551 S.E.2d 499 (2001), that it was in the trial court's discretion whether to conduct an inquiry with the juror who prepared the notes. The Court of Appeals did "concede that a better course of action might have been for the trial court to have conducted a voir dire of the juror. 145 N.C. App. at 578. Since the document was a collection of the juror's own thoughts and his recollection of the evidence presented in the case, there was no substantial or irreparable harm to the defendant's case and the denial of the motion for a mistrial was not an abuse of discretion.

19. The defendant was convicted of sexual battery. After the jury returned its verdict and before the sentencing hearing the next morning, the defendant's trial counsel moved for a mistrial. The defendant's attorney indicated that several jurors told him that jurors had admitted looking up legal terms such as "sexual gratification, reasonable doubt and intent" and the sexual battery statute on the internet during the trial. The trial court did not conduct any further inquiry and denied the defendant's motion for a mistrial. Did the trial court abuse its discretion by failing to act?

NO. In general, a trial court may not receive juror testimony to impeach a verdict that has already been rendered. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention. Extraneous prejudicial information is information dealing with the defendant or the case which is being tried, which information reaches a juror without being introduced into evidence. Dictionary definitions of legal terms

researched and read to the jury are not extraneous prejudicial information and cannot be used to impeach a jury's verdict. State v. Patino, 207 N. C. 322, 699 S. E. 2d 678 (2010). This information does not implicate a defendant's constitutional right to confront witnesses against him. 207 N. C. App. at 330. There was no abuse of discretion in failing to inquire further.

20. During the sentencing phase of a capital murder trial, a juror took a Bible into the jury room and read passages from the Old Testament concerning the death penalty to the other jurors and the jurors discussed those passages in their deliberations. The jury then returned a death sentence. On a Motion for Appropriate Relief, the defendant established that this occurred by testimony from jurors. Is the defendant entitled to a new trial?

There is no North Carolina case directly on point. In State v. Barnes, 345 N.C. 184, 481 S.E.2d 44 (1997), the Supreme Court concluded that the trial court did not abuse its discretion in failing to conduct an inquiry or to declare a mistrial based on an attorney's mere assertion that a juror read a Bible in the jury room prior to the commencement of deliberations and when there was no indication that the Bible reading was in any way directed to the facts or governing law at issue in the case. In this hypothetical, the Bible reading occurred during deliberations and the passages read pertained to the issue of what sentence was appropriate. Courts in other jurisdictions have reached differing conclusions in this situation. See Birch v. Corcoran, 273 F. 3d 577 (4th Cir. 2001) (no improper jury communication); Jones v. Kemp, 706 F. Supp. 1534 (N.D. Ga.) (error); McNair v. State, 706 So.2d 828 (Ala. Crim. App. 1997) (no prejudice); People v. Mincey, 2 Cal. Rptr. 4th 408 (1992) (no error); People v. Harlan, 109 P.3d 616 (Colo. 2005) (death sentence vacated); Jones v. Francis, 252 Ga. 60, 312 S.E.2d 300 (Ga. 1984) (harmless error); Grooms v. Commonwealth, 756 S.W.2d 131 (Kent. 1988) (concurring opinion, error); State v. Harrington, 627 S.W.2d 345 (Tenn. 1981) (error).

21. A juror informed the court that she had received telephone calls the previous evening from an alternate juror. When the alternate juror was questioned, he informed the court that one of the bailiffs made comments after a defense expert testified to the effect that, "They can pay somebody enough money to say something was wrong with it" and "some of the people who testified for the defense were paid to say what—were here to say because they were paid." The alternate juror indicated that about half the jurors were present when a bailiff made these remarks. Three jurors verified hearing these remarks. When the jurors who heard this bailiff's remarks were questioned, each juror indicated he or she was not influenced by the comments and could make a fair and impartial decision after the presentation of all the evidence. Could the trial court properly rely on the affected jurors' assurances that they could be fair and impartial and deny the defendant's motion for a mistrial?

YES. When the contention is made by the defendant that the jury has been improperly influenced, it must be shown that the jury was actually prejudiced against the defendant, before the defendant is entitled to relief from the verdict and the findings of the trial judge, upon evidence and facts, are conclusive and not reviewable. State v. Lippard 152 N.C. App. 564, 574, 568 S.E.2d 657 (2002) (citing State v. Bonney, 329 N.C. 61, 83, 405 S.E.2d 145, 58 (1991)). In Lippard, the Court of Appeals concluded that the trial court examined the jurors about the alleged misconduct and found as a fact that there was no evidence to support the defendant's allegation of prejudice to his case. 152 N.C. App. at 575. The trial court's findings of fact in Lippard were deemed to be supported by substantial evidence and, in turn, supported the conclusions of law and the subsequent denial of a motion for mistrial. Id.

22. A juror indicated in voir dire that he knew one of the State's witnesses and informed defense counsel that he had not worked with the witness in question on any law enforcement related matters. Later, the defendant learned that the juror was an active member of the Board of Directors of the local Crimestoppers organization and may have known the State's witness in that capacity. Does this evidence justify granting a new trial?

NO. A party moving for a new trial grounded upon misrepresentation by a juror during voir dire must show (1) the juror concealed material information during voir dire; (2) the moving party exercised due diligence during voir dire to uncover the information; and, (3) the juror demonstrated actual bias or bias implied as a matter of law that prejudiced the moving party. State v. Buckom, 126 N.C. App. 368, 380-381, 485 S.E.2d 319 (1997). The presence of bias implied as a matter of law may be determined from examination of the totality of the circumstances and includes (1) the nature of the juror's misrepresentation, including whether a reasonable juror in the same or similar circumstances could or might reasonably have responded as did the juror in question, (2) the conduct of the juror, including whether the misrepresentation was intentional or inadvertent, and (3) whether the defendant would have been entitled to a challenge for cause had the misrepresentation not been made. Id.126 N.C. App. at 382. In this case, the juror's conduct was not so egregious as to establish either actual bias or bias implied as a matter of law.

23. While jury was deliberating, the trial court judge went on the record and stated that "with permission of the parties, I knocked on the jury room door. They invited me in and I asked the foreperson, 'Are you making any progress?' and the foreperson said 'Little to none." And I said, 'Little to none?' to which the other 11 jurors said, 'None." So I'm at the point where I'm going to ask them to come in and declare a mistrial." The Court conferred with counsel about this situation and was then advised by the courtroom officer that the jury had reached a unanimous verdict. The jury then returned a verdict finding the defendant guilty. Was the court's conduct error?

PROBABLY. In State v. Ross, 207 N. C. App. 379, 700 S. E. 2d 412 (2010), this scenario was presented to the Court of Appeals for plain error review and the Court of Appeals concluded the plain error standard was inapplicable. However, the Court of Appeals observed that "we have difficulty imaging circumstances in which it would be appropriate for the trial judge to enter a jury room during deliberations and speak to the jurors regarding the case instead of bringing the jury back into the courtroom." 207 N. C. App. at 389. In Ross, the Court of Appeals quoted an opinion from Minnesota that noted "(i)n view of the judge's dominant role during earlier stages of the trial, an uninvited entrance into the sanctity of the jury room for any purpose offends the integrity of the proceedings and risks influencing the jury's decisional process in some degree, however difficult to define or impossible to measure. At the very least, such unwarranted entrance disrupts the jury's deliberations, intrudes upon their independence, and transgresses the carefully drawn lines of demarcation between the functions of the trial judge and the functions of the jury. Id. at 391. The Court of Appeals in Ross admonished trial court judges that they "should refrain from entering the jury room during deliberations to discuss the jury's progress to avoid the possibility of improperly influencing the jury and to avoid disruptions in the juror's deliberation process." Id at 391.

24. During jury deliberations, a note is sent by the jury to the judge. The note asks, "Do we have any concern for our safety following the verdict? Based on previous witness gang information and large number of people in court during the trial." The note continued by requesting, "please do not bring this up in court." The judge received the note and did not inform the parties of the existence of the note. Later, the jury returned a verdict finding the defendant guilty of first degree murder. Was the trial judge's approach to handling the note erroneous?

YES. It is well established that ex parte communications between the trial court and the jury are prohibited. Here, the trial court did not disclose the note to the parties or their counsel. The trial court judge's failure to disclose the note violated the defendant's state constitutional right to presence. Such an action may prevent the defendant from participating in the proceeding, either personally or through counsel; and it deprives the defendant of any real knowledge of what transpired. State v. Mackey, 241 N. C. App. 586, 774 S. E. 2d 382 (2015).

The Court of Appeals concluded that the trial court did not have an obligation to investigate the subject of the jury's concerns because there was no indication that the jury was exposed to extrinsic or improper matters. The Court of Appeals concluded that the jurors' fears likely originated from evidence of the defendant's membership in a gang and their observations in the courtroom. This evidence was intrinsic to the trial and there was no cause for inquiry.

The case law indicates a series of principles or best practices.

1) There is a duty to investigate or inquire into substantial allegations of juror misconduct.

2) The better practice is to inquire of the witnesses to the misconduct, including jurors.

3) The trial court should find facts on the record based on the results of the inquiry.

4) The trial court should give appropriate curative instructions tailored to the misconduct, if any, is established.

5) The trial court should remove tainted jurors to eliminate prejudice, provided jury deliberations have not begun.

6) If the impact of the misconduct cannot be cured by curative instructions and the removal of tainted jurors, then a mistrial is in order.

Tab: When to Intervene

Pitfalls at Trial: When to Intervene Absent an Objection

This manuscript was originally prepared by Thomasin Hughes, formerly a research assistant at the Court of Appeals, for the 2011 Summer Superior Court Judges' Conference.

Ms. Hughes' original manuscript was revised and shepardized by Robert C. Ervin in April and May 2014, further updated and edited by Sam J. Ervin, IV, Kandace Watkins, Erwin Byrd, and Tim Sookram in May 2018, and further updated and edited by Jonah Bamel and edited by Valerie J. Zachary in February 2024.

Introduction

Ordinarily, our appellate courts will not review an issue that was not properly preserved. North Carolina Rule of Appellate Procedure 10(a)(1) provides:

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make[.] . . . It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion."

N.C.R. App. P. 10(a)(1).

However, certain issues may be raised on appeal, even in the absence of an objection by any party. This manuscript is an introduction to some of the circumstances in which the appellant may obtain review of an alleged error, and the trial court may be reversed, notwithstanding the failure of the appellant to object at trial.

Appellate Review in the Absence of an Objection

I. Court's Authority to Review Issues

There are several broadly based sources for an appellate court's authority to review issues on appeal despite the lack of an objection at the trial level. As a result, if an error occurs during trial that the appellate court wants to correct, the court can likely find a way to address the issue, rendering any serious error potentially subject to review. The following are the most common avenues used by appellate courts to review issues to which no objection was made at trial.

A. Rule 2 of the North Carolina Rules of Appellate Procedure

Rule 2 of the North Carolina Rules of Appellate Procedure provides:

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

It is rare that a defendant successfully invokes Rule 2. Our Supreme Court has explained that "Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (citation omitted). "[W]hether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis." *Id.* at 603, 799 S.E.2d at 603.

However, Rule 2 has occasionally been invoked to review issues not preserved by objection in criminal cases:

- In *State v. Bursell*, the "defendant failed to object to the SBM order on Fourth Amendment constitutional grounds with the requisite specificity, thereby waiving the ability to raise that issue on appeal." 372 N.C. 196, 200, 827 S.E.2d 302, 305 (2019).
    - Our Supreme Court affirmed the Court of Appeals' decision to invoke Rule 2 "when considering defendant's young age, the particular factual bases underlying his pleas, and the nature of those offenses, combined with the State's and the trial court's failures to follow well-established precedent in applying for and imposing SBM, and the State's concession of reversible *Grady* error." *Id.* at 201, 827 S.E.2d at 306 (citation omitted).
- *See also State v. Batchelor*, 190 N.C. App. 369, 378, 660 S.E.2d 158, 164 (2008):

> [T]he State failed to meet its burden of proving that [the d]efendant was the perpetrator of the crime charged, which failure warranted the dismissal of the charge of robbery

> with a dangerous weapon. However, [the d]efendant's trial counsel failed to renew [the d]efendant's motion to dismiss at the close of all the evidence. If we do not review the issue of the sufficiency of the evidence in the present case, [the d]efendant would remain imprisoned for a crime that the State did not prove beyond a reasonable doubt. Such a result would be manifestly unjust and we are therefore compelled to invoke Rule 2 under these exceptional circumstances.

B. General Supervisory Authority

In addition to Rule 2, another rarely invoked but broad source of appellate jurisdiction over unpreserved issues is our Supreme Court's inherent, general supervisory authority over the lower courts of the State. Our Supreme Court "will not hesitate to exercise its rarely used general supervisory authority when necessary to promote the expeditious administration of justice, and may do so to consider questions which are not properly presented according to its rules." *State v. Ellis*, 361 N.C. 200, 205, 639 S.E.2d 425, 428 (2007) (cleaned up).

In *Ellis*, our Supreme Court exercised its general supervisory authority despite a statutory limitation on its appellate jurisdiction over the Court of Appeals' decisions on motions for appropriate relief, explaining that "it is beyond question that a statute cannot restrict this Court's constitutional authority under Article IV, Section 12, Clause 1 of the Constitution of North Carolina to exercise 'jurisdiction to review upon appeal any decision of the courts below.' " *Id.* (quoting N.C. Const. art. IV, § 12).

C. Writ of Certiorari

"The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C.R. App. P. 21(a).

"Certiorari, of course, is an extraordinary remedial writ. We deploy it sparingly, reserving it to correct errors of law, or to cure a manifest injustice[.] To that end, a petitioner must show merit or that error was probably committed below." *State v. Woolard*, ___ N.C. ___, 894 S.E.2d 717, 724 (2023) (cleaned up). "Ultimately, though, the writ is discretionary." *Id.* (cleaned up).

D. Plain Error (in limited criminal cases only, discussed in detail below, at V.)

II. Lack of Subject-Matter Jurisdiction

A. General Rule

"The question of subject matter jurisdiction may properly be raised for the first time on appeal. Furthermore, this Court may raise the question on its own motion even when it was not argued by the parties in their briefs." *State v. Jones*, 172 N.C. App. 161, 163, 615 S.E.2d 896, 897, *disc. review denied*, 360 N.C. 72, 624 S.E.2d 365 (2005) (citation omitted).

B. Examples

1. Invalid Indictment

"North Carolina law has long provided that there can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatsoever, and if it assumes jurisdiction a trial and conviction are a nullity." *State v. Kelso*, 187 N.C. App. 718, 722, 654 S.E.2d 28, 31 (2007) (cleaned up), *disc. review denied,* 362 N.C. 367, 663 S.E.2d 432 (2008)

"The established rule is that an indictment will not support a conviction for a crime unless all the elements of the crime are accurately and clearly alleged in the indictment." *State v. Jerrett*, 309 N.C. 239, 259, 307 S.E.2d 339, 350 (1983). Nonetheless, "[t]he Legislature may prescribe a form of indictment sufficient to allege an offense even though not all of the elements of a particular crime are required to be alleged. *See, e.g.*, G.S. 15-144.1 (authorizing a short-form indictment for rape) and G.S. 15-144 (authorizing a short-form indictment for homicide)." *Id.*

"[W]hen an indictment is alleged to be facially invalid, thereby depriving the trial court of its jurisdiction, it may be challenged at any time, notwithstanding a defendant's failure to contest its validity in the trial court." *State v. Call*, 353 N.C. 400, 429, 545 S.E.2d 190, 208 (citation omitted), *cert. denied*, 534 U.S. 1046, 151 L. Ed. 2d 548 (2001).

2. Misdemeanors

Our General Statutes give the superior court limited jurisdiction over misdemeanors. *See* N.C. Gen. Stat. § 7A-271(a). When a superior court exceeds this limited authority and impermissibly tries a misdemeanor charge over which it has no subject-matter jurisdiction, the judgment is void. *See State v. Price*, 170 N.C. App. 57, 62, 611 S.E.2d 891, 895 (2005) ("Because the trial court did not have jurisdiction over the misdemeanor charges against [the] defendant we vacate the judgments entered on those charges.").

III. Failure to Follow a Statutory Mandate

A. General Rule

"Generally, when a trial court acts contrary to a statutory mandate, the defendant's right to appeal is preserved despite the defendant's failure to object during trial." *State v. Jones*, 382 N.C. 267, 274, 876 S.E.2d 407, 412 (2022) (cleaned up). Our Supreme Court has also "recognized that a trial court sometimes has a duty to act *sua sponte* to avoid statutory violations; for example, the trial court must exclude evidence rendered incompetent by statute, even in the absence of an objection by the defendant." *State v. Hucks*, 323 N.C. 574, 579, 374 S.E.2d 240, 244 (1988).

Our Supreme Court has explained that

> a statute contains a statutory mandate when it is clearly mandatory, and its mandate is directed to the trial court. A statutory mandate is directed to the trial court when it, either (1) requires a specific act by a trial judge; or (2) leaves no doubt that the legislature intended to place the responsibility on the judge presiding at the trial or at specific courtroom proceedings that the trial judge has authority to direct.

Jones, 382 N.C. at 274, 876 S.E.2d at 412 (cleaned up).

B. Examples

1. Failure to Exercise Discretion

Where a statute gives the trial court discretion to rule on an issue, the court errs by basing its ruling on the belief that it lacks authority or discretion to grant a request or motion.

For example, N.C. Gen. Stat. § 15A-1233(a) provides:

> If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other

> evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

"To comply with this statute, a court must exercise its discretion in determining whether or not to permit the jury to examine the evidence. A court does not exercise its discretion when it believes it has no discretion or acts as a matter of law." *State v. Maness*, 363 N.C. 261, 278, 677 S.E.2d 796, 807 (2009) (cleaned up), *cert. denied*, 559 U.S. 1052, 176 L. Ed. 2d 568 (2010); *see also State v. Ashe*, 314 N.C. 28, 36–37, 331 S.E.2d 652, 657–58 (1985) (ordering a new trial where the trial court failed to exercise its discretion as evinced by its statement that the jurors' request to review certain testimony could not be granted because there was "no transcript at this point").

2. Orders Entered Out of Term or Session, without Consent of Parties

In *State v, Trent*, our Supreme Court affirmed the Court of Appeals' ruling that the trial court erred by denying a suppression motion, on the grounds that the order ruling on the suppression motion was entered out of term and out of session:

> This Court has noted that the use of 'term' has come to refer to the typical six-month assignment of superior court judges, and 'session' to the typical one-week assignments within the term.
>
> Furthermore, this Court has held that an order of the superior court, in a criminal case, must be entered during the term, during the session, in the county and in the judicial district where the hearing was held. Absent consent of the parties, an order entered in violation of these requirements is null and void and without legal effect.

State v. Trent, 359 N.C. 583, 585, 614 S.E.2d 498, 499 (2005) (cleaned up). Although the State contended that the defendant had not objected, our Supreme Court explained that "the decisions of our appellate courts adequately demonstrate that [a] defendant's failure to object does not affect the nullity of an order entered out of term and out of session." *Id.* at 586, 614 S.E.2d at 500.

3. Arraignment

In *State v. Edgerton*, the defendant was indicted for habitual larceny and attaining the status of habitual felon. 266 N.C. App. 521, 523, 832 S.E.2d 249, 252 (2019). After the State's evidence, the defendant's counsel informed the court that the defendant "would stipulate to the sufficient prior larcenies to arrive at the level of habitual larceny." *Id.* After jury returned a guilty verdict on the habitual larceny

charge, the defendant became agitated and was removed from the courtroom. *Id.* The habitual felon phase of the trial began in the defendant's absence, and the defendant argued on appeal, *inter alia*, that the trial court erred by failing to arraign him on the the habitual felon charge. The Court of Appeals recognized that, "[b]ecause the arraignment proceeding in question is mandated by [N.C. Gen. Stat. § 15A-928], the trial court's error is preserved for appeal if it prejudiced [the d]efendant." *Id.* at 531, 832 S.E.2d at 257. The *Edgerton* Court concluded that the defendant was not so prejudiced. *Id.* at 532, 832 S.E.2d at 257.

4. Failure to Conduct Statutorily Required Inquiry

a. Plea Transcript: N.C. Gen. Stat. § 15A-1022

Where a defendant "argues the trial court cannot sentence him as an habitual felon without a jury's determination of his habitual felon status or his express waiver of jury determination and admission of habitual felon status[,]" the Court of Appeals reviewed the issue despite the defendant's failure to object. *State v. Artis*, 174 N.C. App. 668, 676, 622 S.E.2d 204, 210 (2005), *disc. review denied,* 360 N.C. 365, 630 S.E.2d 188 (2006); *see also* N.C. Gen. Stat. § 15A-1446(d)(18) (discussed below).

Relatedly, "any error that the trial court committed under [N.C.G.S. § 15A-1023] which prejudiced [the] defendant is an issue that is automatically preserved for appellate review." *State v. Chandler*, 376 N.C. 361, 366, 851 S.E.2d 874, 878 (2020) (concluding that the trial court erred by not accepting a guilty plea because the defendant refused to admit that he was factually guilty).

b. Representation by Counsel: N.C. Gen. Stat. § 15A-1242

"For failure of the trial judge to make the inquiry mandated by N.C.G.S. § 15A-1242 before permitting the defendant to proceed to trial without counsel, the defendant is entitled to a new trial." *State v. Dunlap*, 318 N.C. 384, 389, 348 S.E.2d 801, 805 (1986) (concluding that the trial court erred by allowing the defendant to represent himself without determining that his waiver of counsel was knowing and voluntary).

c. Competence to Stand Trial: N.C. Gen. Stat. § 15A-1002

"Where a defendant demonstrates or where matters before the trial court indicate that there is a significant possibility that a defendant is incompetent to proceed with trial, the trial court must appoint an expert or experts to inquire into the defendant's mental health in accord with N.C.G.S. § 15A-1002(b)(1)." State v. Grooms, 353 N.C. 50, 78, 540 S.E.2d 713, 730 (2000).

d. Waiver of Jury Trial: N.C. Gen. Stat. § 15A-1201(d)

Despite the defendant's failure to object, our appellate courts may review whether the trial court "commenced a bench trial without first personally addressing [the defendant] to determine whether he fully understood and appreciated the consequences of that decision" as required by statute. *State v. Hamer*, 272 N.C. App. 116, 124, 845 S.E.2d 846, 852 (2020), *aff'd*, 377 N.C. 502, 858 S.E.2d 777 (2021).

5. Entry of Unauthorized Sentence

In *Davis,* the defendant was convicted of second-degree murder, felony serious injury by vehicle, and assault with a deadly weapon inflicting serious injury (ADWISI). 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010). On appeal, the defendant argued that N.C. Gen. Stat. § 20-141.4(b) did not authorize his sentences for felony death by vehicle and felony serious injury by vehicle, because the second-degree murder and ADWISI judgments provide greater punishment for the same conduct. *Id.* The Court of Appeals denied review based on his failure to object at trial, but our Supreme Court agreed with the defendant that the issue was preserved despite his failure to object, and reversed. *Id.* at 302, 698 S.E.2d at 68.

This issue also commonly arises when multiple assault charges arise from the same conduct. *See, e.g.*, *State v. McPhaul*, 256 N.C. App. 303, 318, 808 S.E.2d 294, 306 (2017) ("According to the plain language in N.C. Gen. Stat. § 14-32.4(a), the trial court was not authorized to enter judgment and sentence defendant for assault inflicting serious bodily injury, because AWDWIKISI imposes greater punishment for the same conduct."); *see also State v. Harding*, 258 N.C. App. 306, 316, 813 S.E.2d 254, 262 (finding similar statutory mandate in prefatory clause of N.C. Gen. Stat. § 14-33(c)), *disc. review denied*, 371 N.C. 450, 817 S.E.2d 205 (2018).

Unauthorized probationary terms may also be reviewed. *See State v. Lu*, 268 N.C. App. 431, 433–34, 836 S.E.2d 664, 666 (2019).

6. Expression of Opinion

"Whenever a defendant alleges a trial court made an improper statement by expressing an opinion on the evidence in violation of N.C.G.S. §§ 15A-1222 and 15A-1232, the error is preserved for review without objection due to the mandatory nature of these statutory prohibitions." *State v. Duke*, 360 N.C. 110, 123, 623 S.E.2d 11, 20 (2005).

7. Selection of the Jury in Criminal Cases

"[T]he defendant contends that the trial court erred in preventing his counsel from asking jurors questions, solely because the trial court had previously asked the same or similar questions. The defendant contends that this violated N.C.G.S. § 15A-

1214(c) and entitles him to a new trial. . . . Even though the defendant did not object, this assignment of error is reviewable." *State v. Jones*, 336 N.C. 490, 496–97, 498, 445 S.E.2d 23, 26, 27 (1994).

8. Registration of Sex Offenders for Life

"Despite [the d]efendant's failure to object below," the issue of whether an offense is "an aggravated offense" for the purposes of N.C. Gen. Stat. § 14-208.23 "is preserved for appeal." *State v. Johnson*, 253 N.C. App. 337, 344, 801 S.E.2d 123, 128-130 (2017).

9. Jail Fees

"The trial court acted contrary to the statutory mandate in calculating the jail fees and prejudiced [the] defendant by ordering him to pay twice the amount of jail fees authorized by statute. Accordingly, the issue of jail fees is also preserved under the rule articulated in *Ashe*." *State v. Fennell*, 241 N.C. App. 108, 112, 772 S.E.2d 868, 871 (2015); *see also* N.C. Gen. Stat. § 15A-1446(d)(18) (discussed below).

IV. Errors Preserved by Statute in Criminal Cases

N.C. Gen. Stat. § 15A-1446(d) lists eighteen errors that "may be the subject of appellate review even though no objection, exception or motion has been made in the trial division." Although several subsections have been declared unconstitutional, in that our Constitution provides that "[t]he Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division[,]" N.C. Const. art. IV, § 13(2), most of the eighteen have nonetheless been cited approvingly as enabling appellate review.

The following provisions of N.C. Gen. Stat. § 15A-1446(d) have been cited by our appellate courts when reviewing alleged errors to which the defendant did not object:

N.C. Gen. Stat. § 15A-1446(d)(1): "Lack of jurisdiction of the trial court over the offense of which the defendant was convicted."

"[T]he failure of a criminal pleading to charge the essential elements of the stated offense is an error of law which may be corrected upon appellate review even though no corresponding objection, exception or motion was made in the trial division." *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981).

N.C. Gen. Stat. § 15A-1446(d)(3): "The criminal pleading charged acts which, at the time they were committed, did not constitute a violation of criminal law."

This subsection has only been cited once, in a case in which the State sought review of a trial court's quashing a common law public nuisance charge. The Court of Appeals held "that this subsection applies only to appeals by defendants who have been convicted of acts which do not constitute a crime. Quite simply, if the State believed that an act 'did not constitute a violation of the criminal law,' the State should have dismissed the case." *State v. Truzy*, 44 N.C. App. 53, 55, 260 S.E.2d 113, 115 (1979), *disc. review denied*, 299 N.C. 546, 265 S.E.2d 406 (1980)

N.C. Gen. Stat. § 15A-1446(d)(4): "The pleading fails to state essential elements of an alleged violation, as required by G.S. 15A-924(a)(5)."

In *State v. Jerrett*, the defendant "did not challenge at trial the sufficiency of the indictment to allege first-degree kidnapping." 309 N.C. 239, 259 n.4, 307 S.E.2d 339, 349 n.4 (1983). This, however, did not preclude appellate review. Our Supreme Court cited § 15A-1446(d)(4), as well as *State v. Partlow*, 272 N.C. 60, 157 S.E. 2d 688 (1967), in which the Court "held that if the offense is not sufficiently charged in the indictment, this Court, *ex mero motu*, will arrest the judgment." *Id.* (cleaned up).

N.C. Gen. Stat. § 15A-1446(d)(5): "The evidence was insufficient as a matter of law." (at least with respect to sentencing-related errors)

This provision is inconsistent with Rule 10(a)(3) of the North Carolina Rules of Appellate Procedure, which provides that a defendant who fails to make a motion to dismiss at the close of all the evidence may not attack on appeal the sufficiency of the evidence at trial. N.C.R. App. P. 10(a)(3). Accordingly, our Supreme Court has held: "To the extent that N.C.G.S. § 15A-1446(d)(5) is inconsistent with N.C.R. App. P. 10([a])(3), the statute must fail." *State v. Richardson*, 341 N.C. 658, 677, 462 S.E.2d 492, 504 (1995) (citation omitted).

However, our appellate courts have nonetheless invoked subsection (d)(5) to review sufficiency-of-the-evidence issues arising from sentencing hearings. *See State v. Morgan*, 164 N.C. App. 298, 304, 595 S.E.2d 804, 809 (2004):

> The State argues that [the d]efendant did not properly preserve this error for appellate review because she failed to object to the prosecution's calculation of her prior record level at the sentencing hearing. However, the assignment of error in this case is not evidentiary; rather, it challenges whether the prosecution met its burden of proof at the

> sentencing hearing. Error based on insufficient evidence as a matter of law does not require an objection at the sentencing hearing to be preserved for appellate review.

N.C. Gen. Stat. § 15A-1446(d)(9): "Subsequent admission of evidence from a witness when there has been an improperly overruled objection to the admission of evidence on the ground that the witness is for a specified reason incompetent or not qualified or disqualified."

"Under N.C.G.S. § 15A-1446(d)(9), the subsequent admission of evidence from a witness when there has been an improperly overruled objection to the admission of evidence on the ground that the witness is incompetent may be asserted as error on appeal notwithstanding the lack of an objection to or motion to strike the testimony at trial." *State v. Gordon*, 316 N.C. 497, 501, 342 S.E.2d 509, 511 (1986).

N.C. Gen. Stat. § 15A-1446(d)(10): "Subsequent admission of evidence involving a specified line of questioning when there has been an improperly overruled objection to the admission of evidence involving that line of questioning."

"A sole improperly overruled objection to a single line of questioning at one instance in the trial is sufficient to preserve the entire line of questioning for appellate review, if the same evidence is not admitted on a number of occasions throughout the trial." *State v. Graham*, 186 N.C. App. 182, 189–90, 650 S.E.2d 639, 645 (2007), *appeal dismissed and disc. review denied*, 362 N.C. 477, 666 S.E.2d 765 (2008). "Because we believe . . . that [the] defendant's objection was improperly overruled, we will review the entire line of questioning." *Id.*

N.C. Gen. Stat. § 15A-1446(d)(11): "Questions propounded to a witness by the court or a juror."

This subsection has also only been cited once, in a case in which, during the testimony of the defendant's husband, "the presiding judge questioned him as to a conversation between him and his wife shortly before the robbery. [The husband] testified that the idea for the robbery originated with his wife and that she told him to get out of the automobile and take [the victim]'s purse." *State v. Josey*, 328 N.C. 697, 703, 403 S.E.2d 479, 482 (1991). Our Supreme Court held: "Although the defendant did not object to these questions her exceptions to questions asked by the court are automatically preserved." *Id.*

N.C. Gen. Stat. § 15A-1446(d)(16): "Error occurred in the entry of the plea."

This subsection has been cited as supporting review of:

- Whether "the trial court committed reversible error by accepting [the] defendant's oral guilty plea to being an habitual felon." *State v. Szucs*, 207 N.C. App 694, 701 S.E.2d 362, 367 (2010).
- Whether a defendant could be sentenced "as an habitual felon without a jury's determination of his habitual felon status or his express waiver of jury determination and admission of habitual felon status." *State v. Artis*, 174 N.C. App. 668, 676, 622 S.E.2d 204, 210 (2005).
- Whether "a stipulation by defense counsel that [the defendant] has been convicted of the prior misdemeanors alleged in an indictment charging habitual misdemeanor assault is not sufficient to establish the prior conviction element of that charge without submission of that element for determination by the jury," *Id.* at 677–78, 622 S.E.2d at 210–11.

N.C. Gen. Stat. § 15A-1446(d)(18): "The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law."

Our Supreme Court has confirmed that this subsection is constitutional: "This provision does not conflict with any specific provision in our appellate rules and operates as a 'rule or law' under Rule 10(a)(1), which permits review of this issue." *State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010). This subsection has been cited as supporting review of, *inter alia*:

- Whether "the trial court recommended an amount of restitution that was not supported by competent evidence." *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004).
- Whether the State "prove[d] that [the] defendant's out-of-state convictions were for offenses substantially similar to any North Carolina offenses[.]" *State v. Henderson*, 201 N.C. App. 381, 383, 689 S.E.2d 462, 464 (2009).
- "[T]he calculation of a prior record level . . . ." *State v. Boyd*, 207 N.C. App 632, 641, 701 S.E.2d 255, 261 (2010).

N.C. Gen. Stat. § 15A-1446(d)(19): "A significant change in law, either substantive or procedural, applies to the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required.

"Given the procedural posture of this case, and the timing of the United States Supreme Court's decision in *Indiana v. Edwards*, . . . N.C. Gen. Stat. § 15A-1446(d)(19) . . . specifically allows review of this issue presented in this appeal." *State*

v. Wray, 206 N.C. App 354, 356, 698 S.E.2d 137, 139 (2010), *review dismissed as moot*, 365 N.C. 88, 706 S.E.2d 477 (2011).

The following provisions of N.C. Gen. Stat. § 15A-1446(d) have not been cited as the basis for an appellate court's review of an issue otherwise subject to default.

N.C. Gen. Stat. § 15A-1446(d)(2): "Lack of jurisdiction of the trial court over the person of the defendant."

N.C. Gen. Stat. § 15A-1446(d)(8): "The conduct for which the defendant was prosecuted was protected by the Constitution of the United States or the Constitution of North Carolina."

N.C. Gen. Stat. § 15A-1446(d)(12): "Rulings and orders of the court, not directed to the admissibility of evidence during trial, when there has been no opportunity to make an objection or motion."

N.C. Gen. Stat. § 15A-1446(d)(14): "The court has expressed to the jury an opinion as to whether a fact is fully or sufficiently proved."

N.C. Gen. Stat. § 15A-1446(d)(15): "The defendant was not present at any proceeding at which his presence was required."

- "However, our Court has also held the failure to object at trial to the alleged denial of a defendant's constitutional right to be present at all stages of the trial constitutes waiver of the right to argue the denial on appeal." *State v. Jefferson*, 288 N.C. App. 257, 261, 886 S.E.2d 180, 183 (2023).
- The *Jefferson* Court did not resolve the apparent tension between this precedent and § 15A-1446(d)(15), *id.*, and no other case has cited this subsection.

N.C. Gen. Stat. § 15A-1446(d)(17): "The form of the verdict was erroneous."

V. Plain Error (in limited criminal cases only)

A. Introduction

In 2012, our Supreme Court clarified the plain error doctrine in *State v. Lawrence*:

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To

> show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (cleaned up).

"Furthermore, plain error review in North Carolina is normally limited to instructional and evidentiary error." *Id.* at 516, 723 S.E.2d at 333; *see also State v. Miles*, 221 N.C. App. 211, 216, 727 S.E.2d 375, 378 (2012) (recognizing that issue of "whether it was plain error for the trial court to require the defendant to wear prison garb in front of the jury . . . was not appropriate for plain error review because the alleged error was not instructional or evidentiary.").

This standard of review is difficult to satisfy, but our appellate courts have found plain error on rare occasions. The following cases are examples:

B. Admission of Evidence

- *State v. Brunson*, 204 N.C. App 357, 359, 693 S.E.2d 390, 392 (2010) (concluding that the trial court committed plain error by admitting expert testimony on identification of opiates where expert did not perform any scientific analysis, but relied solely on visual inspection).
- *State v. Harwood*, 221 N.C. App. 451, 463, 727 S.E.2d 891, 901 (2012) (concluding that the trial court committed plain error by admitting the defendant's inculpatory statements and items seized from a search of his residence, because they were the direct result of an illegal search and seizure and, "absent the admission of the evidence obtained as a result of the unlawful investigative detention, the record would probably not have contained sufficient evidence to establish [the] defendant's guilt").
- *State v. Ryan*, 223 N.C. App. 325, 338, 734 S.E.2d 598, 607 (2012) (reversing the trial court on the grounds that the admission of "Dr. Gutman's improper expert opinion testimony vouching for the credibility of the child constituted plain error" given that, "[e]xcept for Dr. Gutman's testimony, the evidence presented at trial amounted to conflicting accounts" and "[b]ecause Dr. Gutman was an expert in treating sexually abused children, her opinion likely held significant weight with the jury"), *disc. review denied,* 366 N.C. 433, 736 S.E.2d 189 (2013).

- *State v. Hinton*, 226 N.C. App. 108, 112, 738 S.E.2d 241, 246 (2013) (ordering a new trial on the grounds that the admission of "testimony from Sergeant Bray regarding gang activity in Elizabeth City" constituted plain error given that "the testimony was irrelevant and highly inflammatory when no evidence was presented to the jury that the offense in question was gang related").
- *State v. Farook*, 381 N.C. 170, 178, 871 S.E.2d 737, 746 (2022) ("The trial court plainly erred when it admitted privileged testimony from [the defendant's prior counsel] as evidence against [the defendant] at the hearing on [the] defendant's motion to dismiss" on speedy-trial grounds.).

C. Jury Instructions

1. Failure to instruct on all elements of offense

- *State v. Bogle*, 324 N.C. 190, 196, 376 S.E.2d 745, 748 (1989) ("[A]ll substantive and material features of the crime with which a defendant is charged must be addressed in the trial court's instructions to the jury. . . . Because the "willful blindness" jury instructions given here failed to adequately address the material element of knowledge, there was error. We hold that the willful blindness instruction is inconsistent with North Carolina law, and thus the trial court erred in giving such an instruction to the jury.").
- *State v. Coleman*, 227 N.C. App. 354, 742 S.E.2d 346 (reversing the trial court on the grounds that the trial court failed to instruct the jury in accordance with footnote 4 of N.C.P.I.—Crim. 160.17 and Crim. 260.30, which provides that "if the defendant contends that he did not know the true identity of what he possessed" then the trial judge must add to the beginning of the jury charge for trafficking in heroin by possession and by transportation that "the defendant knew that what he possessed was [heroin]"), *disc. review denied,* 367 N.C. 271, 752 S.E.2d 466 (2013).

2. Instructions allowing conviction without requiring the State to prove every element of offense with respect to each defendant

- *State v. Berry*, 356 N.C. 490, 524, 573 S.E.2d 132, 153 (2002) ("[T]he instruction given during the sentencing proceeding allowed the jury to find the course of conduct aggravating circumstance solely on the basis that [the] defendant had committed another murder, effectively negating the cautionary instructions given during the guilt-innocence phase. Because the sentencing instruction allowed the jury to disregard both the potentially attenuating effects of the passage of time on an alleged course of conduct and the differences between the two murders, while relieving the burden

on the State of proving the required link between the two murders, we are satisfied that the instruction constituted plain error.").

- *State v. Jones*, 357 N.C. 409, 418, 584 S.E.2d 751, 757 (2003) (The trial court plainly erred by instructing the jury on the aggravating circumstance of pecuniary gain because the trial court's instruction "set forth an irrebuttable presumption that the aggravator existed based on the jury's determination that Mr. Jones was guilty of felony murder.").
- *State v. Nobles*, 350 N.C. 483, 516, 515 S.E.2d 885, 905 (1999) (The trial court's instruction "effectively took from the jury's consideration whether the weapon used in this case is normally hazardous to the lives of more than one person. We conclude that this error relieved the State of its burden to prove this element of the aggravating circumstance in violation of due process principles; further, the trial court's instructions constituted plain error.").
- *State v. Adams*, 212 N.C. App. 413, 418, 711 S.E.2d 770, 773 (2011) ("The jury instructions . . . impermissibly grouped [the] defendants together in presenting the charges, the issues, and [the] defendants to the jury. Given that conflicting evidence was presented as to the order in which weapons were drawn and what role generally each defendant played in the incident, this confusion likely had an effect on the jury's verdict.").
- *State v. Williams*, 226 N.C. App. 393, 396, 401, 741 S.E.2d 9, 13, 16 (2013) (The trial court plainly erred by instructing the jury on a newly enacted stalking statute "when the bulk of the conduct constituting the offense was alleged to have taken place while the old stalking statute was still in effect and the evidence failed to show that defendant continued to harass the victim after the new statute came into effect" because "the trial court must specifically instruct the jury that they must decide whether the State has proven that the defendant committed a criminal act after the date of enactment beyond a reasonable doubt and render a special verdict as to that issue.").

3. Failure to instruct on mitigating factors

- *State v. Jones*, 346 N.C. 704, 717, 487 S.E.2d 714, 722 (1997) ("In the present case [the] defendant's criminal history was presented to the jury, but the jury was not allowed to consider whether this history was significant under the statutory (f)(1) mitigating circumstance" because the trial court plainly erred by failing to instruct the jury on that mitigating factor.).
- *State v. Flippen*, 344 N.C. 689, 702, 477 S.E.2d 158, 166 (1996) (Where the defendant and the State stipulated to the existence of a statutory mitigating factor, the trial court erred by not giving the *mandatory*

peremptory instruction that the factor existed and must be given some weight.).

4. Failure to charge on defenses and lesser-included offenses supported by the evidence

- *State v. Collins*, 334 N.C. 54, 62–63, 431 S.E.2d 188, 193 (1993) (The trial court plainly erred by failing to instruct the jury on attempted first-degree murder as a lesser-included offense where the defense expert testified that the victim would have died of unrelated causes.).
- *State v. Davis*, 177 N.C. App. 98, 103, 627 S.E.2d 474, 478 (2006) (The trial court plainly erred by failing to instruct the jury on all elements of self-defense, as defense was supported by evidence.).
- *State v. Clark*, 201 N.C. App. 319, 324, 689 S.E.2d 553, 558 (2009) (The trial court "did not conclude that the truck was, as a matter of law, a deadly weapon, but rather left that question to be decided by the jury"; therefore, "the trial court should have instructed on the lesser included offense of assault on a government official" in the event the jury determined the truck was a deadly weapon," with the failure to do so constituting plain error.).
- *State v. Hamilton*, ___ N.C. App. ___, ___, 895 S.E.2d 611, 619 (2023) ("[B]ecause a rational jury could have viewed the evidence to support common-law robbery and not robbery with a dangerous weapon, the trial court erred by not instructing the jury on common-law robbery . . . . Therefore, the trial court plainly erred in failing to instruct the jury on the lesser included offense." (cleaned up)).

5. Variance between indictment and jury instructions

- *State v. Tucker*, 317 N.C. 532, 540, 346 S.E.2d 417, 422 (1986) (The trial court plainly erred by failing to instruct the jury on a kidnapping theory not charged in the indictment.).

VI. Other

A. Failure to correct grossly improper argument *ex mero motu*

- *State v. Rogers*, 355 N.C. 420, 464–65, 562 S.E.2d 859, 886 (2002) ("In the case at bar, the prosecutor went beyond ascribing the basest of motives to defendant's expert. As detailed above, he also indulged in *ad hominem* attacks, disparaged the witness'[s] area of expertise, and distorted the expert's testimony. We have observed that maligning the expert's profession rather than arguing the law, the evidence, and its inferences is not the proper function of closing argument. In light of the cumulative effect

of the improprieties in the prosecutor's cross-examination of [the] defendant's expert and the prosecutor's closing argument, we are unable to conclude that [the] defendant was not unfairly prejudiced. Accordingly, we hold that [the] defendant is entitled to a new capital sentencing proceeding.").

- *State v. Jones*, 355 N.C. 117, 126, 131, 558 S.E.2d 97, 103, 106 (2002) ("[T]he prosecutor's repeated degradations of [the] defendant: (1) shifted the focus from the jury's opinion of [the] defendant's character and acts to the prosecutor's opinion, offered as fact in the form of conclusory name-calling, of [the] defendant's character and acts; and (2) were purposely intended to deflect the jury away from its proper role as a fact-finder by appealing to its members' passions and/or prejudices. As a consequence, we deem the disparaging remarks grossly improper and prejudicial.").
- *State v. Ward*, 354 N.C. 231, 266, 555 S.E.2d 251, 273 (2001) ("[W]e hold that the prosecutor impermissibly commented on [the] defendant's silence in violation of his rights under the state and federal Constitutions. . . . Hence, the trial court's failure to intervene *ex mero motu* amounted to an abuse of discretion. Because we cannot conclude that this omission had no impact on the jury's sentencing recommendation, we set aside the sentence of death and remand for a new capital sentencing proceeding.").
- *State v. Hembree*, 368 N.C. 2, 20, 770 S.E.2d 77, 89 (2015) (The trial court erred by failing to intervene *ex mero motu* where "[t]he State argued to the jury, not only that [the] defendant had confessed truly and recanted falsely, but that he had lied on the stand in cooperation with defense counsel" where "there was no evidence showing that he had done so at the behest of his attorneys.").

B. Right to Trial by a Jury of 12 and Unanimous Jury Verdict

"[I]t is well established that for the trial court to provide explanatory instructions to less than the entire jury violates the defendant's constitutional right to a unanimous jury verdict. . . . While the failure to raise a constitutional issue at trial generally waives that issue for appeal . . . where the error violates the right to a unanimous jury verdict under Article I, Section 24, it is preserved for appeal without any action by counsel." *State v. Wilson*, 363 N.C. 478, 483, 681 S.E.2d 325, 329 (2009) (The trial court's *ex parte* conversation with foreman in absence of entire jury violated a defendant's right to unanimous verdict.).

See also State v. Johnson, 183 N.C. App. 576, 582, 646 S.E.2d 123, 127 (2007) (The defendant's right to unanimous verdict is violated by an instruction allowing the jury to convict the defendant on either of two theories, one of which was not supported by evidence.):

> Generally, a defendant's failure to object to an alleged error of the trial court precludes the defendant from raising the error on appeal. Where, however, the error violates a defendant's right to a trial by a jury of twelve, a defendant's failure to object is not fatal to his right to raise the question on appeal.

Most recently, the Court of Appeals considered whether "the trial court's substitution of an alternate juror after jury deliberations had begun constitutes reversible error." *State v. Chambers*, No. COA22-1063, 2024 WL 675885, at *1 (N.C. Ct. App. Feb. 20, 2024). The *Chambers* Court noted that the defendant failed to object to the juror substitution at trial, but determined that "this error is not waivable and is, therefore, appropriately before our Court for review." *Id.*, at *2. It then concluded that the juror substitution violated the defendant's constitutional right to a jury of 12, notwithstanding a recently enacted amendment to N.C. Gen. Stat. § 15A-1215(a) allowing the substitution of an alternate juror after jury deliberations had begun: "[W]here a statute conflicts with our state constitution, we must follow our state constitution." *Id.*

C. Right to be Present (in Capital Trial)

"[T]he trial court's action in excusing prospective jurors as a result of its private unrecorded bench conferences with them violated the defendant's state constitutional right to be present at every stage of the trial. The confrontation clause of the Constitution of North Carolina guarantees the right of this defendant to be present at every stage of the trial." *State v. Smith*, 326 N.C. 792, 794, 392 S.E.2d 362, 363 (1990).

Notably, the right to be present may be waived by noncapital defendant. "Unlike the right to a unanimous jury verdict under Article I, Section 24, the right to be present at every stage of the trial under Article I, Section 23 may be waived by noncapital defendants. *Wilson*, 363 N.C. at 485, 681 S.E.2d at 330. Accordingly, our Supreme Court has held that a defendant "waived appellate review of the trial court's unrecorded conversations by failing to object at trial." *State v. Tate*, 294 N.C. 189, 197, 239 S.E.2d 821, 827 (1978).

D. Change in Law

See State v. Chapman, 359 N.C. 328, 381, 611 S.E.2d 794, 831–32 (2005):

> On 1 March 2005, the United States Supreme Court issued its opinion, *Roper v. Simmons*, 543 U.S. 551, 161 L. Ed. 2d 1 (2005), . . . holding that the Eighth and Fourteenth

Amendments to the United States Constitution prohibit the states from imposing a death sentence on offenders who were younger than eighteen years of age when they committed their crime. Because [the] defendant was not yet eighteen years old at the time he murdered Ms. Nesbitt, we vacate [the] defendant's death sentence pursuant to the United States Supreme Court's recent decision in *Roper v. Simmons*.

PRESENTATION ON “WHEN TO INTERVENE”

STATEMENTS OF FACTS

In this hypothetical case, the defendant Clyde Barrow is charged with possession with intent to sell or deliver methamphetamine, maintaining a dwelling for the purpose of selling controlled substances and being an habitual felon. The defendant has entered pleas of not guilty.

The State’s evidence in this case tends to show that a search warrant was issued for the search of a house located at 100 Bundy Drive in Brentwood, North Carolina. Detective Steve McGarrett executed the search warrant on March 3, 2022. After entering the house, detective McGarrett searched the premises. During the search, detective McGarrett discovered approximately 6 grams of a white granular substance in a bedroom. The white substance, according to the detective, was in a large plastic bag that contained 2 separate smaller clear plastic bags. There was also a set of digital scales seized that was located on a dresser in the same bedroom. The detective indicated that there were both men’s and women’s clothing in the bedroom where the white substance was located. There were also photographs of the defendant and utilities and credit card bills addressed to the defendant that bore an address of 100 Bundy Drive found in the same bedroom.

The defendant’s attorney, in her opening statement, informed the jury that the evidence would show that three people, the defendant, his girlfriend Bonnie Parker and Kato Kaelin, lived in the house located at 100 Bundy Drive. The defendant’s attorney further indicated that the defendant would offer evidence that proved that the white substance found in the house was possessed by Kato Kaelin and not the defendant.

CAST OF CHARACTERS

ADA ZEALOUS	ROBERT BROADIE
ATTORNEY PLEAD’EM OUT	ALYSON GRINE
DEFENDANT CLYDE BARROW	TIM WILSON
TRIAL JUDGE	DAVID STRICKLAND
APPELLATE COURT	BOB ERVIN
DETECTIVE MCGARRETT	REGGIE MCKNIGHT
BONNIE PARKER	BRENDA BRANCH

HYPOTHETICAL NUMBER ONE: JURY SELECTION PROCEDURES

COURT: What case does the State desire to call for trial?

ADA ZEALOUS: The State calls the case of State of North Carolina v. Clyde Barrow.

COURT: Are the parties ready to proceed?

ADA ZEALOUS: ADA Zealous for the State. The State is prepared to proceed.

PLEAD'EM OUT: Your, honor, I'm Penelope Plead'Em Out for the defendant. We are ready to go…

COURT: Before we start jury selection, I want to make a couple of things crystal clear. First, I am going to ask the jurors some basic questions. These questions will elicit information about their employment, their spouse's employment, where they live and their experience with the court system. Don't ask them any more questions about the matters that I inquire about. Do you understand that?

ZEALOUS: Yes, sir.

PLEAD'EM OUT: You betcha.

COURT: The second thing is we are short of both jurors and time. The jury pool is smaller than usual and we have to finish this trial by tomorrow afternoon. I've got to make sure that I get to the Pattern Jury Instruction meeting on Friday so that I can keep Judge Gottlieb from messing up the patterns again. So, when the State finishes with a group of jurors, even if they aren't a full group of 12, we're going to pass them to the defense while the Sheriff goes out to Wal-Mart to find some volunteers to fill out the jury pool. Any objections to this expedited approach.

ZEALOUS: No, sir.

PLEAD'EM OUT: Is it my understanding there's a possibility that, if we run out of jurors, then they would be passed to me with what we've got even if there are less than a full group of 12 jurors.

COURT: You betcha. There's that possibility.

HYPOTHETICAL NUMBER TWO: EVIDENCE OF CONTROLLED SUBSTANCES

ZEALOUS: Detective McGarrett, did you seize anything from the house located at 100 Bundy Drive?

DETECTIVE: Yes, I did.

ZEALOUS: (Approaching the witness) I am now showing you State's Exhibit Number Four, do you recognize it?

DETECTIVE: This is the white substance that I found in the bedroom at 100 Bundy Drive.

ZEALOUS: What is inside the large plastic bag?

DETECTIVE: Methamphetamine.

PLEAD'EM OUT: (Playing with her cell phone acting like she's texting)

ZEALOUS: Detective, I'm showing you State's Exhibit Number Five. Do you recognize it?

DETECTIVE: Yes I do. It is a lab report from the State Bureau of Investigation Crime Lab that analyzes the material in State's Exhibit Number Four.

ZEALOUS: What did the SBI lab conclude?

DETECTIVE: The SBI lab determined that the white substance was methamphetamine and that it weighed 5.69 grams.

ZEALOUS: The State moves to admit State's Exhibits Four and Five.

COURT: What says the defense?

PLEAD'EM OUT: No problem, judge.

COURT: Let State's Exhibits Four and Five be admitted into evidence.

HYPOTHETICAL NUMBER THREE: MOTION TO DISMISS

COURT: Will there be any more evidence for the State?

ZEALOUS: The State rests, your Honor.

COURT: Anything for the defense?

PLEAD'EM OUT: (Pretends to text something on a cell phone).

COURT: Any evidence for the defense?

PLEAD'EM OUT: I'd like to make a motion at this time.

COURT: I'll put a ruling in the record to that later. Do you have any witnesses?

PLEAD'EM OUT: Yes, your Honor.

COURT: All right, you may proceed.

HYPOTHETICAL NUMBER FOUR: TRIAL COURT'S EXPRESSION OF OPINION

PLEAD'EM OUT: The defense calls Bonnie Parker.

COURT: Come around and be sworn. (Swear witness).

PLEAD'EM OUT: What is your name?

WITNESS: Bonnie Parker.

PLEAD'EM OUT: Do you know Clyde Barrow?

WITNESS: Yes sir.

PLEAD'EM OUT: How do you know him?

WITNESS: He's my boyfriend. We've been seeing each other for five blissful years.

PLEAD'EM OUT: Where did you live on March 3, 2022?

WITNESS: At 100 Bundy Drive with Clyde.

PLEAD'EM OUT: Do you know Kato Kaelin?

WITNESS: Yes, sir.

PLEAD'EM OUT: How do you know him?

WITNESS: He stayed at 100 Bundy Drive for about two months prior to the search.

ZEALOUS: Objection, Your Honor. Where Kato Kaelin stayed or didn't stay has nothing to do with these charges.

COURT: Sustained. Ms. Plead'em Out, move on to something else.

PLEAD'EM OUT: Are you aware though of Kato Kaelin staying…

COURT: Move on to another area. Kaelin has no involvement with these charges.

HYPOTHETICAL NUMBER FIVE: IMPROPER JURY ARGUMENT

COURT: Is the State ready to make its final argument to the jury?

ZEALOUS: Ladies and Gentleman, in my first argument, I explained the State's evidence to you and showed you why you should return a verdict of guilty on both counts. Now you have heard the defendant's argument that the defendant should be found not guilty because Kato Kaelin possessed the methamphetamine.

Did the defendant ever have the guts to tell you that himself. What would be wrong when you're represented by a lawyer with calling up the detective or having his lawyer call him up and say "let me tell you some more, let me tell you the rest of this?" He didn't do that. He didn't call the DA's office. He didn't call any police officer. He didn't call the detective. He didn't do any of that.

(DURING THE ARGUMENT, DEFENDANT SHOULD PRETEND TO POKE OR PROD HIS ATTORNEY TO GET HER TO OBJECT. THE ATTORNEY SHOULD IGNORE THE DEFENDANT OR BRUSH HIM OFF.)

Ladies and gentlemen of the jury, ask yourselves now "Why on earth would I wait until now to try to tell that story if I had that kind of story? Why would I do that?"

Well, that's because of who he is. You got this quitter, this loser, this worthless piece of—who's mean…He's as mean as they come. He's lower than the dirt on a snake's belly." Hiding behind his friend here. Find him guilty on both charges.

HYPOTHETICAL NUMBER SIX: COURT'S CHARGE OMITTING AN ELEMENT

COURT Ladies and gentlemen of the jury, the defendant has been charged with maintaining a building which is used for the purpose of unlawfully selling controlled substances.

For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt:

First, that the defendant maintained a building which was used for the purpose of unlawfully selling methamphetamine. Methamphetamine is a controlled substance, the selling of which is unlawful.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant maintained a building which was used for the unlawful selling of controlled substances, then it would be your duty to return a verdict of guilty of this offense. If you do not so find, or have a reasonable doubt as to one or both of these things, you would not find the defendant guilty of this offense.

At the conclusion of the court's charge and in the absence of the jury, are there any objections, corrections or additions to the Court's charge, from the State?

ZEALOUS: No, your honor.

COURT: From the defense?

PLEAD'EM OUT: Can we be at ease now? I've got some cases in another courtroom that I need to go handle.

HYPOTHETICAL NUMBER SEVEN: JURY REQUEST FOR A TRANSCRIPT

COURT: Counsel, I've just received a note from the jury asking for a transcript of the detective's testimony. What is the State's position on that request?

ZEALOUS: The State will leave that matter to the Court.

COURT: What says the defense?

PLEAD'EM OUT: However you want to handle it is okay with us.

COURT: Bring the jury in, please. Ladies and Gentlemen of the jury, I have received your note requesting a transcript of the testimony of Detective McGarrett.

There is no transcript to bring back there. She might get one typed up in a month. You see what I mean; we don't have the fancy equipment that you might see on TV. I don't think it's out there, but if it was, I can assure you the State of North Carolina won't spend the money for it. I don't mind putting that in the record because higher judges agree with me on that. So, we don't have anything that can bring it back there to you. The Court doesn't have the ability to now present to you the transcription of what was said during the course of the trial.

What does counsel say about those additional comments to the jury?

PLEAD'EM OUT: Tell it like it is brother.

HYPOTHETICAL NUMBER EIGHT: HABITUAL FELON PLEA

COURT: The jury having returned as its unanimous verdict that the defendant is guilty of possession with intent to sell and deliver methamphetamine and maintaining a dwelling for the purpose of selling methamphetamine, how does the defendant desire to proceed on the habitual felon status?

PLEAD'EM OUT: Your Honor, may I confer with Mr. Barrow briefly?

COURT: Yes, Madam.

(DEFENDANT AND PLEAD'EM OUT HUDDLE BRIEFLY WITH DEFENDANT SHAKING HIS HEAD AND LOOKING DISGUSTED)

PLEAD'EM OUT: The defendant will skip the jury trial and admit being an habitual felon.

COURT: Is that correct, Mr. Barrow? What do you have to say?

DEFENDANT: What I say doesn't matter in this courthouse. Given what's happened already and since I got appointed "Penitentiary Penny" here, I don't guess I have much choice or much of a chance anyway. I admit it.

COURT: Alright, I'll discharge the jury and then we can have a sentencing hearing.

PLEAD'EM OUT: We're ready to be heard on sentencing.

HYPOTHETICAL NUMBER NINE: OUT OF STATE CONVICTION

COURT: The State may proceed with its presentation at the sentencing hearing.

ZEALOUS: I have a worksheet which I am handing to the Court, and the worksheet indicates that the defendant has prior convictions in Pennsylvania in 1989.The most serious conviction would be the two counts of armed robbery, Class D felony.
He also had an unauthorized use of a motor vehicle in '88 in Pennsylvania, and a domestic violence conviction in South Carolina in 2002.

The worksheet does not include the felonies that the State relied upon to establish his status as an habitual felon.

So, we would contend he has eight points, he's a prior record Level III for sentencing.

COURT: Does the defendant stipulate that he would have eight prior record level points, therefore, for sentencing purposes, he would be a record Level III?

PLEAD'EM OUT: Yes, sir.

COURT: Based on that stipulation, the Court will conclude that the defendant has eight prior record level points and he will be sentenced in Prior Record Level III? The Court will assign six points for the armed robbery conviction and one point for the two other convictions.

HYPOTHETICAL NUMBER TEN: RESTITUTION ISSUE

ZEALOUS: Your Honor, there is one more thing we need to address.

COURT: What is that, Mr. Zealous?

ZEALOUS: You may recall that the search warrant was obtained using the assistance of a confidential and reliable informant who purchased methamphetamine at the defendant's residence on three prior occasions. The drug task force officers paid this informant for his or her services and there is also the buy money for the three purchases from the defendant's residence prior to the search. The State is seeking restitution of $ 400 for the informant's services and $ 200 for the buy money. I have a worksheet to hand up for that.

COURT: Does the defendant want to be heard?

PLEAD'EM OUT: Judge, he's going to be in so long that it won't matter.

COURT: The Court will grant the restitution request and tax it as a civil judgment.

Tab: Compassion Fatigue

The Price We Pay As Professional Problem Solvers

An examination of Compassion Fatigue

Brought to you by:
NC Lawyer Assistance Program
& LAP Foundation of NC, Inc.

lapfoundationnc.org

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1

Training Objectives

- Gain an understanding of what compassion fatigue is
- Identify signs and symptoms
- Recognize contributing factors
- Understand best practices for prevention and mitigation (at the individual/personal level)

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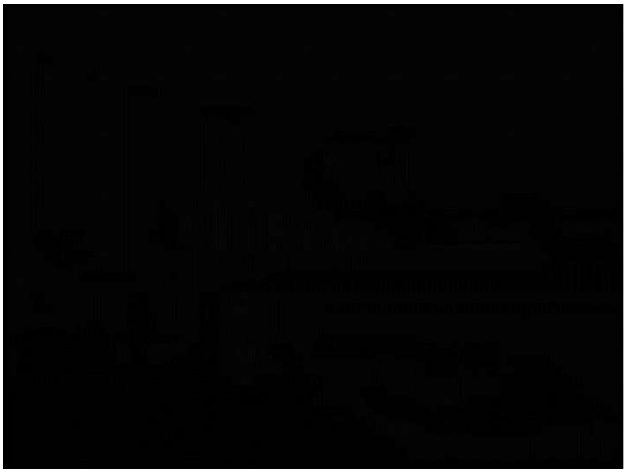
2



3

Fill in the blanks...

- The world is a _____ place.
- Life is _____.
- I am _____ as a human being.
- I want to change _____ about my job.
- I want to change _____ about myself.
- Most often I feel _____.

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4

Compassion Fatigue Defined

- The cumulative physical/ emotional/psychological effects of continual exposure to traumatic or distressing stories/events
- When working in a helping capacity
- Where demands outweigh resources

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5

Doing...

- Too much
- For too long
- With too few resources
- And working with the "big uglies" in life

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6


The Two Big Uglies
Trauma Exposure
Workload/Hours
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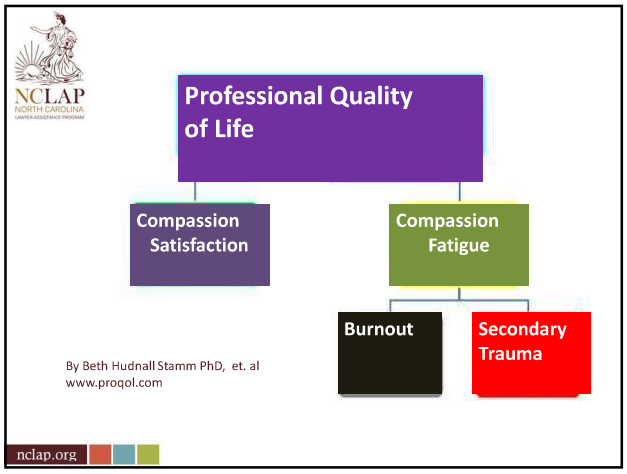
7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Professional Quality of Life
Compassion Satisfaction
Compassion Fatigue
Burnout
Secondary Trauma
By Beth Hudnall Stamm PhD, et. al
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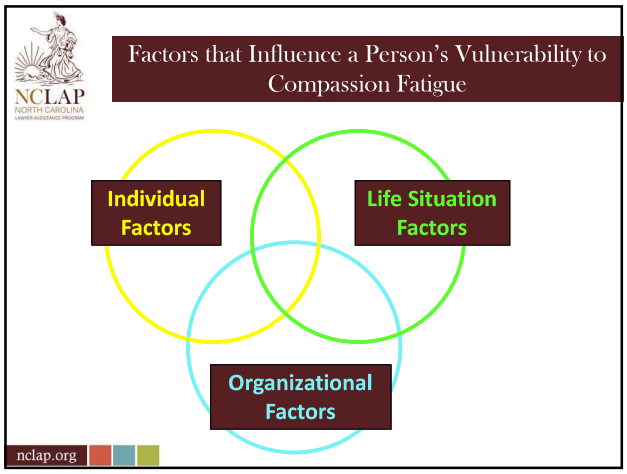
8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Factors that Influence a Person's Vulnerability to Compassion Fatigue
Individual Factors
Life Situation Factors
Organizational Factors
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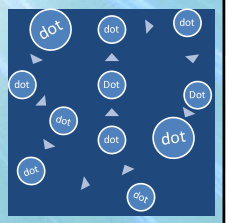
9

Individual Vulnerabilities and Life Situations

- History of or current trauma
- Health problems
- Alcohol or drug use/troubles
- Poor job performance
- Depression or anxiety
- Generic life problems-
  - Spouse/partner,
  - Children,
  - Parents
  - Finances



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10

Organizational Stressors

- Unrealistic expectations
- Unrecognized accomplishments
- Budget cuts
- Eliminating positions
- Performing multiple jobs
- Personalities and politics
- Intense competition (within and without)

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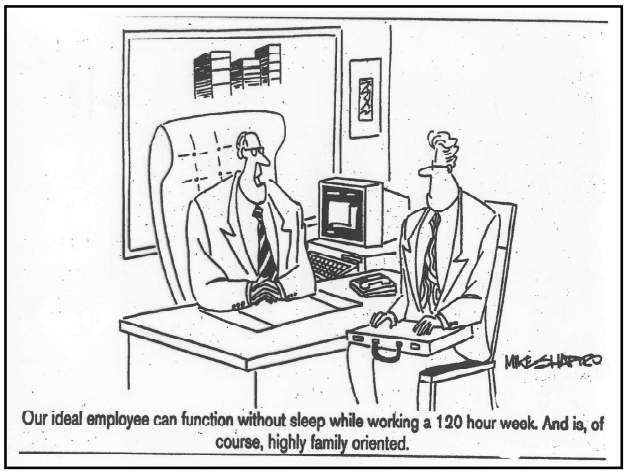
11



12

Workload: Look & Feel Familiar?

Statistically significant correlation with CF

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13

Client Expectations/Stressors

- Unrealistic
- Want it now
- Unhappy, sad, mad, frustrated
- Stress from the pressure
- Stress from the difficult material being reviewed and the workload yet expected to appear and be completely unaffected by it (i.e. not be human)

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14

Competitive Nature of Stress

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15

16

Compassion Fatigue Advisory...

- Any person regardless of race, gender, ethnicity, age, occupation…. develop this condition
- Doesn't imply weakness, just "human-ness"
- Is more about "dis-ease" than disease.

Unfit/Unable to practice ⟷ Top of your game

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17

Symptoms Reported

- Intrusive thoughts
- Anger/anxiety/fear
- Sleep disturbance
- Fatigue
- Loss of Appetite
- Loss of empathy
- Loss of faith in humanity
- Sense of isolation from others
- Health problems & Physical symptoms

Source: Vrklevksi et sl. (2008) and Levin et al. (2003) and Jaffe et al. (2006)

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18

Role of Mirror Neurons in the Brain

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19

20

Empathy

- Experience the experiences of someone else (Shane, 2008)
- Enduring those same experiences and emotions (Lydialyle Gibson)
- Empathy is involuntary: a shared emotion- this is hardwired into the brain (L. Gibson)
- *Human beings who spend time with other human beings who are empathetic tend to feel better*

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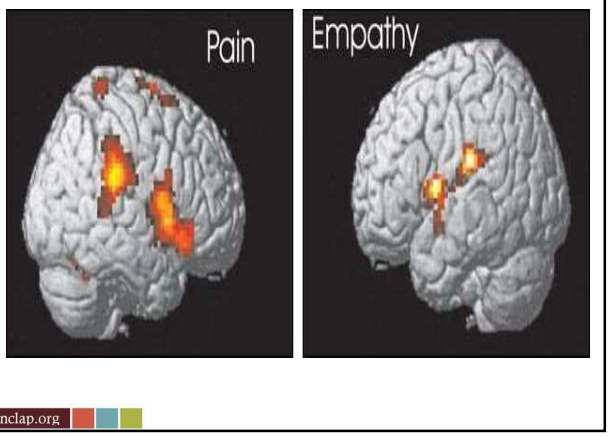
21


Pain
Empathy
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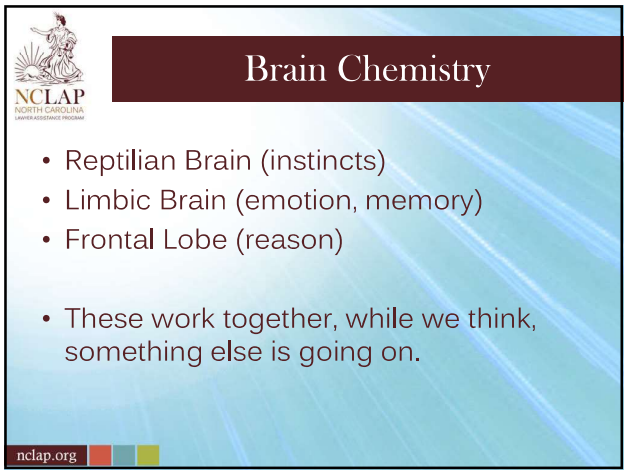
22


Hand
Foot
Pain
No Pain
Pain
No Pain

23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Brain Chemistry
• Reptilian Brain (instincts)
• Limbic Brain (emotion, memory)
• Frontal Lobe (reason)
• These work together, while we think, something else is going on.
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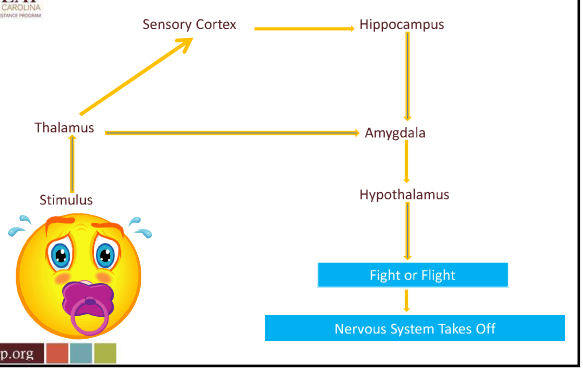
The Fight or Flight Response



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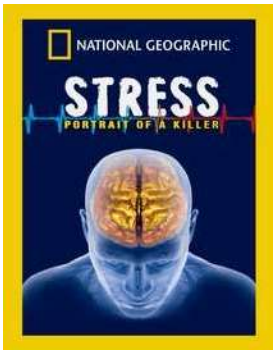
Stress: Portrait of a Killer

This movie sheds wonderful insight into the propagation of illness in today's society via the inner workings of the human stress response.

Only 50 minutes long.

Available on You Tube.



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Impact on Primary Assumptions

- The World is Benevolent
- The World is Meaningful
- The Self is Worthy

Source: Bulman, Shattered Assumptions

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One Attorney Says...

- "I think this happens to everyone whether they admit or not or show it or not. It is inevitable with that kind of caseload that one will at least at times go bonkers. This wears on all of us and on some of us more than others. We see colleagues severely affected all the time. I think the practice leaves scars. Some make it better than others, obviously, but everyone suffers....."

--criminal lawyer, PD office in Wisconsin

Source: WisLAP Program permission granted

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JUDGES SPEAK OUT

Some of the things 50 Canadian judges told U.S. psychologist Isaiah Zimmerman about their jobs:

"Cases of horrible, sexual, predatory exploitation of children haunt me. I keep my balance and my job as a judge by profoundly guarding myself against being swept away by the gruesome evidence I have to confront."

"It's no fun to be disliked in a small community where you also need to be a member of the church, the neighborhood and raise your kids."

"So little of our work involves legal issues to be truly adjudicated. At our level in minor courts, we are an dumping ground for massive social and economic issues and the acts of very dysfunctional families. I feel I am more a social worker than a judge."

"I always take work home. I'm the workaholic. I work evenings, seven days a week. If I didn't do it, I'd be hopelessly behind. You speak of control! I can't even control the cheesecake in my courtroom."

"I wasn't prepared for the isolation of this position. It slowly overtakes you, and then you realize indeed how alone often you are, despite your friends and family."

"You're always on – except in the sanctuary of your home. You march in public what you are, how you appear, where you appear."

"The sheer volume of each day's work makes me fear I'm just processing people and have lost touch with my better self. Am I becoming indifferent to horror?"

"Cases of horrible, sexual, predatory exploitation of children haunt me. I keep my balance and my job as a judge by profoundly guarding myself against being swept away by the gruesome evidence I have to confront."

Zimmerman, (2002). Trauma and Judges. Canadian Bar Association Annual Meeting

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Fill in the blanks

- The world is a _____ place.
- Life is _____.
- I am _____ as a human being.
- I want to change _____ about my job.
- I want to change _____ about myself.
- Most often I feel _____.

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So slow, is it even moving?

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That which is to give light must endure burning.....

Victor Frankl

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Rather slow and insidious.... then increases... then overwhelming.....

Burning

Uncomfortable

Overwhelming

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So what happens?

We crash.

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Visible Results

- Strong correlation with what is known as "Disruptive Behavior"
  - Intimidation, Anger and Lashing Out
    - At opposing counsel, support staff, associates
- "Kick the dog" syndrome: spouse/partner and kids take the brunt of the frustration
- Isolate/withdraw from clients and colleagues
- Enter the grievance and discipline process
- Physical manifestations: migraines, gastrointestinal problems, heart issues

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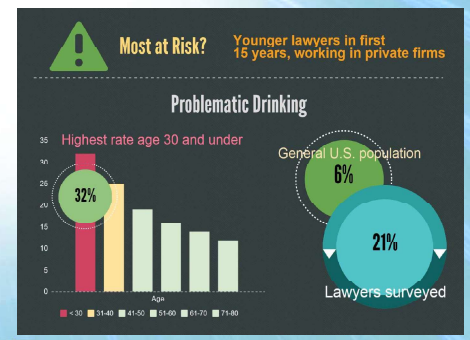
Problematic Drinking



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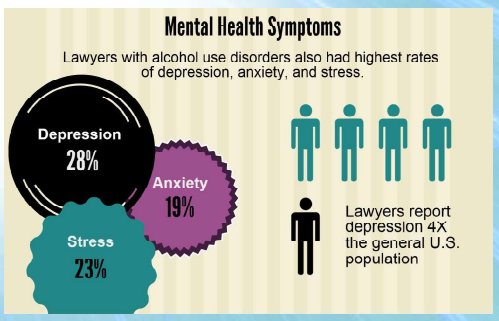
Mental Health



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37

Impact on Lawyers

- Powerlessness
  - Indecisive/Anxious
- Alienate from others

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Most common client complaints & grievance notices

- Lack of communication
- Apathy (improper advocacy)
- Lack of Diligence
- i.e. "I just don't care anymore."

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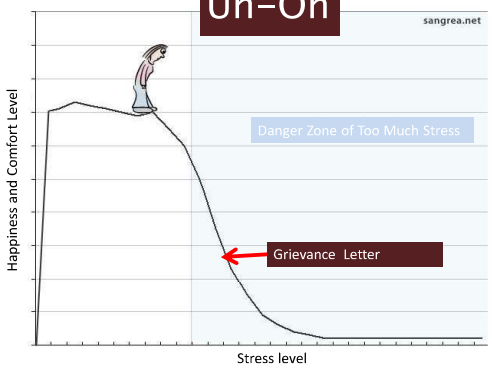
39

Uh–Oh



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Who most at risk?

- Personal Injury, Workers Comp, Bankruptcy, Wills, Trusts and Estates and Criminal or Family Law Attorneys/Judges
- High caseloads; long work hours
- High exposure to graphic evidence, 911 tapes, photos, videotapes, victim statements
- Serving clients with high levels of distress
- Little if any education on the subject of CF
- Little support from peers; isolation

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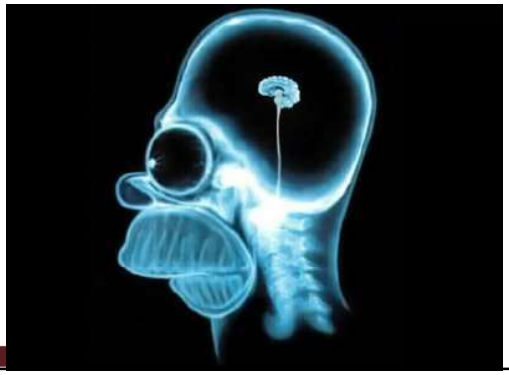
There is Hope for all of us…



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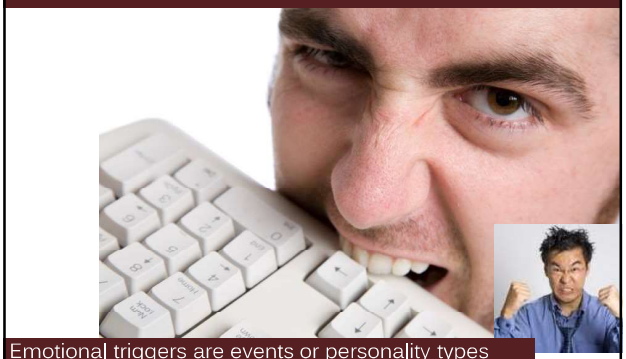
Understanding Triggers



Emotional triggers are events or personality types that cause an intense emotional response.

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Understanding Triggers

- Different for each one of us
- Examples:
  - Double Bind
  - Abuse of vulnerable populations
  - Disrespect from colleagues/judges/clients/people
  - Unfair, unjust realities of life and the system
  - The line at your door

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Research-based suggestions for improving mood, increasing life satisfaction and mitigating stress

- Recognize the **risks** for yourself
- Find a way to **debrief** distressing material
- Work on **self awareness** every day
- Take an **inventory** of how balanced your life is-be intentional about balancing it out
- **Evaluate** your tension reducing behaviors
- Be **intentional** about **protecting** yourself

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How Many are You Spinning?…

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Becoming Happier

- Spin fewer plates:
  - –Squeeze in less.
  - –Resume hobbies and activities that bring you joy and trigger the good stuff in the limbic brain

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Becoming Happier

- It is the obvious:

Sleep
Exercise
Eat

What do you do at the end of the day to transition out of work?
If nothing, admit that. Then change it.

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Square Breathing

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Body Scan Exercise

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Becoming Happier

- Don't deny negative emotions [fear, sadness, anxiety] – move toward them and accept them.
- Identify and speak with a close person (or people) who you trust to share your internal experience.

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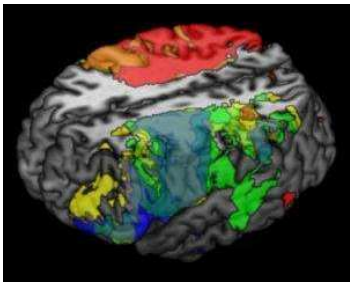
Talking and Connections Help the Brain



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Becoming Happier

- It is not state of status or bank account – "state of mind" is what matters most.
- While we may be paid well, money does not trigger the mirror neuron stimulus we (all humans) need to translate into better emotional health in our bodies and psyches.

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Becoming Happier

- Intersect pleasure and meaning → interests are central.
- Express Gratitude
- Try making a gratitude list every morning of 3 things you are grateful for. Do it for a few months and see what you notice. It will change your life.

Adapted from T. Ben-Shahar

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If you need to reach us

Cathy Killian
Clinical Director/West
704-910-2310
cathy@nclap.org

Nicole Ellington
Eastern Area
919-719-9267
nicole@nclap.org

Robynn Moraites
Executive Director
704-503-9695
robynn@nclap.org

Candace Hoffman
Field Coordinator
919-719-9290
candace@nclap.org

Thank you!

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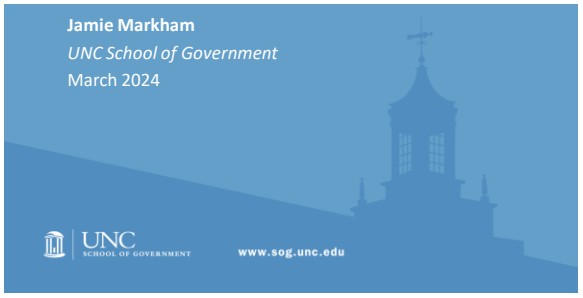
Tab: Advanced Sentencing

Advanced Criminal Procedure: Sentencing



1

Overview

- Presentence Investigations
- Contingent sentences
- Extraordinary Mitigation
- Substantial Assistance (Drug Trafficking)
- Advanced Supervised Release

2

Sentencing: A broad inquiry…

"[P]rior to imposing a sentence, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come."

State v. Thompson, 310 N.C. 209 (1984)

3

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No straightjacket…

"In our opinion it would not be in the interest of justice to put a trial judge in a straightjacket of restrictive procedure in sentencing."

State v. Pope, 257 N.C. 326 (1962)

Appropriate to inquire…

"In determining the proper sentence to impose upon a convicted defendant, it is appropriate for the trial judge to inquire into such matters as the age, character, education, environment, habits, mentality, propensities, and record of the person about to be sentenced."

State v. Smith, 300 N.C. 71 (1980)

"Pre-sentence investigations are favored and encouraged."

Pope, 257 N.C. at 335

UNC SCHOOL OF GOVERNMENT

Presentence Reports

- Presentence investigation
- Presentence commitment for study

7

Presentence Investigation

- G.S. 15A-1332
  - Court may order PSI for *any* defendant
    - Pre-conviction on defendant's motion
  - Completed by probation officer

8

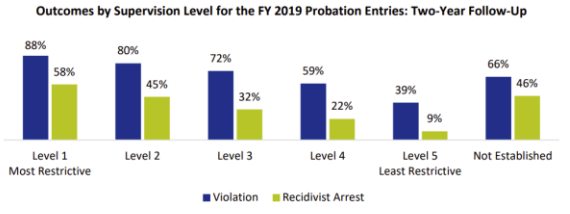
Presentence Investigation

- Prompt investigation into defendant's:
  - Health
  - Family and social history
  - Criminal history
  - History of substance abuse
  - Employment
  - Education
- Tailored to your request

9

Risk-Needs Assessment

- Risk assessment:
  - Offender Traits Inventory, Revised (OTI-R)
- Needs assessment
  - Officer interview + Offender self-report
  - Will flag substance abuse, family issues



Presentence Commitment

- Any felony or Class A1 or 1 misdemeanor
- Requires defendant's consent (except for sexually violent predator determination)
- Commit for up to 90 days

UNC SCHOOL OF GOVERNMENT

Presentence Reports

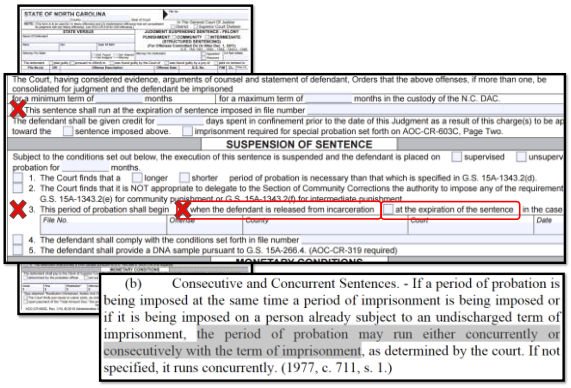
- Sentencing hearing may be held in different district upon completion of report
- Reports not a public record
- Reports may be expunged upon request, in your discretion

Advanced Sentencing Issues

"Contingent" Sentences

- Active sentence followed by probation
- Permitted under G.S. 15A-1346

> (b) Consecutive and Concurrent Sentences. - If a period of probation is being imposed at the same time a period of imprisonment is being imposed or if it is being imposed on a person already subject to an undischarged term of imprisonment, the period of probation may run either concurrently or consecutively with the term of imprisonment, as determined by the court. If not specified, it runs concurrently. (1977, c. 711, s. 1.)


STATE OF NORTH CAROLINA

The Court, having considered evidence, arguments of counsel and statement of defendant, Orders that the above offenses, if more than one, be consolidated for judgment and the defendant be imprisoned

for a minimum term of _____ months | for a maximum term of _____ months in the custody of the N.C. DAC.

This sentence shall run at the expiration of sentence imposed in file number _____

The defendant shall be given credit for _____ days spent in confinement prior to the date of this Judgment as a result of this charge(s) to be ap

toward the _____ sentence imposed above. imprisonment required for special probation set forth on AOC-CR-603C, Page Two.

SUSPENSION OF SENTENCE

Subject to the conditions set out below, the execution of this sentence is suspended and the defendant is placed on supervised unsupery

probation for _____ months.

1. The Court finds that a longer shorter period of probation is necessary than that which is specified in G.S. 15A-1343.2(d).
2. The Court finds that it is NOT appropriate to delegate to the Section of Community Corrections the authority to impose any of the requirement G.S. 15A-1343.2(e) for community punishment or G.S. 15A-1343.2(f) for intermediate punishment.
3. This period of probation shall begin when the defendant is released from incarceration at the expiration of the sentence in the case

File No. | Offense | County | Court | Date

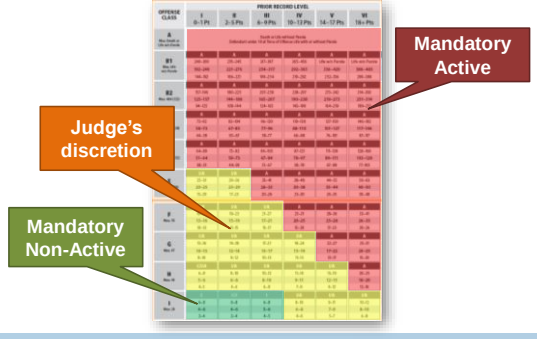
4. The defendant shall comply with the conditions set forth in file number _____
5. The defendant shall provide a DNA sample pursuant to G.S. 15A-266.4. (AOC-CR-319 required)

MONETARY CONDITIONS

(b) Consecutive and Concurrent Sentences. - If a period of probation is being imposed at the same time a period of imprisonment is being imposed or if it is being imposed on a person already subject to an undischarged term of imprisonment, the period of probation may run either concurrently or consecutively with the term of imprisonment, as determined by the court. If not specified, it runs concurrently. (1977, c. 711, s. 1.)

Extraordinary mitigation

- Allows an Intermediate sentence in certain "A"-only cells of the sentencing grid based on the presence of extraordinary factor(s)

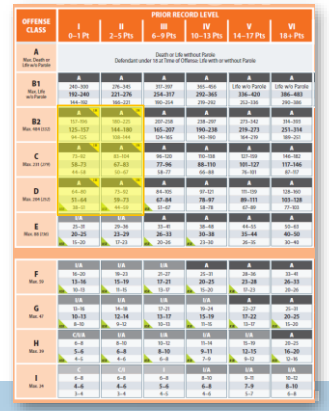


Extraordinary mitigation

- Exclusions
  - Cannot use with Class A or Class B1 felony
  - Cannot use for drug trafficking/conspiracy
  - Must have fewer than 5 prior record points

EM

Grid cells in which EM might be possible are flagged with this symbol.



Extraordinary mitigation

- Permissible when court finds:
  - Extraordinary mitigating factors of a kind significantly greater than in the normal case;
  - Those factors substantially outweigh any factors in aggravation; and
  - It would be a manifest injustice to impose an active punishment in the case

UNC SCHOOL OF GOVERNMENT

Extraordinary mitigation

- Court must find extraordinary mitigating factors "significantly greater than in the normal case"
  - Quality, not quantity, makes mitigation extraordinary
  - Cannot be an ordinary mitigating factor

Extraordinary mitigation

- Improper extraordinary mitigating factors
  - "The defendant's level of mental functioning was insufficient to constitute a defense but significantly reduced his culpability."
  - The 14-year-old victim consented to the crime

Example

- 18-year-old defendant has intercourse with a 13-year-old victim
- No prior record

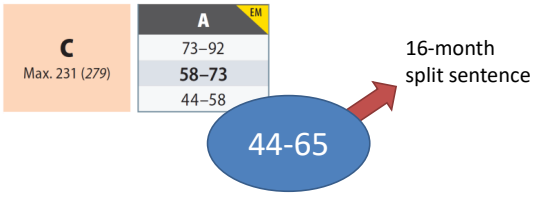
C
Max. 231 (*279*)

A	EM
73–92	
58–73	
44–58	

UNC SCHOOL OF GOVERNMENT

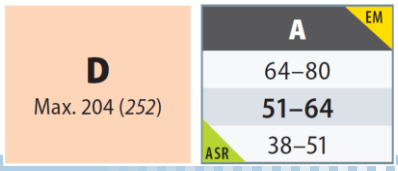
Example

- 18-year-old defendant has intercourse with a 13-year-old victim
- No prior record



Felony Death by Vehicle

Felony death by vehicle is a Class D felony. Notwithstanding the provisions of G.S. 15A-1340.17, intermediate punishment is authorized for a defendant who is a Prior Record Level I offender.



Drug Trafficking

Drug Trafficking

- Substantial assistance
- Attempted trafficking

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Substantial Assistance

- Drug trafficking only
- "Substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals."
- Judge has discretion to give reduced sentence, reduced fine, or probation

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Substantial Assistance

<u>2022</u>
459 trafficking convictions
60 probationary sentences

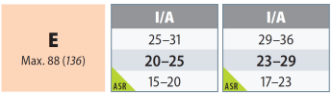
30

UNC SCHOOL OF GOVERNMENT

Attempted Trafficking

- Reverts to regular sentencing grid for that class of offense

Class E	90	120



- No mandatory fine

Advanced Supervised Release

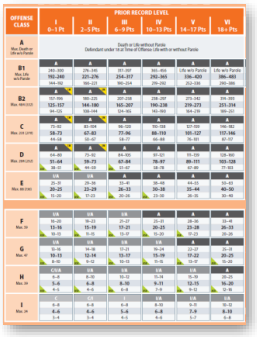
Advanced Supervised Release

- Created by Justice Reinvestment Act
- Allows early release from prison to post-release supervision for identified defendants who complete "risk reduction incentives" in prison
- Used 221 times in 2022

Eligibility

- Only certain grid cells
- Only Active sentences
- Only if court-ordered at sentencing
- Never over prosecutor objection

ASR
Grid cells in which ASR might be possible are flagged with this symbol.



ASR Date

- Court imposes regular sentence from the grid
- ASR date, if ordered, flows from regular sentence
  - If **presumptive or aggravated**, ASR date is the lowest mitigated minimum sentence in the defendant's grid cell
  - If **mitigated**, ASR date is 80% of imposed minimum sentence

C/I/A
6–8
5–6
ASR 4–5

4-14 month sentence
ASR date: 3.2 months

Example

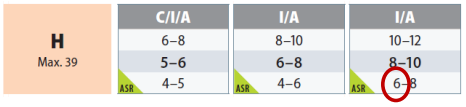
- PRL III defendant convicted of Obtaining Property by False Pretenses
  - Regular sentence: 8-19 months (presumptive)

H Max. 39	C/I/A	I/A	I/A
	6–8	8–10	10–12
	5–6	**6–8**	**8–10**
	ASR 4–5	ASR 4–6	ASR 6–8

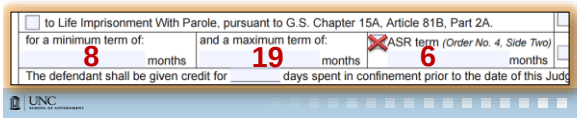
What is the ASR date?

Example

- PRL III defendant convicted of Obtaining Property by False Pretenses
  - Regular sentence: 8-19 months



H Max. 39	C/I/A	I/A	I/A
	6–8	8–10	10–12
	5–6	6–8	8–10
ASR	4–5	4–6	6–8



to Life Imprisonment With Parole, pursuant to G.S. Chapter 15A, Article 81B, Part 2A.

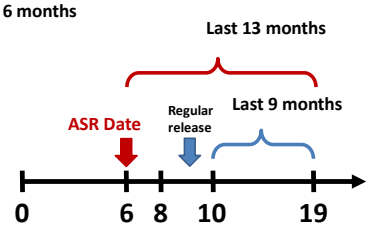
for a minimum term of: 8 months | and a maximum term of: 19 months | ASR term *(Order No. 4, Side Two)* 6 months

The defendant shall be given credit for _____ days spent in confinement prior to the date of this Judg

UNC

37

Regular sentence: 8-19 months
ASR date: 6 months



UNC

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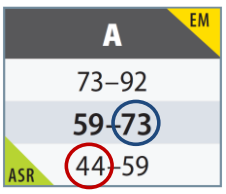
ASR Date (Class D, Level II)



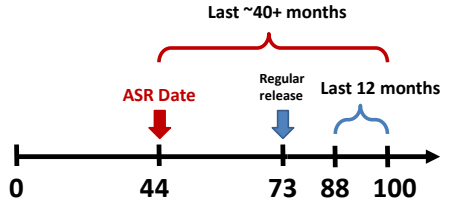
A	EM
73–92	
59–73	
ASR 44–59	

Regular sentence: 73-100 months
Regular release: ~75 months
ASR: 44 months

UNC

39

Regular sentence: 73-100 months
ASR date: 44 months



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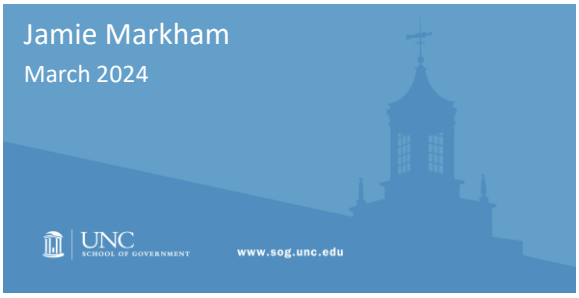
41

Tab: Probation Violation Hearings

Advanced Criminal Procedure:
Probation Violations



1

Before 2011

- A court could revoke probation for any violation of probation

2

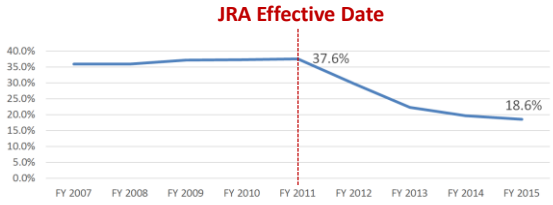
After Justice Reinvestment

- Court may revoke only for **new crimes** and **absconding**
- For other violations (**technical violations**), the court may impose lesser sanctions:
  - Confinement in Response to Violation (CRV)
  - "Quick dips"

3

UNC SCHOOL OF GOVERNMENT

Probation Revocation Rate



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Violation Hearing Procedure

5

Jurisdiction

- The court may act…"[a]t any time prior to the expiration or termination of the probation period." G.S. 15A-1344(d).
- Court may also act after expiration if violation report filed before probation ends. G.S. 15A-1344(f).

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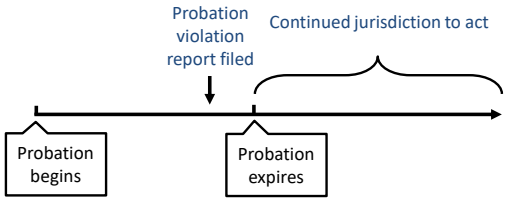
UNC SCHOOL OF GOVERNMENT



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G.S. 15A-1344(f)

(f) Extension, Modification, or Revocation after Period of Probation. – The court may extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:

(1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.

(2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.

(3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked

8

State v. Morgan (N.C., 2019)

- To preserve jurisdiction to act on a case after it has expired, the court must make a finding of **"good cause shown and stated"**

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UNC SCHOOL OF GOVERNMENT

What is Good Cause?

In other words, to extend a defendant's probation after the probationary term has expired, "the trial court must first make a finding that the defendant did violate a condition of his probation." *State v. Morgan*, 372 N.C. 609, 617, 831 S.E.2d 254, 259 (2019). "After making such a finding, trial courts are then required by subsection (f)(3) to make an *additional* finding of 'good cause shown and stated' to justify the [extension] of probation even though the defendant's probationary term has expired." *Id.* A finding of good cause "cannot simply be inferred from the record." *Id.*

State v. Jackson, 894 S.E.2d 263, 266 (N.C. Ct. App. 2023)

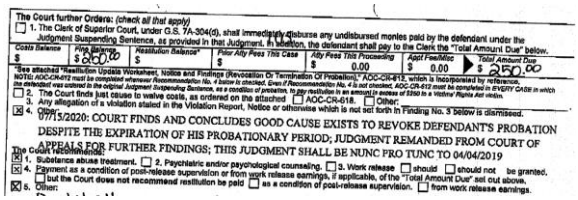
Good Cause?

- State v. Geter, 383 N.C. 484 (2022)
- Defendant's probation case expired after a probation violation had been filed for a pending criminal charge.

Good Cause?

Trial court finding: "It is clear to the [c]ourt that the State waited until disposition of the underlying offenses alleged before proceeding with the probation violation. The [c]ourt would find that this would constitute good cause."

Good Cause?



The Court further Orders: (check all that apply)
☐ 1. The Clerk of Superior Court, under G.S. 7A-304(d), shall immediately disburse any undisbursed monies paid by the defendant under the Judgment Suspending Sentence, as provided in that Judgment. In addition, the defendant shall pay to the Clerk the "Total Amount Due" below.

Costs Balance	Fine Balance	Restitution Balance*	Prior Atty Fees This Case	Atty Fees This Proceeding	Appt Fee/Misc	Total Amount Due
$	$ 5060.00	$	$	$ 0.00	$ 0.00	$ 250.00

*See attached "Restitution Update Worksheet, Notice and Findings (Revocation Or Termination Of Probation)," AOC-CR-612, which is incorporated by reference. NOTE: AOC-CR-612 must be completed whenever Recommendation No. 4 below is checked. Even if Recommendation No. 4 is not checked, AOC-CR-612 must be completed in EVERY CASE in which the defendant was ordered in the original Judgment Suspending Sentence, as a condition of probation, to pay restitution in an amount in excess of $200 to a Victims' Rights Act victim.

☐ 2. The Court finds just cause to waive costs, as ordered on the attached ☐ AOC-CR-618. ☐ Other:
☒ 3. Any allegation of a violation stated in the Violation Report, Notice or otherwise which is not set forth in Finding No. 3 below is dismissed.
☒ 4. Other:
07/15/2020: COURT FINDS AND CONCLUDES GOOD CAUSE EXISTS TO REVOKE DEFENDANT'S PROBATION DESPITE THE EXPIRATION OF HIS PROBATIONARY PERIOD; JUDGMENT REMANDED FROM COURT OF APPEALS FOR FURTHER FINDINGS; THIS JUDGMENT SHALL BE NUNC PRO TUNC TO 04/04/2019

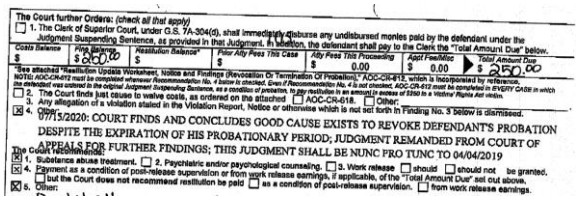
The Court recommends:
☒ 1. Substance abuse treatment. ☐ 2. Psychiatric and/or psychological counseling. ☐ 3. Work release ☐ should ☐ should not be granted.
☒ 4. Payment as a condition of post-release supervision or from work release earnings, if applicable, of the "Total Amount Due" set out above. ☐ but the Court does not recommend restitution be paid ☐ as a condition of post-release supervision. ☐ from work release earnings.
☒ 5. Other:

State v. Geter, 383 N.C. 484 (2022)

State v. Geter

Supreme Court: "The trial court complied with the provisions of N.C.G.S. § 15A-1344(f) and therefore possessed the jurisdiction to revoke defendant's probation after his term of probation had expired. Specifically, pursuant to N.C.G.S. § 15A-1344(f)(3), the trial court did not abuse its discretion in determining that good cause existed for the revocation of defendant's probation after his term of probation had expired."

Memorializing Good Cause



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☒ 5. Other:

State v. Geter, 383 N.C. 484 (2022)

Good Cause?

"Defendant takes issue with the fact that "neither the prosecutor nor the judge stated what the good cause was[,]" with the trial court only having specified that good cause existed. However, we do not read *Geter*, *Morgan*, or N.C.G.S. § 15A-1344(f) as requiring that the trial court specify what it found to constitute good cause, only that good cause exist."
State v. Harris, (N.C. Ct. App. Feb. 20, 2024)

Good Cause

- Identify "discontinued" cases
- If there is good cause, be sure to make a finding
  - Need not be detailed
  - There is no check-box
- Broad discretion
  - Pending charges
  - Violations filed near expiration
  - Continuances
  - Absconding

Final Violation Hearings

- Not a formal trial
- Probationer entitled to counsel
- Probationer may confront and cross-examine witnesses, unless the court finds good cause for not allowing confrontation
- Rules of evidence don't apply
  - Hearsay admissible
  - Exclusionary rule inapplicable
- Proof to judge's "reasonable satisfaction"

Confrontation

- G.S. 15A-1345(d): "At the hearing the probationer may appear and speak in his own behalf, may present relevant information, and may, on request, personally question adverse informants unless the court finds good cause for not allowing confrontation."

Confrontation

- "A proceeding to revoke probation is not a criminal prosecution[.] Therefore, a Sixth Amendment right to confrontation in a probation revocation hearing does not exist." State v. Singletary, (N.C. Ct. App. 2023).

No Exclusionary Rule

- State v. Boyette, 287 N.C. App. 270 (2022).
  - Defendant's probation revoked for possession of a firearm and meth. Defendant argued on appeal that the evidence was found during an improper search.

No Exclusionary Rule

"In 1982, our Supreme Court held 'that evidence which does not meet the standards of the [F]ourth and [F]ourteenth [A]mendments to the United States Constitution may be admitted in a probation revocation hearing.' . . . Thus, regardless of whether the search would have passed constitutional muster if offered as the basis for the admission of evidence at a trial on the new offenses, the trial court did not err by admitting the evidence at Defendant's probation revocation hearing."

Response Options

Revocation

Serious Violations
- New criminal offense
- Absconding

Eligible for revocation upon first violation

Technical Violations
- Everything else

Three Strikes approach
Eligible for revocation after two prior CRV's

Revocation

- Permissible in response to:
  - Commit no criminal offense
  - Absconding
  - Any violation by a probationer with two prior CRV's

New criminal offense

- "Commit no criminal offense in any jurisdiction"
  - **Conviction** for new offense
  - **Independent findings** of criminal offense at probation violation hearing
- No revocation solely for Class 3 misdemeanor

New criminal offense

Of the conditions of probation imposed in that judgment, the defendant has willfully violated:
1. General Statute 15A-1343(b)(1) "Commit no criminal offense in any jurisdiction" in that OFFENDER WAS ARRESTED AND CHARGED WITH FELONY UTTERING A FORGED INSTRUMENT ON 02/20/2022. OFFENSE DATE 09/31/21 AT THE STATE EMPLOYEE'S CREDIT UNION IN WAKE COUNTY CASE 22CR201479.

UNC SCHOOL OF GOVERNMENT

State v. Singletary, (N.C. Ct. App. 2023)

"The sworn violation report constitutes competent evidence sufficient to support the trial court's finding that [the] defendant committed this violation. . . The trial court was entitled to infer from two arrest warrants issued by two different law enforcement offices in two alleged incidences involving fraudulent checks, two sworn violation reports, and Horne's sworn testimony, that the images of Defendant depicted her committing the crimes alleged. Thus, the court made an independent finding based on the evidence provided at the probation revocation hearing and did not reach its determination based solely on Defendant's being charged with the crimes. A probation revocation hearing is not a trial, and the State need not present evidence sufficient to convict Defendant nor call as witnesses the investigating officers of the crimes alleged."

Absconding (p. 21)

"Not abscond by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer, if the defendant is placed on supervised probation."

G.S. 15A-1343(b)(3a)

Absconding

- More than merely failing to report
- More than merely failing to remain within the jurisdiction
- Facts supporting absconding:
  - Long absence from residence
  - Repeated attempts by officer to contact
  - Probationer knows officer is looking for him or her and still doesn't respond

Confinement in Response to Violation (CRV)

- Permissible in response to violations other than "commit no criminal offense" and "absconding"
- Length:
  - Felony: 90 days
  - DWI: Up to 90 days
  - No CRV for misdemeanors

CRV (cont.)

- Must be continuous period (no "weekend CRV")
- Must be to proper place of confinement
  - DAC for felonies
  - SMCP for DWI
  - Not DART-Cherry or Black Mountain
- CRV periods ordered in multiple probation cases must run concurrently
- Maximum of 2 CRVs per case

Revocation after CRV

- After two CRVs, felony or DWI probation may be revoked for any subsequent violation

UNC SCHOOL OF GOVERNMENT

"Terminal CRV"

- CRV that exhausts the defendant's suspended sentence
- CRV that runs out the clock on the defendant's period of probation
- CRV followed by the judge's affirmative termination of probation

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Special Probation (Split)

- May be added in response to any violation
- Maximum term of imprisonment is ¼ of imposed suspended sentence
- May be served on weekends or other intervals
- "Terminal Split"

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Extending Probation

- Two types: *ordinary* and *special purpose*

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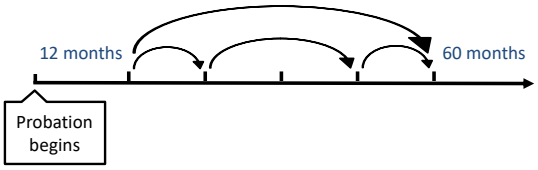
Ordinary Extensions

- At any time prior to expiration, for good cause shown, the court may extend probation to the 5-year maximum
  - No violation required
  - Could happen multiple times



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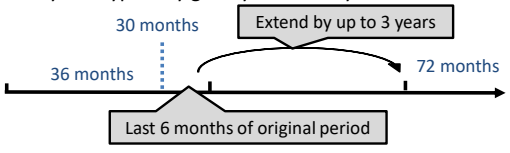
Special Purpose Extensions

- Extension by up to 3 years beyond the ***original*** period if:
  - Probationer consents
  - During last 6 months of ***original*** period, *and*
  - Extension is for restitution or medical or psychiatric treatment
- Only this type may go beyond the 5-year maximum



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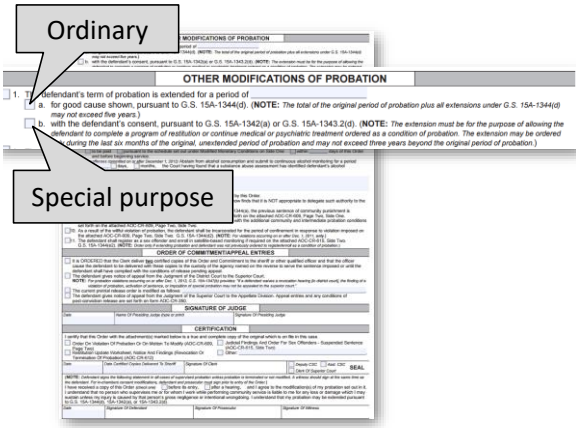

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Termination

- Ends probation early
- Permissible at any time if warranted by the defendant's conduct and "the ends of justice"
- "Terminate unsuccessfully"

"Elect to Serve"

- No longer an option by statute (since 1997)

Appeals

- District court defendants have a statutory right to appeal **revocation** or imposition of a **split sentence** to superior court for de novo violation hearing
  - No appeal of CRV
- No de novo appeal to superior court if violation hearing "waived"
- After appeal, case remains in superior court

Appeals

- Class H and I felonies pled in district court
  - By default, violation hearing is in superior court
  - With consent, may be held in district court
  - Appeal is de novo to superior court
- **2023 legislation**: In conditional discharge cases, superior court has jurisdiction to hold revocation hearing *and* to enter judgment and sentence Class H or I felony case originating in district court

Appeals

- Superior court defendant may appeal **revocation** and **split sentences** to the court of appeals
  - Appeal does not stay an activated sentence
  - Appeal stays imposition of a split
  - Court may allow release with conditions pending appeal

UNC SCHOOL OF GOVERNMENT

Tab: MARs

UNC SCHOOL OF GOVERNMENT

MOTIONS FOR APPROPRIATE RELIEF

Joseph L. Hyde, Assistant Professor

1

Itinerary

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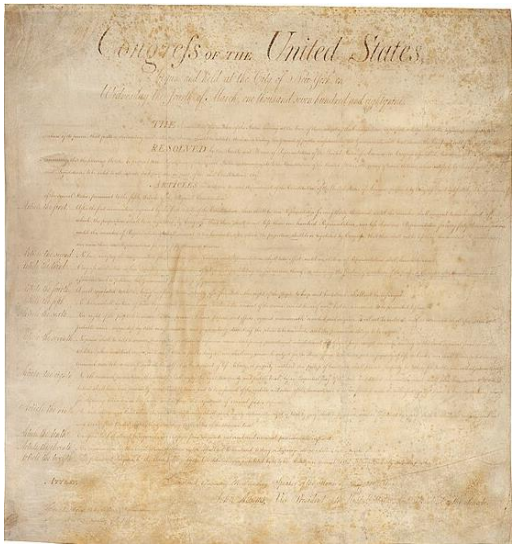
There is No Constitutional Right to Appeal

- "[A] North Carolina criminal defendant's right to appeal a conviction is provided entirely by statute."
- "The authority for appellate review in criminal proceedings is found in the North Carolina General Statutes and Rules of Appellate Procedure."



Statutes Governing the Right to Appeal

- A defendant who has entered a plea of not guilty, and who has been found guilty of a crime, is entitled to appeal when final judgment has been entered.
- The State may appeal:
  - Dismissal of charges;
  - Certain sentencing issues;
  - Order granting a motion to suppress.*

The Rules of Appellate Procedure

Any party entitled by law to appeal from an order or judgment in a criminal action may take appeal by:

(1) giving oral notice of appeal at trial; or

(2) filing written notice of appeal within fourteen days after entry of judgment or order . . .
or within fourteen days after a ruling on a motion for appropriate relief made within the fourteen-day period following entry of judgment or order.

1. Types and Timing

WILMINGTON, NC

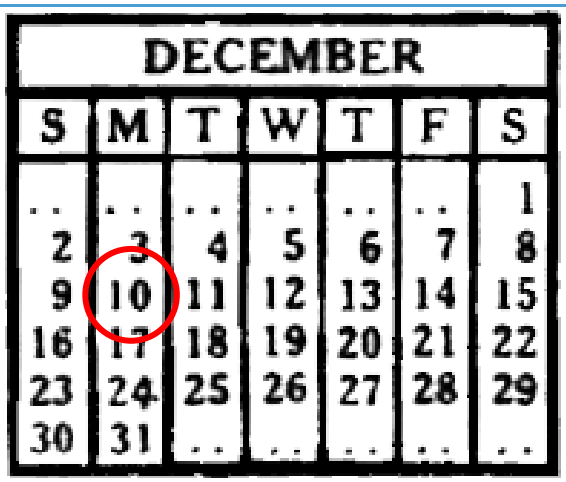
Post-trial Relief May be Sought by MAR

- It should be noted that the "post-trial motions" Article was drawn with an eye to the Appeals Article which follows in Article 91.

In general, an MAR must:
(1) be in writing;
(2) state grounds for relief;
(3) set forth relief sought;
(4) be supported by affidavit; and
(5) if made in superior court by an attorney, contain certification.

- Relief from errors committed in the trial division, or other post-trial relief, may be sought by MAR.

There Are Two Types of MARs:



- Within 10 days of judgment, the defendant may by MAR seek relief from any error committed during or prior to trial.
- Within 10 days of judgment, the State may by MAR seek relief from any error which it may assert upon appeal.
- The case remains open for taking appeal until the court has ruled on the MAR.

Beyond 10 Days, MAR Grounds are Limited:

JURISDICTION CLAIMS

- The trial court lacked jurisdiction;
- Acts charged in the pleading did not, at the time committed, constitute a violation of criminal law;

CONSTITUTIONAL CLAIMS

- The conviction was obtained in violation of the state or federal constitution.
- The defendant was convicted or sentenced under unconstitutional statute;
- The conduct for which the defendant was prosecuted was protected by the state or federal constitution;

SENTENCING CLAIMS

- The sentence imposed was unauthorized by law at the time imposed;
- The defendant is entitled to release because his sentence has been fully served.

Beyond 10 Days, MAR Grounds are Limited:

RETROACTIVITY CLAIMS

- There has been a significant change in law and retroactive application of the changed legal standard is required.

NEWLY DISCOVERED EVIDENCE CLAIMS

- Evidence is available which was unknown or unavailable at the time of trial, which could not with due diligence have been discovered or made available, including recanted testimony.

2. Counsel Issues

NEW BERN, NC

UNC SCHOOL OF GOVERNMENT

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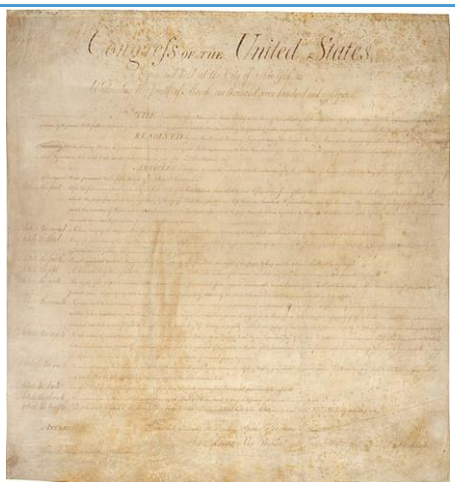
Right to Postconviction Counsel



- In general, there is no constitutional right to postconviction counsel.
- By statute (G.S. 7A-451), an indigent defendant is entitled to counsel if:
  (1) Appointment is authorized by Ch. 15A; and
  (2) The defendant has been convicted of a felony, fined $500 or more, or sentenced to a term of imprisonment.

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Counsel Authorized by Chapter 15A

FRIVOLITY REVIEW

- The judge assigned to the MAR shall conduct an initial review of the motion.
- If the judge determines the claims are frivolous, the judge shall deny the MAR.
- The judge shall appoint counsel if:
  (1) The MAR warrants a hearing, or
  (2) The interests of justice so require.

Counsel's Duties Upon Appointment

- Counsel shall review the MAR filed by the defendant and either adopt the MAR or file an amended motion.
- The defendant may file amendments to an MAR:
  (1) 30+ days prior to commencement of a hearing, or
  (2) at any time before the date of a hearing has been set.
- After postconviction counsel files an initial or amended motion, the judge may direct the State to file an answer.

Waiver of Attorney-Client Privilege

- When a defendant by MAR alleges ineffective assistance of trial or appellate counsel . . .
- The defendant is deemed to waive the attorney-client privilege.
- This waiver is automatic upon the filing of the MAR, and the superior court need not enter an order waiving the privilege.

3. Procedural Bars

RALEIGH, NC

Grounds for Denial of an MAR

- The ground or issue was previously determined on the merits upon a prior appeal or upon a previous motion or proceeding in state or federal court.
- Upon a previous appeal or upon a previous MAR, the defendant was in a position adequately to raise the ground or issue but did not do so.

The court shall deny the MAR under these circumstances

UNLESS . . .

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Bypassing the Procedural Bar

The court shall the deny the MAR unless the defendant can demonstrate:

(1) (a) good cause for excusing the grounds for denial prescribed, and

(b) can demonstrate actual prejudice resulting from the claim; or

(2) that failure to consider the claim will result in a fundamental miscarriage of justice.

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Good Cause Defined

Good cause may be shown only if the defendant establishes that his failure to raise the claim was:

(1) the result of unconstitutional state action, including IAC;

(2) the result of the recognition of a new right retroactively applicable; or

(3) Based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim.

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Actual Prejudice Defined

Actual prejudice may be shown only if . . .

(1) the defendant shows that an error occurred during trial or sentencing; and

(2) that, but for the error, a different result would have occurred.

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Fundamental Miscarriage of Justice Defined

A fundamental miscarriage of justice results only if:

(1) The defendant shows that, but for the error, no reasonable fact finder would have found the defendant guilty; or

(2) The defendant shows that, in light of newly discovered evidence, no reasonable juror would have found the defendant guilty.

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4. Evidentiary Hearings

CHARLOTTE, NC

22

Whether to Conduct a Hearing

Any party is entitled to a hearing unless the court determines the MAR is without merit.

An MAR is meritless if:

- There are no disputed issues of fact, and the claim must fail as a matter of law;
- Assuming all disputed issues of fact are resolved in the movant's favor, the claim must fail as a matter of law; or
- The defendant cannot show prejudice or the error is harmless beyond a reasonable doubt.

Whether to Conduct an *Evidentiary* Hearing

The court must determine whether an evidentiary hearing is required to resolve questions of fact.

- If the court cannot rule on the MAR without the hearing of evidence, it must conduct an evidentiary hearing for the taking of evidence.
- The court must determine the MAR without an evidentiary hearing when the MAR presents only questions of law.

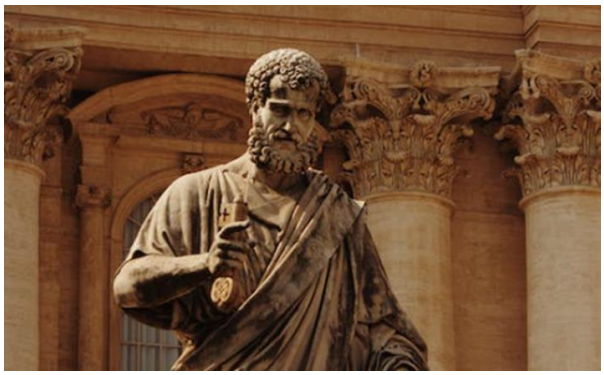
Procedure at an Evidentiary Hearing

If an evidentiary hearing is conducted:

- The defendant has a right:
  (1) To be present at the hearing, and
  (2) To be represented by counsel.

- The Rules of Evidence apply at the hearing.

Burdens at an Evidentiary Hearing



If an evidentiary hearing is conducted:

- The moving party has the burden of proving by a preponderance of the evidence every fact essential to support the MAR.

- A defendant must show the existence of the asserted ground for relief.

- Relief must be denied unless prejudice appears.

5. Orders and Appeals

ASHEVILLE, NC

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Findings & Conclusions

- The court must rule upon the motion and enter its order accordingly.
- If the court conducts an evidentiary hearing, it must make findings of fact.
- When the MAR is based on an alleged violation of federal rights, the court must make conclusions of law and a statement of reasons to indicate whether the defendant has had a full and fair hearing on the merits.

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Appellate Review

MAR WITHIN 10-DAYS OF JUDGMENT

The grant or denial of relief sought under G.S. 15A-1414 is subject to review only in an appeal regularly taken.

MAR BEYOND 10-DAYS OF JUDGMENT

The court's ruling on an MAR under G.S. 15A-1415 is subject to review:

- If the time for appeal from the conviction has not expired, by appeal.
- If an appeal is pending when the ruling is entered, in that appeal.
- If the time for appeal has expired and no appeal is pending, by writ of certiorari.

The Rules of Appellate Procedure

The writ of certiorari may be issued in appropriate circumstances to permit review of the judgments and orders of trial tribunals when:

(1) The right to prosecute an appeal has been lost by failure to take timely action, or

(2) When no right to appeal from an interlocutory order exists, or

(3) For review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court ruling on an MAR.

UNC SCHOOL OF GOVERNMENT

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MOTIONS FOR APPROPRIATE RELIEF

Jessica Smith, UNC School of Government (Aug. 2017)
Updated by Christopher Tyner (Feb. 2023)

Contents

I. Introduction.

A. MARs Generally.

A motion for appropriate relief (MAR) is a statutorily created vehicle for defendants to challenge their convictions and sentences.[1] A MAR may be filed before, during, or after direct appeal, although some restrictions apply to the types of claims that can be raised after a certain date. The statute also authorizes the State to file a MAR in certain circumstances. However, the overwhelming proportion of MARs are filed by the defense, and many of those are *pro se*. The statute also authorizes a judge to act *sua sponte* and grant relief on his or her own MAR.

Unlike an appeal, where the reviewing court is bound by the record, in a MAR proceeding, the trial court may hold an evidentiary hearing. Thus, the procedure often is used when the claim is one that depends on facts outside of the record, such as ineffective assistance of counsel.[2] However, MARs are not limited to claims that require factual findings and can assert errors of law.

B. Scope of This Chapter.

This Benchbook chapter discusses procedural issues that arise in connection with MARs filed in the trial division. These procedures apply to all MARs filed in the trial division with three exceptions:

- Racial Justice Act MARs;
- MARs by certain defendants who also are victims of human trafficking or related offenses; and

1. The MAR statutes are in North Carolina General Statutes Chapter 15A, Article 89 (Motion for Appropriate Relief and Other Post-Trial Relief).

2. *See* State v. Fair, 354 N.C. 131, 167 (2001) ("[B]ecause of the nature of [ineffective assistance of counsel] claims, defendants likely will not be in a position to adequately develop many [such] claims on direct appeal."). *Fair* also noted that defendants should nevertheless raise any ineffective assistance of counsel claims that are apparent from the record on direct appeal, to avoid procedural default under G.S. 15A-1419(a)(3). *See* Section X (discussing procedural default). *See also* State v. Johnson, 203 N.C. App. 718, 722-23 (2010) (dismissing the defendant's ineffective assistance claim without prejudice to file a MAR in superior court).

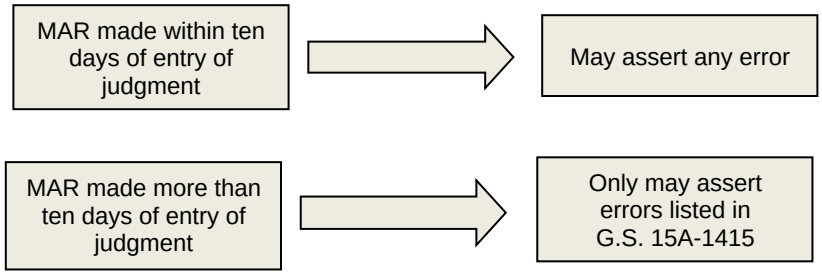
- MARs by juveniles raising *Miller*/8th Amendment issues.

Information about the procedures governing those MARs is provided in the accompanying footnote.[3]

II. Types of Claims That Can Be Raised.

A. Motions by the Defendant. As illustrated in Figure 1 and discussed in the text below, the types of claims that a defendant may assert in a MAR depend on when the motion is filed.

Figure 1. Defendants' MARs—Claims and Timing Rules



1. Made Within Ten Days of Judgment.

a. Claims That May Be Asserted. Pursuant to G.S. 15A-1414, if a MAR is made within ten days of entry of judgment, it may assert "any error committed during or prior to the trial." This provision reflects the notion that the most efficient way to obtain review of a trial error warranting reversal is to bring it to the attention of the trial judge.[4] Such a procedure allows the trial judge to correct the error while avoiding the time and expense of an appeal.

b. Claims That Must Be Asserted. G.S. 15A-1414(b) provides that unless the claim falls within the list of claims in G.S. 15A-1415 that can be asserted more than ten days after entry of judgment,[5] a nonexclusive list of claims that *must* be asserted within the ten-day period includes:

- Any error of law, including that
  - the court erroneously failed to dismiss the charge before trial pursuant to G.S. 15A-954 (setting out ten grounds that the defendant may assert to support dismissal of the charge);

3. For information about Racial Justice Act MARs, see JEFFREY B. WELTY, NORTH CAROLINA CAPITAL CASE LAW HANDBOOK 263-74 (3d ed. 2013). For the statute governing MARs filed by certain defendants who also are victims of human trafficking or related offenses, see G.S. 15A-1416.1. For the statute governing MARs by juveniles raising *Miller*/8th Amendment issues, see G.S. 15A-1340.19C.

4. *See* Leon H. Corbett, *Post-Trial Motions and Appeals*, 14 WAKE FOREST L. REV. 997, 998, 1003 (1978) [hereinafter Corbett].

5. *See* Section II.A.2 (discussing the types of claims that can be raised by a defendant in a MAR made more than ten days after entry of judgment).

- the court's ruling was contrary to law with regard to motions made before or during the trial, or with regard to the admission or exclusion of evidence;
- the evidence was insufficient to justify submission of the case to the jury; and
- the court erred in its jury instructions.

- The verdict is contrary to the weight of the evidence.
- For any other cause the defendant did not receive a fair and impartial trial.
- The sentence is not supported by evidence introduced at the trial and sentencing hearing.

2. Made More Than Ten Days After Judgment. Once the ten-day period expires, G.S. 15A-1415 contains an exclusive list of claims that may be asserted by the defendant.[6] Of course, all of these claims may be asserted before the expiration of the ten-day period.[7] G.S. 15A-1415 reflects legislative recognition that some errors are so egregious that the law should afford an extended or even unlimited time for raising them.[8] Thus, this provision includes claims that are "so basic that one should be able to go back into the courts at any time, even many years after conviction, and seek relief."[9]

a. Exclusive List of Claims That May Be Asserted. If the MAR is filed more than ten days after entry of judgment, the only claims that may be asserted are the ten claims discussed below, and illustrated in Figure 2 below.

Figure 2. MAR Claims That May Be Asserted More Than 10 Days after Entry of Judgment

MAR Claims That May Be Asserted More Than 10 Days after Entry of Judgment

i. Acts not a violation of law
ii. Trial court lacked jurisdiction
iii. Unconstitutional conviction
iv. Unconstitutional statute
v. Constitutionally protected conduct
vi. Retroactive change in the law
vii. Sentence was unauthorized, illegal, or invalid
viii. Sentence fully served
ix. Newly discovered evidence
x. Defendant was a victim of human trafficking, etc.

6. State v. Howard, 247 N.C. App. 193, 204 (2016) (G.S. 15A-1415 provides an exclusive list of claims that can be asserted; as such the trial court was without authority to grant the defendant's MAR that asserted a claim under the state's post-conviction DNA statute); State v. Wilkerson, 232 N.C. App. 482, 489 (2014) (the statute lists the only grounds that a defendant may assert in a MAR made more than 10 days after the entry of judgment); State v. Stubbs, 232 N.C. App. 274, 279 (2014) (G.S. 15A-1415 lists "the only grounds which the defendant may assert by a motion for appropriate relief made more than 10 days after entry of judgment"), *aff'd on other grounds*, 368 N.C. 40 (2015); State v. Smith, 263 N.C. App. 550, 562 (2019) (same).
7. *See* G.S. 15A-1414; Official Commentary to G.S. 15A-1415; Official Commentary to G.S. 15A-1414.
8. *See* Corbett, *supra* note 4, at 1006.
9. Official Commentary to G.S. 15A-1415.

i. **Acts Not a Violation of Law.** G.S. 15A-1415(b)(1) provides that a MAR filed more than ten days after entry of judgment may assert a claim that the acts charged in the criminal pleading did not, when committed, constitute a violation of criminal law. This provision allows a defendant to argue that he or she was convicted for something that was not a crime. For example, this provision would apply when the statute proscribing the crime for which the defendant was convicted was repealed before he or she committed the offense at issue.[10] Another example is when the defendant was convicted of sale of a controlled substance in violation of G.S. 90-95(a)(1), but the substance that the defendant sold was not in fact a controlled substance.

ii. **Trial Court Lacked Jurisdiction.** G.S. 15A-1415(b)(2) provides that a MAR filed more than ten days after entry of judgment may assert a claim that the trial court lacked jurisdiction over the defendant or over the subject matter of the case. An assertion that an indictment was fatally defective is an example of a claim that would be properly raised under this provision.[11] Another example is an allegation that an unreasonable period of time elapsed between entry of prayer for judgment continued and entry of judgment.[12]

iii. **Unconstitutional Conviction.** G.S. 15A-1415(b)(3) provides that a MAR filed more than ten days after entry of judgment may assert a claim that the conviction was obtained in violation of the United States or North Carolina constitutions. An ineffective assistance of counsel claim is an example of a claim that would be properly asserted under this provision.[13] Another is a claim asserting that a guilty plea was not knowing, voluntary, and intelligent.[14]

iv. **Unconstitutional Statute.** G.S. 15A-1415(b)(4) provides that a MAR filed more than ten days after entry of judgment may assert a claim that the defendant was convicted or sentenced under a statute that violated the

10. *See* Corbett, *supra* note 4, at 1006.
11. *See* State v. Sturdivant, 304 N.C. 293, 308 (1981) ("[A] valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony. Thus, defendant's motion, attacking the sufficiency of an indictment, falls squarely within the proviso of G.S. 15A-1415(b)(2) . . . ." (citations omitted)); State v. Futrelle, 266 N.C. App. 207, 209 (2019) (same). For more information about indictment defects, see Jessica Smith, *The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment*, ADMIN. OF JUSTICE BULL. No. 2008/03 (UNC School of Government) (July 2008), *available at* https://www.sog.unc.edu/publications/bulletins/criminal-indictment-fatal-defect-fatal-variance-and-amendment.
12. *See* State v. Degree, 110 N.C. App. 638, 641 (1993) (unreasonable time between entry of prayer for judgment continued and entry of judgment leads to a loss of jurisdiction); *see generally* Jessica Smith, *Prayer For Judgment Continued* in this Benchbook, *available at* http://benchbook.sog.unc.edu/criminal/prayer-judgment-continued.
13. *See, e.g.*, State v. House, 340 N.C. 187, 196–97 (1995).
14. *See* State v. Fennell, 51 N.C. App. 460, 462–63 (1981).

United States or North Carolina constitutions. An example of such a claim is one asserting that the habitual felon statute violates the double jeopardy clause[15] or that a sentence imposed under Structured Sentencing violates the Eighth Amendment.[16]

v. Constitutionally Protected Conduct. G.S. 15A-1415(b)(5) provides that a MAR filed more than ten days after entry of judgment may assert a claim that the conduct for which the defendant was prosecuted was protected by the United States or North Carolina constitutions. This provision would apply, for example, when the defendant argues that the conduct leading to a disorderly conduct conviction was protected by the First Amendment. Another example would be when a defendant convicted of crime against nature for private consensual homosexual sex between adults alleges the conduct was protected by the Due Process Clause of the United States Constitution under *Lawrence v. Texas*.[17]

vi. Retroactive Change in Law. G.S. 15A-1415(b)(7) provides that a MAR filed more than ten days after entry of judgment may assert a claim that there has been a significant change in law, either substantive or procedural, applied in the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required. The change in law must be significant[18] and can result from an appellate case or new legislation.[19] In both cases, G.S.15A-1415(b)(7) does not apply unless the change in law has retroactive application. Retroactive application refers to a new law that applies backward in time to cases decided and resolved before the new rule came about. When the change is brought about by legislation, determining whether the new

15. Note, however, that this claim has been rejected by the North Carolina courts. *See* Jeffrey B. Welty, *North Carolina's Habitual Felon, Violent Habitual Felon, and Habitual Breaking and Entering Laws*, ADMIN. OF JUSTICE BULL. No. 2013/07 (UNC School of Government) (August 2013), *available at* https://www.sog.unc.edu/publications/bulletins/north-carolinas-habitual-felon-violent-habitual-felon-and-habitual-breaking-and-entering-laws.

16. State v. Wilkerson, 232 N.C. App. 482, 490 (2014) (recognizing that such a claim falls within the scope of this subsection). Note that a claim asserting an illegal sentence may be challenged under either this provision of the MAR statute or under subsection 15A-1415(b)(8) (discussed below). *Id*. at 490-91 (so noting this overlap with respect to a claim that a sentence violated the Eighth Amendment).

17. *Cf.* Lawrence v. Texas, 539 U.S. 558 (2003).

18. State v. Chandler, 364 N.C. 313, 315-19 (2010) (*State v. Stancil*, 355 N.C. 266 (2002), dealing with the admissibility of expert opinions in child abuse cases, was not a significant change in the law; it merely applied existing law on expert opinion testimony to the context of child abuse cases); State v. Harwood, 228 N.C. App. 478 (2013) (declining to address whether *State v. Garris*, 191 N.C. App. 276 (2008), applied retroactively, the court held that the defendant's MAR failed because *Garris* does not constitute a significant change in the law; rather *Garris* resolved an issue of first impression; "a decision which merely resolves a previously undecided issue without either actually or implicitly overruling or modifying a prior decision cannot serve as the basis for an award of appropriate relief made pursuant to [G.S.] 15A-1415(b)(7)").

19. *See* Corbett, *supra* note 4, at 1009.

law applies retroactively is usually a simple matter of examining the statute's effective date. This is done by examining the session law's effective date provision, usually the last section of the session law.[20]

When the new rule derives from the case law, retroactivity analysis is more complicated. Because appellate courts generally do not indicate whether their rulings have retroactive application, it is necessary to determine after the fact whether a new court-made rule operates retroactively.[21] A defendant who alleges that his or her claim depends on a new federal criminal rule faces the difficult burden of establishing that the rule retroactively applies to his or her case under the test set forth in *Teague v. Lane*[22] and its progeny.[23] If the change is one of state law, the relevant retroactivity rule is that articulated in *State v. Rivens*.[24] For a detailed discussion of both of these tests, see Jessica Smith, *Retroactivity of Judge-Made Rules*, ADMIN. OF JUSTICE BULL. No. 2004/10 (UNC School of Government) (Dec. 2004).[25]

vii. Sentence Was Unauthorized, Illegal, or Invalid. G.S. 15A-1415(b)(8) provides that a MAR filed more than ten days after entry of judgment may assert a claim that the sentence imposed

- was unauthorized at the time imposed,
- contained a type of sentence disposition or a term of imprisonment not authorized for the particular class of offense and prior record or conviction level,
- was illegally imposed, or
- is otherwise invalid as a matter of law.

20. *See* State v. Whitehead, 365 N.C. 444, 447 (2012) (the superior court judge erred by "retroactively" applying Structured Sentencing Law (SSL) provisions to a Fair Sentencing Act (FSA) case; the defendant was sentenced under the FSA; after SSL came into effect, he filed a MAR asserting that SSL applied retroactively to his case and that he was entitled to a lesser sentence under SSL; the superior court judge granted relief; the supreme court reversed, relying on the effective date of the SSL, as set out by the General Assembly when enacting that law). Session laws are available on the North Carolina General Assembly's Web page at https://www.ncleg.gov (last visited Jan. 20, 2023).

21. *Cf*. State v. Bennett, 262 N.C. App. 287, 289 (2018) (trial court erred by granting defendant's MAR on grounds of a retroactive change in the law where prior to the MAR being filed the Court of Appeals explicitly had held that the new procedural rule at issue did not apply retroactively).

22. 489 U.S. 288 (1989).

23. *Teague* was a plurality decision that later became a holding of the Court. *See, e.g.*, Gray v. Netherland, 518 U.S. 152 (1996); Caspari v. Bohlen, 510 U.S. 383 (1994).

24. 299 N.C. 385 (1980); *see also* State v. Zuniga, 336 N.C. 508, 513 (1994) (noting that *Rivens* "correctly states the retroactivity standard applicable to new state rules").

25. Available online at http://www.sog.unc.edu/sites/www.sog.unc.edu/files/aoj200410.pdf. Note that the bulletin cited here was written prior to the United States Supreme Court decision in *Edwards v. Vannoy* holding that *Teague's* purported exception to the general rule of non-retroactivity for "watershed rules" of criminal procedure was moribund. 593 U.S. ___, ___, 141 S. Ct. 1547, 1560 (2021) (announcing that "[n]ew procedural rules do not apply retroactively on federal collateral review").

A motion only can be granted pursuant to this section if an error of law exists in the sentence.[26] An example of an error of law with regard to sentence would be when the trial judge sentences the defendant under the Fair Sentencing Act but the applicable law is the Structured Sentencing Act or when a sentence is alleged to be invalid because it violates the Eighth Amendment.[27] Note that a claim that the sentence is not supported by the evidence must be asserted within ten days of entry of judgment.[28]

viii. Sentence Fully Served. G.S. 15A-1415(b)(9) provides that a MAR filed more than ten days after entry of judgment may assert a claim that the defendant is in confinement and is entitled to release because the sentence has been fully served. This ground could be asserted when, for example, the Department of Correction has not complied with a judge's ruling ordering credit for time served,[29] and if such credit was given, the defendant would be entitled to release.

ix. Newly Discovered Evidence. G.S. 15A-1415(c) provides that a MAR filed more than ten days after entry of judgment may assert a claim of newly discovered evidence. However, a motion asserting such a claim "must be filed within a reasonable time of its discovery."[30]

To assert this claim, the defendant must allege the discovery of new evidence that was unknown or unavailable at the time of trial and could not with due diligence have been discovered or made available at that time, including recanted testimony.[31] The defendant also must show that the evidence has a direct and material bearing upon his or her eligibility for the death penalty or guilt or innocence.[32] This language codifies the case law regarding newly discovered evidence.[33] That case law establishes that in order to obtain a new trial on grounds of newly discovered evidence, the defendant must establish that:

26. *See* State v. Morgan, 108 N.C. App. 673, 678 (1993).
27. State v. Wilkerson, 232 N.C. App. 482, 490 (2014) (recognizing the latter claim as falling within the scope of this subsection); State v. Stubbs, 232 N.C. App. 274, 280 (2014) (same), *aff'd on other grounds*, 368 N.C. 40 (2015). Note that a claim asserting an illegal sentence may challenged under either this provision of the MAR statute or under subsection 15A-1415(b)(4) (discussed above). *Wilkerson,* 232 N.C. App. at 490-91 (so noting this overlap with respect to a claim that a sentence violated the Eighth Amendment).
28. G.S. 15A-1414(b)(4); *see also* State v. Espinoza-Valenzuela, 203 N.C. App. 485, 496 (2010).
29. *See* G.S. 15-196.1 to 196.4 (provisions on credit for time served).
30. G.S. 15A-1415(c).
31. *Id.*
32. *Id.*
33. *See* State v. Powell, 321 N.C. 364, 371 (1988) (addressing a provision in an earlier MAR statute pertaining to newly discovered evidence).

- the witness or witnesses will give newly discovered evidence;
- the newly discovered evidence is probably true;
- the newly discovered evidence is competent, material, and relevant;
- due diligence and proper means were employed to procure the testimony at the trial;
- the newly discovered evidence is not merely cumulative;
- the newly discovered evidence does not tend only to contradict a former witness or to impeach or discredit the witness; and
- the newly discovered evidence is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail.[34]

If the defendant seeks a new trial because of recanted testimony, the courts apply a different test. A defendant can obtain a new trial on the basis of recanted testimony if:

- the court is reasonably well satisfied that the testimony given by a material witness is false; and
- there is a reasonable possibility that, had the false testimony not been admitted, a different result would have been reached at the trial.[35]

A number of published North Carolina cases apply these tests to claims of newly discovered evidence.[36]

34. *See* State v. Britt, 320 N.C. 705, 712–13 (1987); *see also* State v. Howard, 247 N.C. App. 193, 200-01 (2016); State v. Peterson, 228 N.C. App. 339, 344 (2013).
35. *See Britt,* 320 N.C. at 715.
36. Cases rejecting claims of newly discovered evidence include: State v. Rhodes, 366 N.C. 532, 537-38 (2013) (after the defendant was convicted of drug possession, his father told a probation officer that the contraband belonged to him; because the information implicating the defendant's father was available to the defendant before his conviction, the statement was not newly discovered evidence; the court noted that the search warrant named both the defendant and his father, the house was owned by both of the defendant's parents, and the father had a history of violating drug laws; although the defendant's father invoked the Fifth Amendment at trial when asked whether the contraband belonged to him, the information implicating him as the sole possessor of the drugs could have been made available by other means; the court noted that on direct examination of the defendant's mother, the defendant did not pursue questioning about whether the drugs belonged to the father; also, although the defendant testified at trial, he gave no testimony regarding the ownership of the drugs); State v. Hall*,* 194 N.C. App. 42, 49-50 (2008) (evidence related to witness's bias was cumulative, pertained only to impeachment, and it was improbable that it would cause a jury to reach a different result on another trial); State v. Rhue*,* 150 N.C. App. 280, 288-89 (2002) (evidence was witness testimony that the murder victim had a gun; because the defendant testified that he never saw a weapon on the victim, the fact that the victim was armed was irrelevant to the defendant's assertion of self-defense; to the extent the defendant sought to discredit a trial witness's testimony that the victim was unarmed, this is not a proper basis for granting a MAR asserting newly discovered evidence); State v. Bishop*,* 346 N.C. 365, 401–04 (1997) (evidence consisting of eyewitness testimony that the defendant was not responsible for the crime; the State's cross-examination of the witness and the testimony of other witnesses "tended to substantially question his character for truthfulness and veracity" and support the trial court's conclusions that the witness's testimony was not true and that the defendant had not shown that a different result would probably be reached at another trial); State v. Wiggins, 334 N.C. 18, 37–39 (1993) (evidence was known to the defendant and available to him at the time of trial as the

By its terms, G.S. 15A-1415(c) speaks to evidence discovered "at any time after verdict" that was unknown or unavailable to the defendant "at the time of trial." No published North Carolina appellate case has considered whether a defendant who has pleaded guilty may assert a newly discovered evidence claim under the MAR statute. In *State v. Alexander*, 380 N.C. 572, 582-96 (2022), the North Carolina Supreme Court held that a defendant may be entitled to postconviction DNA testing under G.S. 15A-269 following a guilty plea notwithstanding language in that statute, including a reference to "the verdict," which the State argued should be interpreted as limiting relief to defendants who are convicted at trial. It remains to be seen whether[37] and how[38] North Carolina courts will interpret the applicability of G.S. 15A-1415(c) to cases involving guilty pleas.

x. Defendants who are victims of human trafficking, etc. 2019 legislation, S.L. 2019-158, sec. 5(a), amended G.S. 15A-1415 to allow a defendant who was convicted of a

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defendant and the witness both were in pretrial detention at the same jail and communicated with each other); State v. Eason, 328 N.C. 409, 432–35 (1991) (evidence tended to show that post-trial confession by a third party that was later recanted was not truthful where the witness stood by his disavowal and confession was uncorroborated and not credible); State v. Riggs, 100 N.C. App. 149, 156–57 (1990) (accomplice's testimony at his own trial that a third person was solely responsible for the crime; the testimony was cumulative, the defendant did not establish that it was probably true, and he failed to show due diligence); *Powell*, 321 N.C. at 370–71 (the defendant did not act with due diligence in obtaining testimony of witness whose statement the defendant was aware of at trial).

Cases finding merit in such claims include: State v. Reid, 380 N.C. 646 (2022) (newly discovered evidence of a third party's contemporaneous confession tending to exculpate the defendant entitled the defendant to a new trial where the trial court did not abuse its discretion by concluding that at the time of trial the defendant exercised due diligence in unsuccessfully attempting to procure the relevant witness's testimony, the substance of which was then unknown); State v. Peterson, 228 N.C. App. 339, 344-47 (2013) (newly discovered evidence that the State's expert bloodstain witness, Duane Deaver, had misrepresented his qualifications entitled the defendant to a new trial); State v. Stukes, 153 N.C. App. 770, 772-76 (2002) (newly discovered evidence consisted of a co-defendant's testimony offered at his own trial, which tended to exculpate the defendant); *see also* State v. Monroe, 330 N.C. 433, 434–35 (1991) (recounting the procedural history of the case and noting that the defendant was granted a new trial on the basis of newly discovered evidence; the defendant had contended that ballistic tests conducted by the Federal Bureau of Investigation after trial showed that the gun the State presented at trial was not used in the crime).

Cases involving claims of recanted testimony include: *Britt*, 320 N.C. at 711–17 (the defendant failed to establish that a recanting witness's trial testimony was false); State v. Doisey, 138 N.C. App. 620, 628 (2000) (trial court did not err in denying the defendant's MAR on the basis that a child victim in a sex offense case had recanted her testimony; although the victim recanted, she later reaffirmed that her trial testimony was correct, and the trial court found that the recantation was made after the victim was repeatedly questioned by the defendant's friends and family and that she was embarrassed about the events at issue).

37. It is conceivable that in some cases, rather than applying G.S. 15A-1415(c), it may be appropriate to apply existing North Carolina caselaw regarding motions to withdraw guilty pleas to a MAR asserting newly discovered evidence following a guilty plea. *Cf.* State v. Salvetti, 202 N.C. App. 18, 25 (2010) ("A post sentencing motion to withdraw a plea is a motion for appropriate relief"). For more information about the analysis applicable to motions to withdraw guilty pleas, see Jessica Smith, Pleas and Plea Negotiations in Superior Court, in this Benchbook, *available at* https://benchbook.sog.unc.edu/criminal/pleas-and-plea-negotiations.

38. *Cf. Alexander*, 380 N.C. at 587 (referencing the Court's precedent that remedial statutes "should be construed liberally, in a manner . . . which brings within [them] all cases fairly falling within [the statutes'] intended scope"); *but cf. Alexander*, 380 N.C. at 605-06 (Newby, C.J., concurring in result) (expressing view that language of G.S. 15A-269 should be interpreted to limit availability of postconviction DNA testing to defendants convicted at trial).

nonviolent offense as defined in G.S. 15A-145.9 to file a MAR to have the conviction vacated if the defendant's participation in the offense was a result of having been a victim of human trafficking, sexual servitude, or the federal Trafficking Victims Protection Act.[39] MARs asserting this ground have special procedural rules and standards, as set forth in G.S. 15A-1416.1.

b. **No Outer Limit on Time.** Except for capital cases,[40] if the claim is listed in G.S. 15A-1415 it may be asserted at any time—one year, five years, or twenty years after judgment. Put another way, no statute of limitations applies to MARs.

c. **Calculating the Ten-Day Period.** The ten-day period begins to run with entry of judgment, which is when the sentence is pronounced.[41] For entry of judgment to occur, the judge must announce the ruling in open court or sign the judgment and file it with the clerk.[42] In capital cases, the oral pronouncement of the recommendation of the sentencing phase jury constitutes entry of judgment.[43] When computing the ten-day period, Saturdays and Sundays are excluded.[44] Presumably, legal holidays when the courthouse is closed would be excluded as well. In civil matters, when computing the time periods prescribed by the rules of civil procedure, the day of the event after which a designated time period begins to run is not included.[45] It is not clear whether this rule applies to the ten-day MAR provision.

B. **Motions by the State.** G.S. 15A-1416 sets out the claims that may be asserted by the State in a MAR.

1. **Made Within Ten Days of Judgment.** G.S. 15A-1416(a) provides that in a MAR filed within ten days of entry of judgment, the State may raise "any error which it may assert on appeal." G.S. 15A-1432(a) governs appeals by the State from district court and provides that unless the rule against double jeopardy prohibits further prosecution, the State may appeal from district to superior court:

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39. G.S. 15A-1415(b)(10). G.S. 15A-1415(b) previously was amended by 2013 legislation creating subsection (10) but confining relief to defendants convicted of a first offense of prostitution under G.S. 14-204(a) that was not dismissed under G.S. 14-204(b). S.L. 2013-368 sec. 9. The expanded eligibility described in the text for convictions of nonviolent offenses as defined in G.S. 15A-145.9 applies to motions filed on or after December 1, 2019. S.L. 2019-158 secs. 5(a), 6(a). *See also generally* JESSICA SMITH, NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME 316-20 (7th ed. 2012) (discussing the offenses of human trafficking and sexual servitude); JESSICA SMITH AND JAMES M. MARKHAM, 2020 CUMULATIVE SUPPLEMENT TO NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME (2021).

40. *See* Section III.B.

41. *See* G.S. 15A-101(4a); *see also* State v. Handy, 326 N.C. 532, 535 (1990).

42. *See* Dep't of Corr. v. Brunson, 152 N.C. App. 430, 437 (2002) (*citing* State v. Boone, 310 N.C. 284 (1984)), *overruled on other grounds by* N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649 (2004).

43. *See Handy*, 326 N.C. at 536 n.1 (in context of motion to withdraw a guilty plea).

44. *See* State v. Craver, 70 N.C. App. 555, 560 (1984).

45. N.C. R. CIV. P. 6(a).

- when there has been a decision or judgment dismissing criminal charges as to one or more counts (e.g., a claim that the district court judge erroneously dismissed an impaired driving charge due to the State's failure to produce the chemical analyst in court[46]); or
- upon the granting of a motion for a new trial on the ground of newly discovered or newly available evidence, but only on questions of law (e.g., a claim that the district court judge erroneously granted a motion for a new trial on grounds of newly discovered evidence when the defense conceded that the evidence was known to it at the time of trial[47]).

G.S. 15A-1445(a) governs the State's appeals from superior court to the appellate division. It is identical to G.S. 15A-1432(a) except that it also allows the State to appeal when it alleges that the sentence imposed:

- results from an incorrect determination of the defendant's prior record level or prior conviction level (e.g., a claim alleging that the trial judge incorrectly added the defendant's prior record points and categorized the defendant as a prior record level III offender when a correct tabulation would have put the defendant in prior record level IV);
- contains a type of sentence disposition that is not authorized for the class of offense and prior record or conviction level (e.g., a claim alleging that the trial judge sentenced the defendant to intermediate punishment when only active punishment is authorized for the offense of conviction);
- contains a term of imprisonment that is for a duration not authorized for the class of offense and prior record or conviction level (e.g., a claim alleging that the trial judge sentenced the defendant to a term of imprisonment not authorized for the offense of conviction); or
- imposes an intermediate punishment based on findings of extraordinary mitigating circumstances that are not supported by evidence or are insufficient as a matter of law to support the dispositional deviation (e.g., a claim alleging that the judge imposed an intermediate punishment based on findings of extraordinary mitigating circumstances for a Class B1 felony).[48]

As noted above, G.S. 15A-1416(a) provides that a MAR filed by the State within ten days of judgment may raise any error that it "may assert

46. G.S. 20-139.1(e2) (criminal case may not be dismissed for failure of the analyst to appear, subject to specified exceptions).
47. *See* Section II.A.2.a.ix (discussing claims of newly discovered evidence).
48. Extraordinary mitigation may not be used for a Class A or Class B1 felony, a drug trafficking offense under G.S. 90-95(h), a drug trafficking conspiracy offense under G.S. 90-95(i), or if the defendant has five or more points as determined by G.S. 15A1340.14. G.S. 15A-1340.13(h)(1)-(3).

upon appeal." G.S. 15A-1445(b) allows the State to appeal a superior court judge's pre-trial ruling granting a motion to suppress, as provided in G.S. 15A-979. The latter statute provides for immediate appeal by the State of a pre-trial ruling on a motion to suppress. However, it is not clear that the State could use a MAR to challenge an adverse superior court ruling on a suppression motion. If the appellate court affirms the superior court's pre-trial ruling, the procedural bar rules would seem to prevent the State from re-asserting the issue in a MAR.[49] Additionally, the State would not be able to use a MAR in lieu of an appeal to challenge a trial judge's pre-trial ruling because a MAR can be made only after the verdict has been rendered.[50] Finally, because G.S. 15A-979 does not provide a right of appeal by the State of an adverse ruling on a motion to suppress made and granted during trial,[51] the issue is not one that the State "may assert upon appeal."

2. Made More Than Ten Days After Judgment. Once the ten-day period has expired,[52] the State's right to file a MAR is very limited, and it is not clear that the MAR statute provides for anything that is not already provided for by law. Under G.S. 15A-1416(b), the State may file a MAR more than ten days after entry of judgment for

- imposition of sentence when a prayer for judgment continued (PJC) has been entered; or
- initiation of a proceeding authorized under Article 82 (probation), Article 83 (imprisonment), and Article 84 (fines), with regard to the modification of sentences.

If the claim falls within the second category, the procedural provisions of those Articles control.[53]

Although the Official Commentary to G.S. 15A-1416 says that the State is authorized "without limitation as to time" to seek imposition of a sentence after a PJC, the court lacks jurisdiction to enter the judgment if a PJC extends for an unreasonable period of time.[54]

There is no statutory authority for the State to make a motion to set aside the judgment on the basis of newly discovered evidence.[55]

C. Motions by the Judge. Under G.S. 15A-1420(d), a judge has the authority to consider a MAR *sua sponte*. Specifically, the statute provides that "[a]t any time that a defendant would be entitled to relief by [MAR], the court may grant such

49. *See* Section X.B.2 (discussing the procedural bar rule that applies when an issue has been ruled on in a prior proceeding).
50. *See* Section III.A.
51. *See* Official Commentary to G.S. 15A-976 (when a trial judge waits until after the trial has begun to rule on a motion to suppress, "this would have the effect of denying the State's right to appeal an adverse ruling").
52. See Section II.A.2.c for the rule regarding calculating the ten-day period.
53. G.S. 15A-1416(b)(2).
54. See Jessica Smith, *Prayer for Judgment Continued*, in this Benchbook, *available at* http://benchbook.sog.unc.edu/criminal/prayer-judgment-continued.
55. *See* State v. Oakley, 75 N.C. App. 99, 102 (1985) (State learned that victim's medical bills were substantially greater than amount provided in restitution).

relief upon its own motion."[56] If the court acts *sua sponte* under this provision, it must provide appropriate notice to the parties.[57]

1. **When the Defendant Would Benefit.** The court has authority to act under G.S. 15A-1420(d) only when "[the] defendant would be entitled to relief." Thus, for example, if after the session has ended, the DOC notifies the trial court that it sentenced the defendant to a term of imprisonment in excess of the statutory maximum, the court need not await a MAR from the defendant to correct its sentencing error.[58] Because the defendant would be entitled to relief,[59] the trial court may exercise its authority under G.S. 15A-1420(d) and *sua sponte* correct the error. Of course, a defendant must be present for any resentencing that is held.[60] See Section XI below for a discussion of when a hearing is necessary.
2. **When the State Would Benefit.** Because G.S. 15A-1420(d) only authorizes the court to act *sua sponte* when the defendant would be entitled to relief, it does not authorize action when the error works to the defendant's advantage and any relief would benefit only the State.[61]

D. "Consent" MARs. Occasionally defense counsel and the prosecutor will inform the judge that both sides agree that relief requested in a MAR should be granted. These requests may become more common as a result of 2012 legislative changes that added a new subsection (e) to G.S. 15A-1420 stating: "Nothing in this section shall prevent the parties to the action from entering into an agreement for appropriate relief, including an agreement as to any aspect, procedural or otherwise, of a motion for appropriate relief." The 2012 statutory amendments may be read to override G.S. 15A-1420(c)(6), which suggests that a judge is not authorized to grant a MAR unless a valid ground for relief exists.[62] Absent guidance from the appellate division, caution is advised before setting aside an error-free conviction and sentence on a consent MAR.

III. Time for Filing.

As discussed in Section II, when the MAR is filed affects the types of claims that may be raised. Other timing issues are discussed in this section.

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56. G.S. 15A-1420(d); *see* State v. Williams, 227 N.C. App. 209, 213 (2013) (because the defendant could have raised the issue, the trial court's *sua sponte* MAR was proper).
57. G.S. 15A-1420(d); *see Williams*, 227 N.C. App. at 214 (2013) (trial court's oral notice, given one day after judgment was entered, was adequate).
58. DOC has no authority to modify a judgment. *See* Hamilton v. Freeman, 147 N.C. App. 195, 204 (2001). Rather, the DOC should notify the court and the parties of the sentencing error. *See id.*
59. *See* G.S. 15A-1415(b)(8) (allowing a MAR when the sentence is unauthorized at the time imposed).
60. *See* Jessica Smith, *Trial in the Defendant's Absence*, in this Benchbook, *available at* http://benchbook.sog.unc.edu/criminal/trial-defendants-absence.
61. State v. Oakley, 75 N.C. App. 99, 103-04 (1985) (trial court had no authority to strike a plea under G.S. 15A-1420(d) when such relief benefited the State only).
62. G.S. 15A-1420(c)(6) (defendant must show the existence of the asserted ground for relief); *see* Section XI.H (discussing burdens and standards for granting relief on a MAR). Whatever the new provision means, it probably cannot be read to avoid procedural rules contained in *other* sections that bar the granting of a MAR in certain circumstances. *See, e.g.,* Section X (Procedural Default), below.

A. Post-Verdict Motion. A MAR may not be filed until after the verdict is rendered.[63] A verdict is "the answer of the *jury* concerning any matter of fact submitted to [it] for trial."[64] When there is no verdict by the jury—such as when the defendant pleads guilty—a MAR may not be filed until after sentencing.[65] A mistrial is not a "verdict" within the meaning of the MAR statute.[66]

B. Capital Cases. As noted in Section I.B. above, special rules apply to Racial Justice Act MARs. But even for non-RJA capital MARs, special rules apply. For capital cases in which the trial court judgment was entered after October 1, 1996, there is an outer time limit for the filing of MARs. Specifically, unless an extension has been granted[67] or an exception applies, motions in such cases must be filed within 120 days from the latest of the following events:

- The court's judgment has been filed, but the defendant failed to perfect a timely appeal;
- The mandate issued by a court of the appellate division on direct appeal pursuant to North Carolina Rule of Appellate Procedure 32(b) and the time for filing a petition for writ of certiorari to the United States Supreme Court has expired without a petition being filed;
- The United States Supreme Court denied a timely petition for writ of certiorari of the decision on direct appeal by the Supreme Court of North Carolina;
- Following the denial of discretionary review by the Supreme Court of North Carolina, the United States Supreme Court denied a timely petition for writ of certiorari seeking review of the decision on direct appeal by the North Carolina Court of Appeals;
- The United States Supreme Court granted a timely petition for writ of certiorari of the decision on direct appeal by the Supreme Court of North Carolina or North Carolina Court of Appeals, but subsequently left the conviction and sentence undisturbed; or
- The appointment of post-conviction counsel for an indigent capital defendant.[68]

A claim of newly discovered evidence[69] is not subject to the 120-day time limit imposed on capital MARs.[70] But as discussed above, such a claim must be filed within a reasonable time of its discovery.[71]

63. *See* State v. Handy, 326 N.C. 532, 535 (1990) ("A [MAR] is a *post-verdict* motion"); G.S. 15A-1414(a) ("After the verdict . . . ."); G.S. 15A-1415(a) ("At any time after verdict . . . ."); G.S. 15A-1415(c) ("at any time after verdict"); G.S. 15A-1416(a) ("After the verdict . . . ."); G.S. 15A-1416(b) ("At any time after verdict . . . .").
64. *Handy*, 326 N.C. at 535 (quotation omitted) (emphasis in original).
65. *See id*. at 536.
66. State v. Allen, 144 N.C. App. 386, 390 (2001).
67. *See* Section III.C (discussing extensions).
68. *See* G.S. 15A-1415(a); 1995 N.C. Sess. Laws. ch. 719 sec. 8 (effective date of October 1, 1996).
69. *See* Section II.A.2.a.ix (discussing claims of newly discovered evidence).
70. G.S. 15A-1415(c).
71. *See* Section II.A.2.a.ix (discussing claims of newly discovered evidence).

C. Extensions. "For good cause shown," a defendant may be granted an extension of time to file a MAR.[72] It seems clear that this provision applies to the 120-day filing period for capital cases. It is not clear whether it applies to the ten-day period for a defendant's MAR under G.S. 15A-1414. As noted above,[73] once the ten-day period expires, G.S. 15A-1415 sets out an exclusive list of claims that a defendant can raise in a MAR. However, if a trial judge is aware of a defendant's desire to file a G.S. 15A-1414 MAR and wishes to extend the filing period while avoiding a potential issue later about the court's authority to grant such an extension, the judge could simply enter a PJC. Judgment then could be entered when the MAR is ready to be filed, ensuring that the MAR will be filed within ten days of entry of judgment.[74]

The presumptive length of an extension is up to thirty days, but the extension can be longer if the court finds "extraordinary circumstances."[75] No statutory guidance is provided on the meaning of this term.

IV. Pre-Filing Issues.

Discovery issues are discussed in Section VII, below. An indigent defendant's right to counsel for a MAR is discussed in Section VIII.A. Other pre-filing issues are discussed in this section.

A. Capital Cases. The General Rules of Practice for the Superior and District Courts provide that all requests for appointment of experts made before the filing of a MAR and after a denial by the Office of Indigent Defense Services (IDS) must be ruled on by the senior resident superior court judge or his or her designee, in accordance with IDS rules.[76] Those rules also provide that all requests for other *ex parte* and similar matters arising before a MAR is filed in a capital case must be ruled on by the senior resident superior court judge, or his or her designee, in accordance with rules adopted by IDS.[77]

B. Requests for Transcripts. Occasionally, an indigent defendant will make a pre-filing request for the transcript of the trial or plea proceeding to help prepare a MAR. The Unites States Supreme Court has held that the state must, as a matter of equal protection, provide an indigent defendant with a transcript of prior proceedings when the transcript is needed for an effective defense or appeal and would be available at a price to non-indigent defendants.[78] The effect of this rule "is to make available to an indigent defendant those tools available to a solvent defendant which are necessary for preparing an equally effective defense [or appeal]."[79] The Court has identified two factors relevant to the determination of need: "(1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought and (2) the availability of alternative devices

72. G.S. 15A-1415(d).
73. *See* Section II.A.2.
74. For more information about PJCs, see Jessica Smith, *Prayer for Judgment Continued*, in this Benchbook, *available at* http://benchbook.sog.unc.edu/criminal/prayer-judgment-continued.
75. G.S. 15A-1415(d).
76. GEN. R. PRAC. SUP. & DIST. CT. R. 25(2).
77. *Id.* at R. 25(3). The IDS rules are posted on the IDS website at http://www.ncids.org (last visited Jan. 24, 2023).
78. Britt v. North Carolina, 404 U.S. 226, 227 (1971); *see also* State v. Rankin, 306 N.C. 712, 715 (1982).
79. *Rankin,* 306 N.C. at 715.

that would fulfill the same functions as a transcript."[80] However, an indigent defendant's broad right to a transcript for purposes of a trial or direct appeal does not apply with equal force in post-conviction proceedings, such as MAR proceedings. In *United States v. MacCollom*,[81] the Court upheld the constitutionality of a federal habeas statute that allowed trial judges to deny free transcripts to indigent petitioners who raise frivolous claims. In that case, the defendant, who had not appealed his conviction, asked for the transcript in connection with a collateral attack. The Court found the procedural posture of the case significant:

> Respondent chose to forgo his opportunity for direct appeal with its attendant unconditional free transcript. This choice affects his . . . claim[s]. Equal protection does not require the Government to furnish to the indigent a delayed duplicate of a right of appeal with attendant free transcript which it offered in the first instance, even though a criminal defendant of means might well decide to purchase such a transcript in pursuit of [post-conviction] relief. . . . We think it enough at the collateral-relief stage that [the government] has provided that the transcript be [paid] for [with] public funds if one demonstrates to a [trial court] judge that his . . . claim is not frivolous, and that the transcript is needed to decide the issue presented.[82]

To the extent that the attorney certification requirement, discussed in Section V.A.2, is interpreted as requiring production of the transcript as a condition of filing a MAR, this could raise new issues with regard to an indigent defendant's right to a transcript at state expense for purposes of preparing a MAR.

V. Form of the Motion, Service, Filing, and Related Issues.

A. Form of the Motion. As a general rule a MAR must

- be in writing,
- state the grounds for the motion,
- set forth the relief sought,
- be timely filed, and
- if made in superior court by a lawyer, contain a required certification.[83]

1. Oral Motions. The MAR need not be in writing if it is made in open court, before the judge who presided at trial, before the end of the session (if made in superior court), and within ten days after entry of judgment.[84]

80. *Britt,* 404 U.S. at 227.
81. 426 U.S. 317 (1976).
82. *Id.* at 325–26.
83. G.S. 15A-1420(a).
84. *Id.*

2. Certification. If made in superior court by a lawyer, the MAR must contain a required certification. The statute specifies that the attorney must certify, in writing, that

- there is a sound legal basis for the motion and that it is being made in good faith,
- the attorney has notified both the district attorney's office and the attorney who initially represented the defendant of the motion, and
- the attorney has reviewed the trial transcript or made a good-faith determination that the nature of the relief sought does not require that the trial transcript be read in its entirety.[85]

If the trial transcript is unavailable, instead of certifying that he or she has read the trial transcript, the attorney must set forth in writing what efforts were undertaken to locate the transcript.[86] A motion may not be granted if the lawyer fails to provide the required certification.[87]

3. Supporting Affidavits. G.S. 15A-1420(b) provides that a MAR must be supported by affidavit or other documentary evidence if based on facts that are not ascertainable from the record and transcript of the case or that are not within the knowledge of the judge who hears the motion.[88] One open issue is whether, to be sufficient, the affidavit must contain admissible evidence.

B. Service and Filing. G.S. 15A-1420(b1)(1) sets out the rules for filing and service of a MAR. It provides that the motion should be filed with the clerk of superior court of the district where the defendant was indicted. In non-capital cases, service must be made on the district attorney. In capital cases, service must be made on both the district attorney and the attorney general. As written, the statute seems to speak only to MARs by defendants. Presumably, MARs by the State are filed in the same way. It is unclear who receives service of a MAR by the State, as the defendant may no longer be represented by trial counsel. Also, by referencing when the defendant was indicted, the statute restricts its application to superior court convictions and does not address MARs challenging district court convictions. A separate provision in the MAR statute suggests that service for MARs filed in district court must be done pursuant to G.S. 15A-951(c).[89]

85. G.S. 15A-1420(a)(1)c1.
86. *Id.*
87. G.S. 15A-1420(a)(5).
88. State v. Payne, 312 N.C. 647, 668-69 (1985) (denying a MAR because the defendant failed to submit supporting affidavits).
89. *See* G.S. 15A-1420(a)(4) (providing that a MAR may not be granted in district court without the signature of the district attorney indicating that the State has had an opportunity to consent or object to the motion but that a district court judge may grant a MAR without the district attorney's signature ten business days after the district attorney has been notified in open court of the motion, or served with the motion pursuant to G.S. 15A-951(c)). G.S. 15A-951(c) is the provision on service of motions in Article 52 of G.S. Chapter 15A.

C. Amendments.

1. Defendant's MAR. A defendant may amend a MAR in certain circumstances. First, and as discussed in Section VIII.A.5 below, G.S. 15A-1420(b1)(3) provides that once the MAR judge assigns appointed counsel, counsel must review the defendant's pro se filing and either adopt it or file an amended MAR.[90] If counsel opts to adopt the MAR, presumably the required attorney certification still must be filed.[91] Second, G.S. 15A-1415(g) provides that a defendant may amend a motion by the later of

- thirty days before a hearing on the merits begins or
- at any time before the date for the hearing has been set.

Although this provision suggests that an amendment after the hearing has begun would be untimely, that does not appear to be the case. G.S. 15A-1415(g) also provides that after the hearing has begun, the defendant may file amendments to "conform the motion to evidence adduced at the hearing, or to raise claims based on such evidence."[92]

One question that has arisen regarding MAR amendments is whether a defendant may raise new claims by amendment that would be untimely if they do not relate back to the filing date of the original motion. For example, suppose a defendant files a motion on January 1, 2022, within the ten-day window. Although the defendant may assert "any error" in this motion,[93] the defendant only asserts one error: that trial counsel rendered ineffective assistance of counsel. On April 1, 2022, the defendant timely amends the motion asserting a new claim that the evidence was insufficient to submit to the jury. According to G.S. 15A-1414(b)(1)c, this claim must be filed within the ten-day window to be timely. If the amendment relates back to the original motion, the new claim will be timely. If it does not relate back, it is untimely. The statute does not address relation back, and the issue does not appear to have been decided by the North Carolina appellate courts.

2. State's MAR. No statutory provisions speak to the State's ability to amend a MAR.

D. Responses. See Section VI, regarding a judge's duty to order a response by the State to a defendant's MAR. G.S. 15A-1420(b)(2) provides that the party opposing the MAR may file affidavits or other documentary evidence.

VI. Case Processing and Assignment.

A. Clerk's Duties.

1. Non-Capital Cases. When receiving a MAR, the clerk must place the motion on the criminal docket and "promptly" bring the motion (or copy) to

90. G.S. 15A-1420(b1)(3).
91. *See* Section V.A.2 (discussing the required certification).
92. G.S. 15A-1415(g).
93. *See* Section II.A.1 (a motion made within ten days of judgment may assert "any error").

the attention of the senior resident superior court judge or chief district court judge for assignment pursuant to G.S. 15A-1413.[94]

2. **Capital Cases.** When a MAR is filed in a capital case, the clerk must refer the MAR to the senior resident superior court judge or his or her designee.[95]

B. Senior Resident/Chief District Court Judge's Duties. When the motion is received from the clerk, the Senior Resident Judge or Chief District Court Judge must assign the motion pursuant to G.S. 15A-1413 for review and administrative action.[96]

1. **Assignment of G.S. 15A-1415 MARs.** A G.S. 15A-1415 motion (MAR made more than ten days after judgment) may be heard and determined by any trial judge who:

   - is empowered to act in criminal matters in the district court district or superior court district in which the judgment was entered and
   - is assigned pursuant to G.S. 15A-1413 to review the motion and take the appropriate administrative action to dispense with the motion.[97]

   The assignment of a G.S. 15A-1415 MAR is in the discretion of the senior resident superior court judge or chief district court judge.[98]

2. **Assignment of G.S. 15A-1414 MARs.** The judge who presided over the trial may act on a G.S. 15A-1414 motion (MAR made within ten day of entry of judgment), even if he or she is in another district and his or her commission has expired.[99] However, if the judge who presided at the trial is unavailable, the senior resident superior court judge or the chief district court judge must treat the MAR as one filed under G.S. 15A-1415 for purposes of assignment.[100]

C. MAR Judge's Initial Duties. In both non-capital and capital cases, assignment to the MAR judge is for:

> review and administrative action, including, as may be appropriate, dismissal, calendaring for hearing, entry of a scheduling order for subsequent events in the case, including disclosure of expert witness information described in G.S. 15A‑903(a)(2) and G.S. 15A‑905(c)(2) for expert witnesses

94. G.S. 15A-1420(b1)(2).
95. GEN. R. PRAC. SUP. & DIST. CT. R. 25(4).
96. G.S. 15A-1420(b1)(2); -1413(d).
97. G.S. 15A-1413(a).
98. G.S. 15A-1413(e).
99. G.S. 15A-1413(b).
100. *Id.*

reasonably expected to be called at a hearing on the motion, or other appropriate actions.[101]

Additionally, the trial court should:

- Conduct an initial review and dismiss the motion if it is frivolous.[102]
- Enter an order indicating whether the defendant should be allowed to proceed without the payment of costs.[103]
- If the motion presents sufficient information warranting a hearing or the interests of justice so require and if the defendant is entitled to counsel,[104] enter an order appointing counsel.[105]
- Enter an order requiring that appointed counsel either adopt the motion or file an amended MAR.[106]

After counsel files an initial or amended motion, or a determination is made that the defendant is proceeding without counsel, the judge may direct the State to file an answer.[107] Should the State contend that as a matter of law the defendant is not entitled to the relief sought, it may request leave to file a limited answer so alleging.[108] The MAR judge then proceeds to resolve the MAR, with or without a hearing, as appropriate.[109]

D. Trial Court's Authority to Act When Case Is on Appeal.

1. Motions Asserting Claims under G.S. 15A-1415. When a case is in the appellate division for review, a MAR asserting a ground set out in G.S. 15A-1415 must be made in the appellate division.[110] A case is in the appellate division when the jurisdiction of the trial court has been divested as provided in G.S. 15A-1448 or when a petition for a writ of certiorari has been granted.[111] When a petition for a writ of certiorari has been filed but not granted, a copy or written statement of any motion made in the trial court, and of any disposition of the motion, must be filed in the appellate division.[112]

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101. G.S. 15A-1413(d); GEN. R. PRAC. SUP. & DIST. CT. R. 25(4).
102. G.S. 15A-1420(b1)(3). *See* State v. Lane, 271 N.C. App. 307, 320 (2020) (MAR was not frivolous where it "raised arguments not yet addressed by North Carolina appellate courts that support a modification or reversal of existing law").
103. *See* Section VIII.B (discussing costs).
104. *See* Section VIII.A (discussing the right to counsel).
105. G.S. 15A-1420(b1)(3).
106. *Id*.
107. *Id.*
108. *Id.*
109. *See* Section XI (hearings); Section XII (the judge's order).
110. G.S. 15A-1418(a); *see* Section II.A.2 (discussing claims that can be asserted in a MAR under G.S. 15A-1415).
111. G.S. 15A-1418(a). *See also* State v. Lebeau, 271 N.C. App. 111, 113-14 (2020) (in the context of a direct appeal not involving a MAR, interpreting the plain language of G.S. 15A-1448(a)(3) to provide that a trial court's jurisdiction is not divested immediately upon the noticing of an appeal; rather, jurisdiction is divested when notice of appeal has been given and the 14-day window for filing a notice of appeal described by Rule 4 of the North Carolina Rules of Appellate Procedure has expired).
112. *Id.*

2. Motions Made Within Ten Days of Judgment. Defendants' MARs made under G.S. 15A-1414 within ten days of entry of judgment may be heard and acted upon in the trial division regardless of whether notice of appeal has been given.[113] Though G.S. 15A-1416 does not contain an explicit provision parallel to that of G.S. 15A-1414(c), the North Carolina Court of Appeals has held that a trial court properly retained jurisdiction to act upon the State's MAR made within 10 days of judgment regardless of the fact that the defendant had entered a written notice of appeal prior to the state filing the MAR.[114]

VII. Discovery.

A. State's Obligations. The State, to the extent allowed by law, must "make available to the defendant's counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant."[115] This requirement does not appear to apply unless the defendant is represented by counsel. It is not clear whether the relevant statutory provision requires the State to produce discovery pre-filing or whether a MAR must be filed to trigger the State's discovery obligations. As noted in Section VIII.A.2 below, many judges do not appoint counsel to an indigent defendant unless the pro se MAR passes a frivolity review. Thus, as a practical matter, a MAR likely will have been filed when counsel is appointed, which is the trigger for the State's discovery obligations.

B. Protective Orders. If the State has a reasonable belief that allowing inspection of any portion of the files by counsel would not be in the interest of justice, it may submit those portions for court inspection.[116] If upon examination, the court finds that the files could not assist the defendant in investigating, preparing, or presenting a MAR, the court, in its discretion, may allow the State to withhold that portion of the files.[117]

C. Expert Witness Information. As discussed above in Section VI.C, the MAR statute provides that the initial duties of the judge assigned to the MAR include, "as may be appropriate," "entry of a scheduling order for subsequent events in the case, including disclosure of expert witness information described in G.S. 15A‑903(a)(2) and G.S. 15A‑905(c)(2) for expert witnesses reasonably expected to be called at a hearing on the motion."[118]

D. Inherent Authority to Order Discovery. Beyond the MAR statute's explicit discovery provisions, the North Carolina Supreme Court has held that the

113. G.S. 15A-1414(c); *see* Section II.A.1 (discussing MARs made within ten days of entry of judgment).
114. State v. Joiner, 273 N.C. App. 611, 613-14 (2020) (relying on *Lebeau*, 271 N.C. App. at 113-14, to conclude that because the trial court was not immediately divested of jurisdiction by the noticing of the defendant's appeal, the State's MAR filed thereafter and within 10 days of judgment was timely and properly filed in the trial court; consequently, the trial court retained jurisdiction to issue an order on the MAR under G.S. 15A-1448(a)(2) (case remains open for taking of appeal until trial court rules on MAR made under G.S. 15A-1414 or G.S. 15A-1416(a))).
115. G.S. 15A-1415(f).
116. *Id.*
117. *Id.*
118. G.S. 15A-1413(d).

judiciary has inherent authority "to compel disclosure of relevant facts regarding a post-trial motion and may order such disclosure prior to a hearing on such a motion."[119] The Court stated that such discovery orders are proper where they further the interest of justice by "significantly assisting in the search for the truth."[120]

VIII. Indigents.

A. Counsel.

1. Right to Counsel. The United States Supreme Court has rejected the argument that defendants have a constitutionally protected right to counsel in post-conviction proceedings, such as MARs.[121] However, in North Carolina, indigent defendants have a statutory right to counsel in MAR proceedings. Specifically, G.S. 7A-451(a)(3) provides that an indigent defendant is entitled to counsel for a MAR if appointment is authorized by Chapter 15A and

- the defendant has been convicted of a felony,
- has been fined $500 or more, or
- has been sentenced to a term of imprisonment.[122]

For its part, Chapter 15A, specifically the MAR statute, provides that counsel should be appointed "[i]f the motion presents sufficient information to warrant a hearing or the interests of justice so require."[123] As a practical matter, and to clarify the issues for the court and the State and to promote the efficient use of court resources, the interests of justice may require appointment of counsel whenever a MAR passes frivolity review.[124] Additionally, the MAR statute provides that a defendant has a right to be represented by counsel at an evidentiary hearing.[125]

2. Time to Appoint Counsel. G.S. 7A-451(b) provides that an indigent's "entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process." Many judges have interpreted this provision to mean that they need not appoint counsel unless the MAR passes a frivolity review. 2017 amendments to the MAR

119. State v. Taylor, 327 N.C. 147, 154 (1990).
120. *Id*. at 152-55 (explaining in a case involving a MAR alleging ineffective assistance of counsel and predating the enactment of G.S. 15A-1415(e) that it would be within the trial court's inherent authority to grant the State's discovery motion seeking trial counsel's files so long as disclosure was limited to matters relevant to the IAC claim). *See also* State v. Cataldo, 281 N.C. App. 425, 427 (2022) (with respect to a MAR alleging ineffective assistance of counsel on basis of trial counsel's unreasonable failure to subpoena known DHHS and DSS records relevant to the victim's credibility, the trial court erred by narrowing the scope of *in camera* review of any such records which the Court of Appeals previously had held (in an unpublished opinion) was required by the defendant's sufficiently supported motion for post-conviction discovery).
121. Pennsylvania v. Finely, 481 U.S. 551, 555 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions and we decline to so hold today." (citation omitted)).
122. G.S. 7A-451(a)(3). *See also* G.S. 15A-1421 (G.S. Chapter 7A applies in MAR proceedings).
123. G.S. 15A-1420(b1)(3).
124. *See* Section VI.C (discussing the required frivolity review).
125. G.S. 15A-1420(c)(4).

statute seemed to confirm the propriety of this approach. The 2017 amendments added new language to the MAR statute providing:

> The judge assigned to the motion shall conduct an initial review of the motion. If the judge determines that all of the claims alleged in the motion are frivolous, the judge shall deny the motion. If the motion presents sufficient information to warrant a hearing or the interests of justice so require, the judge shall appoint counsel for an indigent defendant who is not represented by counsel.[126]

The order in which the statute states the tasks to be undertaken by the assigned judge suggests appointment of counsel should be made after a frivolity review.

3. **Capital Cases.** Appointment of counsel in capital MARs must be done in accordance with G.S. 7A-451(c), (d), and (e) and IDS rules.[127]
4. **Trial versus New Counsel.** When appointing counsel for a MAR, it is best if the trial judge appoints someone other than trial counsel so that claims of ineffective assistance can be asserted, if appropriate.
5. **Counsel's Statutory Duties upon Appointment.** The statute specifies that appointed counsel must review the motion filed by the defendant pro se and either adopt the motion or file an amended motion.[128]

B. Costs. The court "may make appropriate orders relieving indigent defendants of all or a portion of the costs of the proceedings."[129]

IX. Counsel Issues.

An indigent defendant's statutory right to counsel is discussed above in Section VIII.A. Other counsel issues are addressed here.

A. Attorney–Client Privilege and Ineffective Assistance Claims. When a defendant's MAR alleges ineffective assistance of prior trial or appellate counsel, the defendant is deemed to waive the attorney–client privilege with respect to oral and written communications between counsel and the defendant, "to the extent the defendant's prior counsel reasonably believes such communications are necessary to defend against the allegations of ineffectiveness."[130] This provision seems to suggest that the defendant's prior counsel should review the case file to determine which communications are necessary to defend against the claim rather than turn over the entire file to the State. The waiver of attorney–client privilege occurs automatically upon the filing of the MAR alleging ineffective assistance of prior counsel; the superior court is not required to enter an order waiving the privilege.[131]

126. G.S. 15A-1420(b1)(3), as amended by S.L. 2017-176, sec. 1.(b).
127. GEN. R. PRAC. SUP. & DIST. CT. R. 25(1).
128. G.S. 15A-1420(b1)(3).
129. G.S. 15A-1421.
130. G.S. 15A-1415(e).
131. *Id.*

B. File Sharing. For defendants represented by counsel in MAR proceedings in superior court, the defendant's prior trial or appellate counsel must make their complete files available to the defendant's MAR counsel.[132] Although this provision does not apply to an unrepresented MAR defendant, such a defendant is likely entitled to those files because they belong to the client, not the lawyer. By its terms, the statutory provision on file sharing is limited to MARs in superior court.

X. Procedural Default. In order for a court to reach the merits of the claims raised in a MAR, the defendant must satisfy certain procedural rules. If the defendant fails to do so, he or she is deemed to have committed a procedural default. When this occurs and the defendant cannot establish that an exception applies, the MAR is rejected on grounds of procedural bar. Thus, the procedural default rules preclude consideration on the merits when a procedural error has occurred.

A. Mandatory Bars. The procedural default rules are mandatory. Unless an exception applies, the judge does not have discretion to waive them.[133]

B. The Default Rules. G.S. 15A-1419 contains four procedural default rules. The rules apply both in non-capital and capital cases.[134]

Figure 3. Grounds for Procedural Default

Grounds for Procedural Default

1. The claim was not raised in a prior MAR.
2. The issue was determined in a prior proceeding.
3. The claim was not raised in a prior appeal.
4. The defendant failed to timely file the MAR.

1. Claim Not Raised in Previous MAR. A MAR must be denied if upon a previous MAR the defendant was in a position to adequately raise the ground or issue but did not do so ("the (a)(1) bar").[135]

a. Lack of Counsel for the Prior MAR. The mere fact that a defendant was unrepresented in the prior MAR does not excuse a procedural default under this rule;[136] case law suggests that to excuse an (a)(1) default, there must have been an improper denial of counsel that impaired the defendant's ability to raise the issue.

132. G.S. 15A-1415(f).
133. G.S. 15A-1419(b).
134. G.S. 15A-1419(a).
135. G.S. 15A-1419(a)(1). Note that the North Carolina Court of Appeals held in *State v. Blake*, 275 N.C. App. 699, 714 (2020) that the trial court erred by entering an order in a MAR proceeding which declared a preemptive bar to the defendant filing future MARs on the purported basis of G.S. 15A-1419(a). The Court in *Blake* explained that the MAR statute "does not give a trial court authority to enter a gatekeeper order declaring in advance that a defendant may not, in the future, file an MAR; the determination regarding the merits of any future MAR must be decided based upon that motion." 275 N.C. App. at 714. *See also* State v. Ballard, 283 N.C. App. 236, 249 (2022) (same).
136. State v. McKenzie, 46 N.C. App. 34, 39 (1980).

Although a defendant might assert that ineffectiveness on the part of prior post-conviction counsel rendered the defendant unable to adequately raise the issue in a prior MAR, the statute specifically provides that ineffectiveness of post-conviction counsel cannot constitute good cause for excusing a procedural default and thus undercuts this argument.[137]

b. Avoiding the Bar Through "Supplemental" MARs. In *State v. McHone*,[138] the capital defendant filed a MAR on January 17, 1995. Without holding an evidentiary hearing, the trial court denied the motion. The defendant then filed a motion to vacate the trial court's order and a "supplemental" MAR pursuant to G.S. 15A-1415(g), a provision that allows MARs to be amended.[139] After a hearing, the trial court denied the supplemental MAR, and the defendant sought review with the North Carolina Supreme Court. Without addressing whether the trial court was authorized to consider the defendant's supplemental MAR after it had denied his initial MAR and without addressing the applicability of the (a)(1) bar, the court held that the trial judge erred by denying the defendant's supplemental MAR without an evidentiary hearing.

Thus, in *McHone*, after having lost his initial MAR, the defendant asserted new claims in a "supplemental MAR" instead of in a separate second MAR (which would have been subject to the (a)(1) bar if the defendant was in a position to adequately raise the issues in the initial MAR). It could be argued that *McHone* suggests that a supplemental MAR filed pursuant to G.S. 15A-1415(g) after an initial MAR has been denied is not subject to the (a)(1) bar. One difficulty with this contention is that G.S. 15A-1415(g) does not seem to contemplate that amendments may be made after the MAR being amended has been denied.[140] Moreover, a court-created exception to the (a)(1) bar for supplemental MARs would swallow the rule; a defendant whose initial MAR has been denied could always avoid the (a)(1) bar by filing a supplemental MAR rather than a separate second MAR. It is unlikely that the supreme court meant to endorse such a reading of the statute in an opinion that did not even mention the issue or its ramifications. A more promising argument for defendants might be that once a trial court has agreed to reconsider an order denying an initial MAR, the initial MAR has been reopened and new claims properly may be asserted by way of a G.S. 15A-1415(g) amendment rather than by a second MAR. Whether this argument ultimately will be successful is unclear.[141]

137. G.S. 15A-1419(c). *See* Section X.C.1.a. (noting that under North Carolina law, ineffective assistance of post-conviction counsel cannot constitute good cause).
138. 348 N.C. 254 (1998).
139. *Id.* at 256. *See also* Section V.C (discussing this provision).
140. *See* G.S. 15A-1415(g).
141. *Cf.* State v. Basden, 350 N.C. 579, 582-83 (1999) (by allowing the defendant time to respond to the State's motion for summary denial of the defendant's motion to vacate denial of MAR, trial court "resurrected" defendant's MAR and made it "pending" for purposes of MAR discovery provision); Bacon v. Lee, 225 F.3d 470, 477 (4th Cir.

c. Specific Exception. General exceptions that apply to all four procedural bar rules are discussed in Section X.C. Additionally, the statute prescribes a specific exception that applies only to this bar. Specifically, the (a)(1) bar does not apply when the previous MAR was made:

- within ten days after entry of judgment, or
- during the pendency of the direct appeal.[142]

The first part of this exception allows counsel who made a MAR in open court to make an additional motion within ten days "without being faced with a bar on the basis of not having raised the available grounds when he stood in open court and made his first motion."[143] However, this exception is not limited to MARs made in open court; it applies to all MARs made within ten days of entry of judgment. Under the second part of this exception, a defendant may file an initial MAR while the direct appeal is pending and later make a second MAR raising new claims without danger of procedural default under subsection (a)(1).

2. Issue Determined in Prior Proceeding. G.S. 15A-1419(a)(2) provides that a MAR must be denied if the ground or issue was previously determined on the merits upon an appeal from the judgment or upon a previous motion or proceeding in North Carolina or federal courts. This provision establishes that as a general rule, a party has one chance to raise an issue; once an issue has been raised and lost, the party is precluded from re-litigating it in MAR proceedings.[144] This is the only procedural default rule that applies to both the State and the defendant.

a. Specific Exception. General exceptions that apply to all four of the procedural bar rules are discussed in Section X.C. Additionally, the statute prescribes a specific exception that applies only to this bar. Specifically, this bar does not apply if, since the time of the previous determination, there has been a retroactively effective change in the law controlling such issue.[145] For a discussion of the retroactivity rules, see Section II.A.2.a.vi and *Retroactivity of Judge-Made Rules*, *supra* note 25.

3. Claim Not Raised in Previous Appeal. A MAR must be denied if upon a previous appeal the defendant was in a position to raise adequately the ground or issue underlying the present motion but did not do so ("the (a)(3) bar").[146]

2000) ("Because the state MAR court reopened the original MAR, the question of whether a governing state rule was regularly and consistently applied to treat a motion to amend thereafter as a second MAR is in some doubt.").

142. G.S. 15A-1419(a)(1). For a case applying the ten-day exception to the (a)(1) bar, see *State v. Garner*, 136 N.C. App. 1, 21 (1999).

143. Official Commentary to G.S. 15A-1419.

144. *See, e.g.*, State v. Hyman, 263 N.C. App. 310, 316 (2018) (trial court properly applied the G.S. 15A-1419(a)(2) procedural bar to a claim defendant raised in a previous MAR which the Court of Appeals addressed on the merits).

145. G.S. 15A-1419(a)(2).

146. G.S. 15A-1419(a)(3). The North Carolina Supreme Court has recognized that it may not be readily discernible from the trial record and supporting documentation whether a defendant was in a position to raise adequately a

a. No Bar to Jurisdictional Issues. In *State v. Wallace*,[147] the defendant filed a MAR challenging the constitutionality of the short-form indictments used to charge him, contending that the constitutionally inadequate indictments deprived the trial court of jurisdiction to hear his case. He further argued that notwithstanding his failure to challenge the indictments on direct appeal, the issue could be heard in the MAR proceeding. Although the court ultimately rejected the defendant's contention on the merits, it held that while the (a)(3) bar generally precludes a defendant from raising an issue that could have been raised on direct appeal, the defendant's challenge to the trial court's jurisdiction was properly presented. Thus, under *Wallace*, the (a)(3) bar does not prohibit a defendant from raising in a MAR jurisdictional issues that were not raised on appeal. Whether *Wallace* will be extended to any of the other statutory procedural bars remains to be seen.

b. Ineffective Assistance Claims. This bar applies when the defendant was in a position to adequately raise the ground or issue in a previous appeal but did not do so. In most instances, a defendant is not in a position to adequately raise a claim of ineffective assistance of counsel on a direct appeal. The appellate court is a court of record and is bound by the record of the trial proceedings below. However, an ineffective assistance claim, such as a claim that the lawyer labored under an impermissible conflict of interest, almost always depends on facts outside of the record and thus requires an evidentiary hearing. Not surprisingly, when such claims are raised on appeal, the appellate courts often dismiss them without prejudice to raise the claims in the trial court.[148] This suggests that as a general rule, ineffective assistance of counsel claims will not be subject to this bar. However, some ineffectiveness claims can be decided on appeal,[149] and as to these claims, there is no reason to except them from this bar.

4. Failure to Timely File. A MAR must be denied if a capital defendant failed to timely file a MAR as required by G.S. 15A-1415(a).[150] Because G.S. 15A-1415(a) provides that in non-capital cases a defendant may file

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ground or issue upon a previous appeal and, in such a case, may be necessary for a MAR court to hold an evidentiary hearing to ascertain whether a claim is subject to the (a)(3) bar. State v. Allen, 378 N.C. 286, 310 (2021) (trial court erred by summarily dismissing as procedurally barred the defendant's claim that he was impermissibly visibly shackled during trial; evidentiary hearing was necessary to ascertain whether defendant was in a position to raise the claim on direct appeal).

147. 351 N.C. 481, 503-04 (2000).

148. *See, e.g.*, State v. Thompson, 359 N.C. 77, 123 (2004) ("[W]hen this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendant to bring them pursuant to a subsequent [MAR] in the trial court.").

149. State v. Casey, 263 N.C. App. 510, 519-22 (2019) (ineffective assistance of trial counsel claim was subject to the (a)(3) bar where deficient performance was apparent from the cold record but not raised on direct appeal). *See also* State v. Goode, 197 N.C. App. 543, 545-48 (2009) (deciding an ineffective assistance of counsel claim asserting a *Harbison* error (unconsented-to admission of guilt) on direct appeal).

150. G.S. 15A-1419(a)(4).

a MAR at any time after verdict, this bar does not apply to those cases. However, as discussed above in Section III.B, G.S. 15A-1415(a) prescribes a 120-day filing period for capital MARs. Also as discussed above, the MAR statute allows for extensions and amendments and excludes claims of newly discovered evidence from the 120-day filing rule.[151]

a. Amendments and Relation Back. One issue regarding this bar is whether amendments to capital MARs raising new claims must be filed within the 120-day deadline of G.S. 15A-1415(a) or whether they can be made later on grounds that they relate back to the original filing for purposes of the 120-day rule. On the one hand, it may be argued that allowing new claims to be asserted in amendments filed after the deadline will frustrate the purpose of the 1996 legislative revisions that added the 120-day rule: to expedite the post-conviction process.[152] In support of this argument it may be noted that G.S. 15A-1415(g) contains no language allowing for relation back of new claims raised in amended MARs.[153] On the other hand, because both provisions were enacted in the same bill, G.S. 15A-1415(g) arguably was meant to serve as a limited exception to G.S. 15A-1415(a), allowing, in certain circumstances, for the assertion of new claims outside of the 120-day period. Under this view, G.S. 15A-1415(g) is not an exception that swallows the rule; rather, it allows new claims to be raised in connection with a properly filed MAR only within a limited window of time, ending when the time for making an amendment ends.

C. General Exceptions. The statute contains two general exceptions to the procedural default rules.

1. Good Cause and Actual Prejudice. A defendant is excused from procedural default if he or she can demonstrate good cause and actual prejudice.[154]

a. Good Cause. G.S. 15A-1419(c) provides that good cause can be shown only if the defendant establishes, by a preponderance of the evidence, that his or her failure to raise the claim or file a timely motion was

- the result of state action in violation of the federal or state constitutions, including ineffective assistance of trial or appellate counsel;
- the result of the recognition of a new federal or state right that is retroactively applicable; or

151. *See* Sections III.C (extension of time) and V.C (amendments).
152. *See* State v. Buckner, 351 N.C. 401, 408 (2000) (purpose of amendments was to expedite the post-conviction process).
153. *Compare* N.C. R. CIV. P. 15(c) ("[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed").
154. G.S. 15A-1419(b)(1).

- based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim on a previous state or federal post-conviction review.

The first ground—result of state action in violation of the federal or state constitutions—expressly includes ineffective assistance of trial or appellate counsel. However, the statue also provides that "a trial attorney's ignorance of a claim, inadvertence, or tactical decision to withhold a claim may not constitute good cause"; neither may "a claim of ineffective assistance of prior post-conviction counsel constitute good cause."[155] Examples of the types of ineffective assistance claims that could fall within the good cause provision include claims of an impermissible conflict of interest or a denial of counsel at a critical stage of the criminal proceeding.[156]

The second ground pertains to a retroactively applicable new right. For a discussion of retroactivity, see Section II.A.2.a.vi.

b. Actual Prejudice. G.S. 15A-1419(d) provides that actual prejudice may be shown only "if the defendant establishes by a preponderance of the evidence that an error during the trial or sentencing worked to the defendant's actual and substantial disadvantage, raising a reasonable probability, viewing the record as a whole, that a different result would have occurred but for the error."

c. Applicability to the "Previously Determined" Procedural Bar. Because it states that "good cause may only be shown if the defendant establishes . . . that his failure to raise the claim or file a timely motion" resulted from one of the good cause grounds, G.S. 15A-1419(c) does not apply to procedural defaults under subsection (a)(2). As discussed above, the (a)(2) bar does not involve a failure to raise a claim or a failure to file a timely motion; a claim is barred by subsection (a)(2) because the defendant previously raised the claim and it was decided unfavorably.[157] Thus, the statutory language suggests that the good cause and actual prejudice exception does not apply to a default on grounds of the (a)(2) bar.

2. Fundamental Miscarriage of Justice. A defendant will be excused from procedural default if he or she can demonstrate that a failure to consider the claim will result in a fundamental miscarriage of justice.[158] According to the statute, a fundamental miscarriage of justice results only if

155. G.S. 15A-1419(c).
156. For more information about ineffective assistance of counsel claims, see JESSICA SMITH, INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN NORTH CAROLINA CRIMINAL CASES (UNC School of Government, 2003).
157. *See* Section X.B.2.
158. G.S. 15A-1419(b)(2).

- the defendant establishes that more likely than not, but for the error, no reasonable fact finder would have found the defendant guilty of the underlying offense or
- the defendant establishes by clear and convincing evidence that, but for the error, no reasonable fact finder would have found the defendant eligible for the death penalty.[159]

a. Claims of Newly Discovered Evidence. A defendant raising a claim of newly discovered evidence of factual innocence or ineligibility for the death penalty, otherwise barred by G.S. 15A-1419(a) or 15A-1415(c), may show a fundamental miscarriage of justice only by proving by clear and convincing evidence that, in light of the new evidence, if credible, no reasonable juror would have found the defendant guilty beyond a reasonable doubt or eligible for the death penalty.[160]

XI. Hearings and Related Issues.

A. Hearing Required Unless MAR Is "Without Merit". G.S. 15A-1420(c)(1) provides that unless the court determines that the MAR is "without merit," "[a]ny party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented." This language can be read to suggest that the non-movant is entitled to a hearing before a MAR is granted. However, one court of appeals case held that the trial court did not err when granting its *sua sponte* MAR without a hearing when the prosecutor failed to request a hearing, instead asking for a continuance so that the prosecutor who handled the case could decide how to proceed.[161]

Neither the statute nor the case law fully explains what is meant by the term "without merit." At the least, the term must include MARs that fail for substantive reasons. Thus, a court may deny a MAR without a hearing on grounds that it is without merit when

- there are no disputed facts and the claim must fail as a matter of law;[162]
- there are disputed facts and the claim must fail as a matter of law even if all disputed facts are resolved in the movant's favor;[163]
- the defendant cannot establish the requisite prejudice even if he or she can establish the asserted ground for relief;[164] or

159. G.S. 15A-1419(e).
160. *Id*.; *see* Section II.A.2.a.ix (discussing claims of newly discovered evidence).
161. State v. Williams, 227 N.C. App. 209, 214 (2013).
162. *See* State v. McHone, 348 N.C. 254, 257 (1998) ("[W]hen a [MAR] presents only a question of . . . law and it is clear . . . that the defendant is not entitled to prevail, 'the motion is without merit' within the meaning of subsection (c)(1) and may be dismissed . . . without any hearing."); State v. Rice, 129 N.C. App. 715, 723–24 (1998) (the defendant was not entitled to a hearing when the legal basis of his MAR was without merit).
163. *See McHone*, 348 N.C. at 257–58 ("[W]here facts are in dispute but the trial court can determine that the defendant is entitled to no relief even upon the facts as asserted by him, the trial court may determine that the motion 'is without merit' within the meaning of subsection (c)(1) and deny it without any hearing on questions of law or fact.").
164. *See* G.S. 15A-1420(c)(6) ("Relief must be denied unless prejudice appears, in accordance with G.S. 15A-1443."); G.S. 15A-1443(a) (prejudice standard); *see generally* Section XI.H.3 (discussing the requisite prejudice).

- the harmless error standard governs and the error, even if established, is harmless beyond a reasonable doubt.[165]

The statutory language leaves open the possibility that a MAR is also without merit within the meaning of G.S. 15A-1420(c)(1) when it fails for procedural reasons. Among the possible reasons a MAR could fail on procedural grounds are

- procedural default;[166]
- improper form;[167]
- improper service;[168]
- improper filing;[169]
- failure to include the requisite supporting affidavits or documentary evidence;[170] or
- failure to file the required attorney certification.[171]

On the other hand, a MAR is not without merit when the allegations in the defendant's MAR, if true, would entitle the defendant to relief; in this situation summary denial is improper.[172]

B. Evidentiary Hearings. An evidentiary hearing is not required if a MAR was filed within ten days of entry of judgment.[173] However, the trial court may hold an evidentiary hearing on a G.S. 15A-1414 MAR if "appropriate to resolve questions of fact."[174]

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165. *See* G.S. 15A-1420(c)(6) (incorporating standards of prejudice set forth in G.S. 15A-1443); G.S. 15A-1443(b) (harmless error standard); *see generally*, Section XI.H.3.a (discussing the harmless error standard).
166. *See* Section X (discussing procedural default).
167. *See* Section V.A (discussing form of the motion).
168. *See* Section V.B (discussing service requirements).
169. *See id.* (discussing filing requirements).
170. *See* Section V.A.3 (discussing the need for these items).
171. *See* Section V.A.2 (discussing the certification).
172. State v. Allen, 378 N.C. 286, 301 (2021) (trial court erred by summarily dismissing defendant's MAR claiming ineffective assistance of counsel based on alleged unreasonable failure by trial counsel to investigate crime scene where claim was supported by facts that would entitle defendant to relief if proven true); State v. Jackson, 220 N.C. App. 1, 21-22 (2012) (the trial court erred by summarily denying the defendant's MAR where the MAR adequately forecast evidence on each issue).
173. G.S. 15A-1420(c)(2); *see also* State v. Howard, 247 N.C. App. 193, 207 n.11 (2016).
174 G.S. 15A-1420(c)(2). For cases where the trial court did not err by denying a G.S. 15A-1414 MAR without an evidentiary hearing, see *State v. Rollins*, 367 N.C. 114 (2013) (affirming per curiam 224 N.C. App. 197, 202 (2012) where the Court of Appeals held that the trial court did not abuse its discretion by denying a hearing on a G.S. 15A-1414 MAR asserting juror misconduct, specifically that a juror watched "irrelevant and prejudicial television publicity during the course of the trial, failing to bring this fact to the attention of the parties or the Court, and arguing vehemently for conviction during jury deliberations"; although the MAR was supported by an affidavit from one of the jurors, the court found that it "merely contained general allegations and speculation"; reasoning that the MAR failed to specify which news broadcast the juror in question had seen; the degree of attention the juror had paid to the broadcast; the extent to which the juror received or remembered the broadcast; whether the juror had shared the contents of the news broadcast with other jurors; and the prejudicial effect, if any, of the alleged juror misconduct); *State v. Harris*, 338 N.C. 129, 143 (1994) (trial court did not err by declining to hold an evidentiary hearing on defendant's G.S. 15A-1414 MAR alleging ineffective assistance of counsel when "[t]here were no specific contentions that required an evidentiary hearing to resolve questions of fact"); *State v. Robinson*, 336 N.C. 78, 125-26 (1994) (trial

For other MARs, the statute provides that the trial court must proceed without an evidentiary hearing when the MAR presents only issues of law.[175] The statute also states a corollary to that rule: that if the trial court cannot rule on the MAR "without the hearing of evidence," it must hold an evidentiary hearing.[176] In determining whether an evidentiary hearing is required, the trial court must consider the MAR and any supporting or opposing information presented.[177] Although there is no North Carolina case law so stating, it seems reasonable to suggest that to trigger the requirement of a hearing, the factual question must be genuine and material. Consistent with this suggestion, at least one case has held that bare MAR allegations are not enough to establish the need for an evidentiary hearing;[178] some evidence must be offered to create an issue of fact warranting a hearing.[179] There are North Carolina cases going both ways on whether or not an evidentiary hearing was required.[180]

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court correctly determined that, as a matter of law, defendant was not entitled to relief on his G.S. 15A-1414 MAR and no evidentiary hearing was required); *State v. Marino*, 229 N.C. App. 130, 140-41 (2013) (trial court did not abuse its discretion by denying the defendant's G.S. 15A-1414 MAR without an evidentiary hearing); *State v. Sullivan*, 216 N.C. App. 495, 500 (2011) (same); and *State v. Shropshire*, 210 N.C. App. 478, 481 (2011) (the trial court did not err by denying the defendant's MAR without an evidentiary hearing; the motion was made immediately after the trial court pronounced sentence and sought to withdraw the plea; no issue of fact was presented; the defendant's statement that he did not understand the trial court's decision to run the sentences consecutively did not raise any factual issue given that he had already stated that he accepted and understood the plea agreement and its term that "the court will determine whether the sentences will be served concurrently or consecutively").

175. G.S. 15A-1420(c)(3); State v. McHone, 348 N.C. 254, 257 (1998); State v. Howard, 247 N.C. App. 193, 207 (2016) (citing *McHone*); State v. Holden, 106 N.C. App. 244, 248 (1992); State v. Essick, 67 N.C. App. 697, 702–03 (1984); State v. Bush, 307 N.C. 152, 166–67 (1982), *habeas corpus granted on other grounds*, 669 F. Supp. 1322 (E.D.N.C. 1986), *aff'd*, 826 F.2d 1059 (4th Cir. 1987) (unpublished).

176. G.S. 15A-1420(c)(4); *Howard*, 247 N.C. App. 193 at 207-211 (trial court erred by granting the defendant's MAR without an evidentiary hearing where claims involved "a large and unusual constellation of conflicting evidence").

177. G.S. 15A-1420(c)(1).

178. *See* State v. Aiken, 73 N.C. App. 487, 501 (1985) (trial court did not err in summarily denying defendant's MAR when defendant filed no supporting affidavit and offered no evidence beyond "bare allegations").

179. Some evidence must be offered in support of a MAR made after entry of judgment or it fails for lack of supporting affidavits. *See* Section V.A.3.

180. Sample cases in which an evidentiary hearing was not required include: *Bush*, 307 N.C. at 166–67 (since defendant's MAR presented only questions of law, "the Superior Court was required to determine the motion without an evidentiary hearing."); State v. Lane, 271 N.C. App. 307, 320 (2020) (trial court properly denied a MAR without an evidentiary hearing where MAR presented only questions of law); State v. Rice, 129 N.C. App. 715, 723-24 (1998) (trial court did not err in denying the MAR without an evidentiary hearing when the MAR was without merit); *Holden*, 106 N.C. App. at 248 (trial court did not err in denying the MAR without a hearing when it presented only the legal question of whether the court had properly excluded evidence); *Aiken*, 73 N.C. App. at 501 (trial court did not err in summarily denying defendant's MAR when defendant "filed no supporting affidavit and offered no evidence beyond the bare allegations" in the MAR); *Essick*, 67 N.C. App. at 702–03 (trial court did not err in refusing to allow defendant to offer oral testimony in support of his MAR made pursuant to G.S. 15A-1414).

Sample cases in which an evidentiary hearing was required include: State v. Morganherring, 350 N.C. 701, 713 (1999) (noting that by prior order, court had remanded defendant's MAR to superior court for an evidentiary hearing to specifically address five issues); *McHone*, 348 N.C. at 258–59 (defendant was entitled to an evidentiary hearing on his MAR as supplemented when the trial court was presented "with a question of fact which it was required to resolve" regarding whether the State had engaged in improper ex parte contact with the judge); State v. Barnes, 348 N.C. 75 (1998) (No. 74P98) (remanding to superior court, without explanation, for the purpose of conducting an evidentiary hearing); State v. Francis, 492 S.E.2d 29 (N.C. 1997) (No. 305PA97) (same); State v. Farrar, 472 S.E.2d 21 (N.C. 1996) (No. 86P96) (same); State v. Stevens, 305 N.C. 712, 716 (1982) (noting that, by prior order of the court, case was remanded to superior court for an evidentiary hearing); State v. Dickens, 299 N.C. 76, 84-85 (1980) (finding record of plea proceeding deficient and remanding for a hearing on whether defendant entered guilty pleas under the misapprehension that a plea bargain had been made with respect to sentence); State v. Ballard, 283 N.C. App. 236, 248-49 (2022) (where defendant's MAR alleged ineffective assistance of counsel, evidentiary hearing was

C. Hearings in Particular Types of Cases. For a discussion about how these rules apply to MARs challenging guilty pleas and raising claims of ineffective assistance of counsel, see Jessica Smith, *Two Issues in MAR Procedure: Hearings and Showing Required to Succeed on a MAR,* ADMIN. OF JUSTICE BULL. No. 2001/04 (UNC School of Government) (Oct. 2001).[181]

D. Pre-Hearing Conferences. Upon motion of either party, the judge may direct the attorneys to appear for a conference on any prehearing matter.[182]

E. Presence of the Defendant. The defendant has no statutory right to be present when only issues of law are argued.[183] However, a defendant has a statutory right to be present at an evidentiary hearing.[184] A waiver of this right must be in writing.[185]

F. Counsel. An indigent defendant has a right to appointed counsel, as discussed in Section VIII.A. Additionally, G.S. 15A-1420(c)(4) provides that all defendants have the right to counsel at the evidentiary hearing.

G. Evidence.

1. Evidence Rules. The rules of evidence apply in an evidentiary hearing on a MAR.[186]

2. Scope of the Hearing. The nature of the evidence presented will depend on the claim asserted in the MAR. A *Strickland* ineffective assistance of counsel claim, for example, may involve defense witnesses who testify about accepted standards of practice for lawyers handling the particular issue.

When the defendant asserts a claim of newly discovered evidence, the State may introduce evidence undercutting that claim. For example, if the defendant introduces evidence that the State's key expert witness

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necessary on the factual issue of whether trial counsel made a strategic decision to not investigate a potential alibi witness); State v. Martin, 244 N.C. App. 727, 732-37 (2016) (trial court erred by denying, without an evidentiary hearing, the defendant's MAR claiming ineffective assistance of counsel; in this "he said, she said" rape case where defense counsel conceded that decisions were not strategic, the court held: "defense counsel's failure to obtain a medical expert to rebut the testimony of . . . the sexual abuse nurse examiner, and his failure to properly cross-examine the State's witnesses with regard to material evidence that could have had a substantial impact on the jury's verdict, entitles Defendant to an evidentiary hearing" to resolve issues of fact); State v. Hardison, 126 N.C. App. 52, 54 (1997) (trial court erred by failing to hold an evidentiary hearing to address issues of fact regarding counsel's alleged conflict of interest and invalidity of the plea agreement); State v. Arsenault, 46 N.C. App. 7, 14 (1980) (defendant raised "a substantial question of violation of his constitutional right [to effective assistance of counsel] which cannot be determined from the record, and evidentiary hearing pursuant to G.S. 15A-1420(c) is necessary"); State v. Roberts, 41 N.C. App. 187, 188 (1979) ("defendant has raised substantial questions of violation of constitutional rights which cannot be determined from the record and . . . an evidentiary hearing . . . is necessary").

181. Available online at https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/aoj200104.pdf (last visited Jan. 25, 2023).

182. G.S. 15A-1420(c)(1).

183. G.S. 15A-1420(c)(3).

184. G.S. 15A-1420(c)(4).

185. *Id.*

186. N.C. R. EVID. 101, 1101; State v. Howard, 247 N.C. App. 193, 211 (2016) ("[T]he North Carolina Rules of Evidence apply to post-conviction proceedings.").

misrepresented his qualifications, the State may introduce evidence supporting the expert's qualifications.[187] However, the trial court does not err by precluding the State from offering evidence that the jury would have reached the same verdict based on evidence not introduced at trial.[188]

H. Burdens and Standards.

1. Factual Issues. The movant bears the burden of establishing the necessary facts by a preponderance of the evidence.[189]

2. Basis for Relief. A defendant must show the existence of the asserted ground for relief,[190] for example, that his or her constitutional rights were violated. Although the statute does not say, presumably the standard is the same when the State seeks the relief.

3. Prejudice. Even if a movant shows the existence of the asserted ground for relief, relief must be denied unless prejudice appears, in accordance with G.S. 15A-1443.[191] That provision sets forth the required prejudice that must be established in a criminal appeal. Thus, when trial judges decide MARs, they are required to apply a standard normally applied on appellate review. Under G.S. 15A-1443 and as discussed immediately below, the relevant standards for establishing prejudice vary depending on whether or not the alleged error involves constitutional rights.

a. Non-Constitutional Errors. Under G.S. 15A-1443(a), when the error relates to non-constitutional rights, prejudice results if "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." The defendant bears the burden of showing such prejudice.[192] The statute provides that "[p]rejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible *per se*."[193] Examples of errors that are reversible *per se* include the presence of an alternate juror in the jury room during deliberations,[194] the trial court's refusal to allow more than one of a capital defendant's attorneys to participate in the final argument to the jury,[195] and allowing a capital case to proceed without the appointment of assistant counsel as required by G.S. 7A-450(b1).[196]

187. State v. Peterson, 228 N.C. App. 339, 344-45 (2013).
188. *Id.* at 347-48 ("[T]he State may not try to minimize the impact of this newly discovered evidence by introducing evidence not available to the jury at the time of trial.").
189. G.S. 15A-1420(c)(5); *see also Howard*, 247 N.C. App. at 207 (noting this standard).
190. G.S. 15A-1420(c)(6); *see also* State v. Foreman, 270 N.C. App. 784, 791 (2020) (noting this standard).
191. *Id*. Note that a different standard for eligibility for relief has been developed in North Carolina caselaw for situations where a defendant makes a post-sentencing motion to withdraw a guilty plea. *See* Jessica Smith, Pleas and Plea Negotiations in Superior Court, in this Benchbook, *available at* https://benchbook.sog.unc.edu/criminal/pleas-and-plea-negotiations.
192. G.S. 15A-1443(a).
193. *Id.*
194. *See* State v. Parker, 350 N.C. 411, 426 (1999).
195. *See* State v. Mitchell, 321 N.C. 650, 659 (1988).
196. *See* State v. Hucks, 323 N.C. 574, 576 (1988).

G.S 15A-1443(a) expressly applies to "errors relating to rights arising other than under the Constitution of the United States." However, in *State v. Huff*,[197] the court held that notwithstanding the express language of G.S. 15A-1443(a), the proper standard to be applied when reviewing violations of a defendant's article I, section 23 state constitutional right to be present at all stages of a capital trial is the harmless beyond a reasonable doubt standard articulated by the United States Supreme Court in *Chapman v. California*[198] and incorporated into G.S. 15A-1443(b).[199] Thus, when there has been a violation of defendant's state constitutional right to be present at his or her capital trial, the harmless error standard applies, not the standard prescribed in G.S. 15A-1443(a).[200]

b. Constitutional Errors. G.S. 15A-1443(b) provides that a violation of the defendant's rights under the federal constitution is prejudicial unless the court finds that it was harmless beyond a reasonable doubt. As noted in the previous subsection, the North Carolina Supreme Court has held that notwithstanding this statutory language, the standard in G.S. 15A-1443(b) also applies to certain errors implicating state constitutional rights. The burden is on the State to demonstrate, beyond a reasonable doubt, that the error was harmless.[201] Notwithstanding G.S. 15A-1443(b), a defendant asserting a Sixth Amendment ineffective assistance of counsel claim in a MAR usually bears the burden of affirmatively proving that he or she was prejudiced by counsel's deficient performance under the analytical framework set out by the United States Supreme Court in *Strickland v. Washington*.[202]

197. 325 N.C. 1, 34-35 (1989), *vacated on other grounds by* Huff v. North Carolina, 497 U.S. 1021 (1990).
198. 386 U.S. 18 (1967).
199. *See Huff*, 325 N.C. at 33 (citing to G.S. 15A-1443(b)).
200. See *id*. The *Huff* court rejected the notion that the General Assembly could set the standard of review for state constitutional violations, stating: "[U]nder our constitutional form of government, only this Court may authoritatively construe the Constitution of North Carolina with finality, and it is for this Court, and not for the legislature, to say what standard for reversal should be applied in review of violations of our state Constitution." *Id.* at 34 (quotation and citation omitted).
201. G.S. 15A-1443(b).
202. 466 U.S. 668 (1984) (stating this general rule but noting certain circumstances, including actual or constructive denial of counsel, where prejudice is presumed; under the general rule, prejudice exists where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). *See also* State v. Braswell, 312 N.C. 553 562-63 (1985) (adopting, in a case on direct appeal, the *Strickland* test as a "uniform standard" applicable to ineffective assistance of counsel claims under the North Carolina Constitution; noting that the *Strickland* prejudice test is analogous to the statutory test for prejudice set out in G.S. 15A-1443(a)); State v. Todd, 369 N.C. 707, 711 (2017) (with respect to a MAR, "both deficient performance and prejudice are required for a successful ineffective assistance of counsel claim."); State v. Baskins, 260 N.C. App. 589, 596-97 (same). The North Carolina Supreme Court has held that a MAR court assessing prejudice "must examine whether any instances of deficient performance . . . prejudiced [the defendant] when considered both individually and cumulatively." State v. Allen, 378 N.C. 286, 304 (2021) ("To be clear, only instances of counsel's deficient performance may be aggregated to prove cumulative prejudice—the cumulative prejudice doctrine is not an invitation to reweigh all of the choices counsel made throughout the course of representing a defendant."). For cases discussing the prejudice analysis applicable to ineffective assistance of counsel claims in cases involving guilty pleas, see *Hill v. Lockhart*, 474 U.S. 52 (1985); *State v. Nkiam*, 243 N.C. App. 777 (2015); and *State v. Jeminez*, 275 N.C. App. 278 (2020). *See generally* SMITH, *supra note* 156.

c. **Invited Error.** G.S. 15A-1443(c) provides that a defendant is not prejudiced by the granting of relief which he or she has sought or by an error resulting from his or her own conduct. Several North Carolina court cases have applied this rule in the direct appeal context.[203]

d. **General Principle.** Although the results in the direct appeal cases are fact-dependent, at least one general principle can be discerned from them: A defendant's burden of establishing prejudice under G.S. 15A-1443(a) or the State's burden of establishing harmless error under G.S. 15A-1443(b) depends on the weight of evidence in the case. The more conclusive or overwhelming the evidence is against a defendant, the harder it will be for the defendant to establish that the error affected the result of the proceeding and the easier it will be for the State to establish that the error was harmless beyond a reasonable doubt. Conversely, when the evidence of guilt is conflicting or not so overwhelming as to be conclusive, it will be easier for the defendant to establish prejudice and harder for the State to establish that the error was harmless.

I. Attorney Certification Required for Superior Court Motions. A MAR filed in superior court by a lawyer may not be granted unless the attorney has provided the required certification, discussed above in Section V.A.2.

J. State's Opportunity to Consent or Object to District Court Motions. G.S. 15A-1420(a)(4) provides that a MAR may not be granted in district court without the signature of the district attorney, indicating that the State has had an opportunity to consent or object to the motion. However, the district court judge may grant a MAR without the district attorney's signature ten business days after

203. *See, e.g.*, State v. McNeil, 350 N.C. 657, 669 (1999) (citing G.S. 15A-1443(c) and holding that by opposing State's joinder motion, defendant obtained a benefit which he cannot claim on appeal was unlawful and requires a new trial); State v. Roseboro, 344 N.C. 364, 373 (1996) (citing G.S. 15A-1443(c) and holding that trial court's limitation of defense witness's testimony to corroborative purposes was "invited error from which defendant cannot gain relief" when defendant "unequivocally agreed" that he offered the witness's testimony only for corroboration); State v. Lyons, 340 N.C. 646, 666–67 (1995) (citing G.S. 15A-1443(c) and holding that defendant cannot successfully contend that the trial court erred by instructing the jury on the doctrine of transferred intent when defendant made "a formal, written request" for a transferred intent instruction); State v. Jackson, 340 N.C. 301, 318 (1995) (citing G.S. 15A-1443(c) and rejecting defendant's contention that his telephone statement that was not revealed by the prosecution until trial was impermissibly used to impeach his expert witness, when the statement was substantially identical to his formal confession given minutes earlier, and when defendant had a copy of the confession long before trial but chose not to provide it to his expert); State v. Eason, 336 N.C. 730, 741 (1994) (citing G.S. 15A-1443(c) and holding that by asking the judge for a return to the original venue, defendant "invited" the judge to take action which he cannot complain of now); State v. Sierra, 335 N.C. 753, 760 (1994) (citing G.S. 15A-1443(c) and holding that "defendant . . . will not be heard to complain on appeal" of trial court's failure to instruct jury on second degree murder when "[d]efendant stated . . . three times that he did not want such an instruction, telling the trial court that . . . [it] was not supported by the evidence and was contrary to defendant's theory of the case"); State v. Gay, 334 N.C. 467, 484–85 (1993) (citing G.S. 15A-1443(c) and rejecting defendant's argument that reliability of guilty verdicts was impaired by the testimony of her expert witness and by the court's failure to prevent counsel from both sides from relying on it in closing arguments when expert was defendant's witness and defendant introduced the testimony, incorporated it into her closing, and did not object to the State doing the same).

the district attorney has been notified in open court of the motion or served with the motion pursuant to G.S. 15A-951(c).[204]

K. Relief Available. The following relief is available when the court grants a MAR:

- new trial on all or any of the charges;
- dismissal of all or any of the charges;
- the relief sought by the State pursuant to G.S. 15A-1416;
- referral to the North Carolina Innocence Inquiry Commission for claims of factual innocence; or
- any other appropriate relief.[205]

The catchall of "any other appropriate relief" gives broad authority to the court to fashion an appropriate remedy for an established wrong.

When the trial court grants relief and the offense is divided into degrees or includes lesser offenses and the court believes that the evidence does not sustain the verdict but is sufficient to sustain a finding of guilty of a lesser degree or of a lesser offense, the court may, with consent of the State, accept a plea of guilty to the lesser degree or lesser offense.[206]

"If resentencing is required, the trial division may enter an appropriate sentence."[207] "If a motion is granted in the appellate division and resentencing is required, the case must be remanded to the trial division for entry of a new sentence."[208]

If the defendant has established a claim of ineffective assistance of appellate counsel, the appropriate relief appears to be for the trial court to consider the underlying issue on the merits. For example, if the defendant has successfully established that appellate counsel was ineffective for failing to raise a constitutional issue on appeal, the relief provided by the MAR judge would be for the judge to consider the merits of the constitutional claim. This procedure is suggested because the trial court cannot order the appellate division to take an appeal.

XII. The Judge's Order.

A. Ruling and Order Required. A judge must rule on the MAR and enter an order.[209]

B. Factual Findings Required. If an evidentiary hearing is held, the court must make findings of fact.[210]

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204. G.S. 15A-1420(a)(4). G.S. 15A-951(c) is the provision on service of motions in Article 52 of G.S. Chapter 15A.
205. G.S. 15A-1417(a).
206. G.S. 15A-1417(b).
207. G.S. 15A-1417(c).
208. *Id.*
209. G.S. 15A-1420(c)(7).
210. G.S. 15A-1420(c)(4). *See* State v. Graham, 270 N.C. App. 478, 499-502 (2020) (trial court abused its discretion by denying defendant's MAR without making findings of fact sufficient to resolve material conflicts in evidence presented at an evidentiary hearing concerning recanted testimony of a child victim in a sexual assault case; remanded for entry of a new order containing sufficient findings), *aff'd on other grounds*, 379 N.C. 75 (2021).

C. Reasons for Decision. When drafting an order, it is best if the judge explains the reasons for his or her decision. This clarification can be helpful if the case ends up in federal habeas proceedings. A federal habeas court will not review a claim rejected by a state court if the state court decision rests on an adequate and independent state law ground.[211] If the state trial court does not clearly state its reasons, the federal habeas court will be unable to determine whether the state decision rests on adequate and independent state law grounds.

D. Federal Rights. G.S. 15A-1420(c)(7) provides that when a MAR is based on an asserted violation of the defendant's rights under federal law, the court must make and enter conclusions of law and a statement of the reasons for its determination to the extent required, when taken with other records and transcripts in the case, to indicate whether the defendant has had a full and fair hearing on the merits of the grounds so asserted.

E. Consent for Taking under Advisement. To avoid any problems with an order being entered out of county, out of session, or out of term, a judge should obtain the parties' consent before taking a MAR under advisement after a hearing.[212]

XIII. Appeal.

A. Superior Court Rulings.

1. Ruling on Defendant's MAR Filed Within Ten Days of Judgment. Under G.S. 15A-1422(b), the grant or denial of relief sought in a MAR under G.S. 15A-1414 (MAR made by the defendant within ten days of judgment) "is subject to appellate review only in an appeal regularly taken."[213] This provision precludes review by way of writ of certiorari for G.S. 15A-1414 MAR rulings.[214]

2. Ruling on Defendant's MAR Filed More Than Ten Days After Judgment. Under the MAR statute, a ruling on a MAR pursuant to G.S. 15A-1415 (MAR made by the defendant more than ten days after judgment) is subject to review as follows:

- if the time for appeal from the conviction has not expired, by appeal;
- if an appeal is pending when the ruling is entered, in that appeal; or
- if the time for appeal has expired and no appeal is pending, by writ of certiorari.[215]

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211. Beard v. Kindler, 558 U.S. 53, 55 (2009).
212. *See* Michael Crowell, *Out-of-Term, Out-of-Session, Out-of-County*, in this Benchbook, *available at* http://benchbook.sog.unc.edu/judicial-administration-and-general-matters/out-term-out-session-out-county.
213. G.S. 15A-1422(b).
214. *See* State v. Thomsen, 369 N.C. 22, 26-27 (2016) (noting that G.S. 15A-1422(b) limits the Court of Appeals' jurisdiction to review MARs in other ways).
215. G.S. 15A-1422(c)(1)-(3); *see* N.C. R. APP. P. 21 ("The writ of certiorari may be issued . . . for review pursuant to [G.S.] 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief); *see generally* State v. Wilkerson, 232 N.C. App. 482, 486-88 (2014) (the court of appeals had authority to grant the State's petition for the issuance of a writ of certiorari authorizing appellate review of a trial court decision granting the defendant's MAR

The statute does not distinguish between rulings where the State prevails or where the defendant prevails.[216]

Note that Rule 21(e) of the Rules of Appellate Procedure provides that petitions for writ of certiorari to review orders of the trial court denying G.S. 15A-1415(b) MARs by *capital* defendants must be filed in the North Carolina Supreme Court.[217] The rule provides that in all other cases, petitions must be filed in and determined by the court of appeals.

Separate from the MAR statute, G.S. 15A-1445 gives the State a right of appeal for certain trial court rulings granting a G.S. 15A-1415 MAR.[218] G.S. 15A-1445 is within G.S. Chapter 15A, Article 91, entitled "Appeal to Appellate Division." The parallel provision in that Article pertaining to when a defendant may appeal,[219] by its terms does not appear to provide the defendant with any alternative avenues to seek review of a MAR ruling outside of the MAR procedure described above.[220]

3. Ruling on State's MAR. G.S. 15A-1422, the MAR provision on appeal, does not address review of a superior court ruling on a MAR filed by the State under G.S. 15A-1416. The proper procedure for review from a ruling on such a motion appears to be by certiorari. This suggestion finds support in *State v. Thomsen*,[221] which held, in the context of an appeal from a trial court's sua sponte MAR, that the Court of Appeals had jurisdiction to review a MAR ruling by way of certiorari "because nothing in the Criminal Procedure Act, or any other statute . . ., revokes the jurisdiction . . . that subsection 7A-32(c) confers more generally"; G.S. 7A-32(c) empowers the Court of Appeals to issue a writ of certiorari "to supervise and control the proceedings of any of the trial courts."[222]

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alleging an Eighth Amendment violation and resentencing him to a lesser sentence); State v. Morgan, 118 N.C. App. 461, 463 (1995) (where the time for appeal had ended and no appeal was pending, the defendant's only option for review of a trial court's order denying his MAR was by writ of certiorari); State v. Garner, 67 N.C. App. 761, 762 (1984) (same); State v. Roberts, 41 N.C. App. 187, 188 (1979) (same).

216. State v. Stubbs, 368 N.C. 40 (2015) (so noting and holding: "given that the General Assembly has placed no limiting language in subsection 15A-1422(c) regarding which party may appeal a ruling on an MAR, we hold that the Court of Appeals has jurisdiction to hear an appeal by the State of an MAR when the defendant has won relief from the trial court").

217. Subsection (f) of that rule provides that a petition for writ of certiorari to review a trial court's order on a capital MAR must be filed in the supreme court within 60 days after delivery of the transcript of the hearing on the MAR to the petitioning party and that the responding party must file its response within 30 days of service of the petition.

218. *See* State v. Peterson, 228 N.C. App. 339, 342-43 (2013) (holding that under G.S. 15A-1445(a)(2) the State could appeal a trial court's order granting a defendant's MAR on the basis of newly discovered evidence and ordering a new trial); *see also* State v. Howard, 247 N.C. App. 193, 201-02 (2016) (same, following *Peterson*); State v. Lee, 228 N.C. App. 324, 328 (2013) (holding that under G.S. 15A-1445(a)(3) the State could appeal when the superior court granted the defendant's MAR asserting a sentencing error and entered an amended judgment). *Cf.* State v. Carver, 277 N.C. App. 89, 93-96 (2021) (analyzing *Peterson* and *Howard* in process of holding that state had no right to appeal trial court's order granting a defendant's MAR and ordering a new trial on the basis of ineffective assistance of counsel where that claim was not "inextricably intertwined" with a claim of newly discovered evidence).

219. *See* G.S. 15A-1444.

220. *See* G.S. 15A-1444(f) ("The ruling of the court upon a motion for appropriate relief is subject to review upon appeal or by writ of certiorari as provided in G.S. 15A-1422.").

221. 369 N.C. 22, 26 (2016).

222. *See also* State v. Linemann, 135 N.C. App. 734, 735 (1999) (treating a defendant's attempt to seek review of a trial court ruling granting the State's MAR as a petition for writ of certiorari and granting the petition).

4. **Ruling on Judge's Own MAR.** In certain circumstances, a judge may sua sponte grant relief to the defendant on a MAR.[223] Although no provision in the MAR statute addresses appeal from such a sua sponte order, the North Carolina Supreme Court has held the appellate courts have jurisdiction to review such a ruling by certiorari.[224]
5. **"Consent" MARs.** Consent MARs are discussed in Section II.D above. Although no provision in the MAR statute addresses appeal from such an order, the Court of Appeals likely has jurisdiction to review such a ruling by certiorari, in the event a party re-assesses the merits of a granted motion.[225]

B. District Court Rulings. There is no right to appeal a MAR when the movant is entitled to a trial de novo on appeal.[226] Thus, a defendant cannot appeal a district court judge's adverse ruling on a MAR when the defendant is entitled to a trial de novo in superior court. But what of a MAR ruling favoring the defendant, such as one vacating a conviction? Based on the cases discussed above holding that G.S. 15A-1445 gives the State a right to appeal certain superior court rulings granting MARs, G.S. 15A-1432 (Appeals by the State from district court judge) may provide one avenue for review. Another is a writ of certiorari to superior court.[227]

C. Court of Appeals Rulings. G.S. 15A-1422(f) and G.S. 7A-28(a) provide that decisions of the Court of Appeals on MARs under G.S. 15A-1415(b) (defendant's MAR made more than 10 days after entry of judgment) are final and not subject to further review by appeal, certification, writ, motion or otherwise. Furthermore, G.S. 7A-31(a) provides that "[i]n any cause in which appeal is taken to the Court of Appeals, *except . . . a motion for appropriate relief* . . . the Supreme Court may, in its discretion, on motion of any party to the cause or on its own motion, certify the cause for review by the Supreme Court (emphasis added)." However, the North Carolina Supreme Court has held that these statutes "cannot restrict [that] Court's constitutional authority under Article IV, Section 12, Clause 1 of the Constitution of North Carolina to exercise jurisdiction to review upon appeal any decision of the courts below."[228] Presumably it would come to the same conclusion with respect to Rule 21(e) of the Appellate Rules, which provides that petitions for writs of certiorari to review trial court MAR orders shall be determined by the Court of Appeals with no further review by the Supreme Court and with respect to other types of MAR cases.

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223. *See supra* Section II.C.
224. State v. Thomsen, 369 N.C. 22, 26 (2016).
225. *See id*.
226. G.S. 15A-1422(d); *see generally Thomsen,* 369 N.C. at 26-27 (so noting).
227. *See generally Thomsen,* 369 N.C. 22; GEN. R. PRAC. SUP. & DIST. CT. R. 19.
228. State v. Ellis, 361 N.C. 200, 205 (2007) (quotation omitted); *see also* State v. Todd, 369 N.C. 707, 709-10 (2017) (Article IV, Section 12, Clause 1 gave the court jurisdiction to decide an appeal from a divided decision of the court of appeals, notwithstanding G.S. 7A-28); State v. Barrett, 307 N.C. 126 (1982) (noting that under G.S. 15A-1422(f) the defendant had no right of review of a decision of the Court of Appeals denying his G.S. 15A-1415 MAR but going on to arrest judgment where the record disclosed that the defendant was convicted of a crime against nature, an offense that is not a lesser of the charged crime).

XIV. Relationship to Other Proceedings.

A. Appeal. The making of a MAR is not a prerequisite for asserting an error on appeal.[229] If an error asserted on appeal has been the subject of a MAR, denial of the MAR has no effect on the right to assert the error on appeal.[230] Put another way, an adverse ruling on a MAR does not constitute a procedural default barring appeal. However, as discussed in Section X, failure to raise a claim on appeal may result in a procedural default with respect to a subsequent MAR proceeding.

A defendant may file a MAR under G.S. 15A-1414, and the motion may be acted upon in the trial division even when notice of appeal has been given.[231] When the case is in the appellate division for review, a MAR under G.S. 15A-1415 must be made in that division.[232] The statute contains no parallel rules for motions filed by the State, but note, as discussed in Section VI.D.2, that the Court of Appeals has held that a trial court may act upon a MAR filed by the State under G.S. 15A-1416(a) even when notice of appeal has been given by the defendant.[233]

B. State Habeas Corpus. The availability of relief by way of a MAR is not a bar to relief by writ of habeas corpus.[234] However, Rule 25(5) of the General Rules of Practice of the Superior and District Courts states that subsequent to direct appeal, an application for writ of habeas corpus shall not be used as a substitute for a MAR.[235]

C. Innocence Inquiry Commission Proceedings. A claim of factual innocence asserted through the North Carolina Innocence Inquiry Commission is not a MAR and does not impact rights or relief available through the MAR statutes.[236] Similarly, a claim of factual innocence asserted through the Innocence Inquiry Commission does not adversely affect a defendant's right to other post-conviction relief.[237]

229. G.S. 15A-1422(a).
230. G.S. 15A-1422(e).
231. G.S. 15A-1414(c); State v. Hallum, 246 N.C. App. 658 (2016) (stating rule).
232. G.S. 15A-1418(a); *see* Section VI.D.1 (discussing when a case is in the appellate division for review).
233. *See* State v. Joiner, 273 N.C. App. 611, 613-14 (2020).
234. G.S. 15A-1411(c).
235. For more information about habeas corpus, see Jessica Smith, *Habeas Corpus*, in this Benchbook, *available at* http://benchbook.sog.unc.edu/criminal/habeas-corpus.
236. G.S. 15A-1411(d).
237. G.S. 15A-1470(b).

Appendix A: Sample Language for MAR Orders

I. Order Denying MAR – Lack of Merit on Its Face

The Defendant's Motion for Appropriate Relief, filed [insert date] is denied because it fails to state a ground that would entitle the defendant to relief. [Explain, *e.g.,* The defendant's motion asserts that the trial judge erred by sentencing him in the aggravated range, having considered an impermissible aggravating factor. However, the record reveals that the defendant was sentenced in the presumptive range. Therefore, the motion lacks merit in that it fails to state a claim that would entitle the defendant to relief].

II. Order Denying MAR – Defect in Form

The Defendant's Motion for Appropriate Relief, filed [insert date] is denied because it
[was not made in writing, as required by G.S. 15A-1420(a)(1)a.]
[does not state the grounds for the motion as required by G.S. 15A-1420(a)(1)b.]
[does not set forth the relief sought, as required by G.S. 15A-1420(a)(1)c.]
[was not timely filed, as required by G.S. 15A-1420(a)(1)d.]
[does not contain the attorney certification, as required by G.S. 15A-1420(a)(1)c1.]
[does not contain supporting affidavits, required by G.S. 15A-1420(b).]

III. Order Denying MAR – Filed in Wrong Division

Judgment was rendered in this case on [insert date]. Notice of appeal was filed on [insert date]. The Defendant's Motion for Appropriate Relief was filed on [insert date], more than ten days after entry of judgment. Under G.S. 15A-1418, the Defendant's motion cannot be heard in this court and must be filed in the Appellate Division. The Defendant's motion is therefore dismissed without prejudice.

IV. Order Denying a MAR – Procedural Default

The Defendant's Motion for Appropriate Relief, dated [insert date] is denied on grounds of procedural default, as required by G.S. 15A-1419(b). Specifically
[the Defendant's motion asserts [briefly explain ground or issue raised in the defendant's motion]. Upon a MAR filed [insert date] and decided [insert date], the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so. G.S. 15A-1419(a)(1).]
[the Defendant's motion asserts [briefly explain ground or issue raised in the defendant's motion]. The ground or issue underlying the motion was previously determined on the merits upon an appeal from the judgment or upon a previous motion or proceeding in the courts of this State or a federal court. [Insert details of when the ground or issue was previously addressed]. G.S. 15A-1419(a)(2).]
[the Defendant's motion asserts [briefly explain ground or issue raised in the defendant's motion]. The defendant previously appealed his conviction [briefly explain the procedural history of the appeal]. Upon the previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so. G.S. 15A-1419(a)(3).]

[the Defendant filed this Motion for Appropriate Relief on [insert date]. G.S. 15A-1415(a) sets out the timing rules for filing motions for appropriate relief. The defendant's motion was untimely filed and thus is procedurally defaulted. G.S. 15A-1419(a)(4).

The Defendant has not asserted a basis for excusing [his/her] procedural default.